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# THE DEATH PENALTY AS INCAPACITATION

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## THE DEATH PENALTY AS INCAPACITATION

*Marah Stith McLeod\**

*Courts and commentators give scant attention to the incapacitation rationale for capital punishment, focusing instead on retribution and deterrence. The idea that execution may be justified to prevent further violence by dangerous prisoners is often ignored in death penalty commentary. The view on the ground could not be more different. Hundreds of executions have been premised on the need to protect society from dangerous offenders. Two states require a finding of future dangerousness for any death sentence, and over a dozen others treat it as an aggravating factor that turns murder into a capital crime.*

*How can courts and commentators pay so little heed to this driving force behind executions? The answer lies in two assumptions: first, that solitary confinement and life without parole also incapacitate, and second, that prediction error makes executions based on future risk inherently arbitrary. Yet solitary confinement and life without parole entail new harms—either torturous isolation or inadequate restraint. Meanwhile, the problem of prediction error, while significant, can be greatly reduced by reevaluating future dangerousness over time.*

*This Article illuminates the remarkable history, influence, and normative import of the incapacitation rationale, and shows how serious engagement with the incapacitation rationale can lead to practical reforms that would make the death penalty*

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*more fair. It concludes by highlighting several of the most promising reforms.*

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#### INTRODUCTION

The Supreme Court has identified retribution and deterrence as “the two distinct social purposes served by the death penalty.”<sup>1</sup> It has routinely omitted incapacitation from this list. The Court has barred the death penalty when it has found the penalty to exceed the goals of retribution and deterrence, without considering the aim of incapacitation.<sup>2</sup> State courts likewise have focused on retribution and

<sup>1</sup> Kennedy v. Louisiana, 554 U.S. 407, 441, modified on denial of reh’g, 554 U.S. 945 (2008); see also Roper v. Simmons, 543 U.S. 551, 571 (2005) (same); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (“*Gregg v. Georgia*, 428 U.S. 153, 183 (1976) . . . identified ‘retribution and deterrence of capital crimes by prospective offenders’ as the social purposes served by the death penalty. Unless the imposition of the death penalty . . . ‘measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.” (citation omitted)).

<sup>2</sup> See, e.g., Roper, 543 U.S. at 571–72 (concluding “that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders,” while failing to mention the incapacitation rationale); Atkins, 536 U.S. at 321 (invalidating the death penalty for intellectually disabled offenders as insufficiently supported by the aims of retribution or deterrence, while ignoring incapacitation); id. at 350 (Scalia, J., dissenting) (“The Court conveniently ignores a third ‘social purpose’ of the death penalty—‘incapacitation of dangerous criminals . . . .’” (citation omitted)).

deterrence; the Connecticut Supreme Court recently proclaimed that “[i]t is generally accepted that, if capital punishment is to be morally and legally justified, it must be based on the deterrent or retributive value of executions.”<sup>3</sup> Scholars, too, tend to take seriously only the retribution and deterrence theories for capital punishment. Even prominent criminal law casebooks, designed to offer foundational knowledge of the law and written by experts in the field, often identify only “two justifications for the death penalty—retribution and deterrence of capital crimes”<sup>4</sup>—and omit any discussion of the incapacitation rationale.<sup>5</sup>

The absence of sustained discourse regarding the incapacitation rationale<sup>6</sup> contrasts markedly with its influence on the actual practice of capital punishment. The risk of future violence is often a dispositive reason for a death sentence. Two states require a finding of future dangerousness before a death sentence may be imposed,<sup>7</sup> and more than a dozen other states and the federal government permit a death sentence to be predicated on future dangerousness.<sup>8</sup> Hundreds of capital offenders, and perhaps thousands, have been executed over the last several decades on this ground. Texas, which has employed capital punishment more often than any other state, has executed more than 550 capital offenders based on jury predictions that they

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<sup>3</sup> *State v. Santiago*, 122 A.3d 1, 56 (Conn. 2015) (citing *Kennedy*, 554 U.S. at 441, and *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

<sup>4</sup> Wayne R. LaFare, *Criminal Law* 233 (6th ed. 2017).

<sup>5</sup> See, e.g., Joshua Dressler & Stephen P. Garvey, *Cases and Materials on Criminal Law* 348–52 (6th ed. 2016) (outlining policy debates regarding the deterrence and retribution aims of the death penalty and omitting any reference to incapacitation); Sanford H. Kadish, Stephen J. Schulhofer & Rachel E. Barkow, *Criminal Law and Its Processes: Cases and Materials* 555–65 (10th ed. 2017) (discussing only the deterrence and retribution arguments for the death penalty); LaFare, *supra* note 4 at 224–33 (discussing Eighth Amendment limitations on the death penalty in light of retribution and deterrence, without mentioning incapacitation).

<sup>6</sup> William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 *Ariz. L. Rev.* 889, 918 (2010) (“[T]he Court has never explicitly addressed the acceptability of future dangerousness as a consideration in the determination of whether to sentence an offender to death.”); Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 *Law & Psychol. Rev.* 63, 69 (2005) (“Strangely, the rationale for future dangerousness as a useful factor in death penalty decision-making has never been adequately addressed by the courts . . .”).

<sup>7</sup> *Or. Rev. Stat. Ann.* § 163.150(1)(b) & (f) (West 2015); *Tex. Code Crim. Pro. Ann.* art. 37.071 (West 2006).

<sup>8</sup> See *infra* notes 71–73 & 79–80.

would commit future violence if allowed to live.<sup>9</sup> In 2017 alone, all seven of the executions in Texas turned upon findings of future dangerousness.<sup>10</sup> It is hard to exaggerate the impact of the incapacitation rationale in America today.<sup>11</sup>

Why have scholars paid so little attention to this influential rationale for the death penalty? This Article contends that scholars (and quite a few judges) have dismissed the incapacitation rationale as invalid based on two mistaken assumptions.<sup>12</sup> First, many believe that the availability of solitary confinement and life without parole renders execution an unnecessary and excessive response to the risk of future violence.<sup>13</sup> To these critics, incapacitation is irrelevant to the death penalty debate, because it is equally served by these non-lethal alternatives.<sup>14</sup> Second, many also believe that the risk of prediction error<sup>15</sup> makes future dangerousness an arbitrary and therefore unjust

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<sup>9</sup> See Searchable Execution Database, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/views-executions> [<https://perma.cc/QTP3-ZK7B>] (last visited May 28, 2018) (showing database results of more than 550 executions in Texas since 1977).

<sup>10</sup> Execution List 2017, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/execution-list-2017> [<https://perma.cc/EGH8-M9LC>] (last visited May 28, 2018).

<sup>11</sup> Predictions of dangerousness have had such influence on death sentencing that one abolitionist scholar, William Berry, has argued that we could achieve de facto abolition of capital punishment by barring such predictions as a basis for death. See Berry, *supra* note 6, at 893.

<sup>12</sup> Some law and economics scholars posit that the benefit from incapacitation at least in theory may justify some executions. See, e.g., Steven Shavell, A Model of Optimal Incapacitation, 77 *Am. Econ. Rev. (Papers & Proc.)* 107, 109 (1987).

<sup>13</sup> See, e.g., Berry, *supra* note 6, at 889 (arguing that the “concept of future dangerousness” is “largely irrelevant in light of the availability of life without parole (and solitary confinement)”); Carla Edmondson, Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty, 20 *Lewis & Clark L. Rev.* 857, 916 (2016) (arguing that “the availability of a sentence of life without the possibility of parole” renders incapacitation an invalid reason for execution); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting) (dismissing the incapacitation rationale because “the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates”); *Harris v. Alabama*, 513 U.S. 504, 517 (1995) (Stevens, J., dissenting) (contending that “incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of parole is available”); *State v. Santiago*, 122 A.3d 1, 56 (Conn. 2015) (asserting that “execution, as compared to life in prison . . . offers minimal additional value by way of incapacitation”).

<sup>14</sup> See, e.g., Berry, *supra* note 6, at 904 (“Life without parole appears to provide the very alternative to death that eliminates dangerousness as a valid reason for execution.”).

<sup>15</sup> Some may argue that prediction “error” or “inaccuracy” is an improper term, because predictions are matters of probabilities. This Article uses the term “prediction error” mostly for linguistic convenience, to refer to the fact that probabilities of violence can change over time. An offender once deemed likely to commit criminal acts of violence may no longer be

criterion for execution.<sup>16</sup> Convinced that these problems are real and insurmountable, such critics give the incapacitation rationale little further thought. Indeed, even scholars who have recognized the practical influence of future dangerousness in capital sentencing have treated its underlying theory as indefensible, given the existence of non-lethal alternatives and prediction error.<sup>17</sup>

This Article contends that neither objection is a sufficient reason to ignore or dismiss the incapacitation rationale. A closer analysis of the proposed non-lethal alternatives reveals that solitary confinement entails extraordinary cruelty and psychological damage,<sup>18</sup> while life imprisonment without parole, though it may reduce the risk to society at large, concentrates the risk of future violence on fellow prisoners and unarmed prison guards.<sup>19</sup> These alternatives, therefore, do not represent the straightforward choice scholars have suggested, but rather an agonizing one: either torturous restraint, or dangerous inadequacy. While one might conclude that the non-lethal alternatives are still better than execution, a reasoned decision requires careful and informed deliberation regarding the relative importance of future safety, humane treatment, human dignity, and human life—considerations that many commentators entirely ignore.

The incapacitation rationale cannot be cast aside because of the second objection—that of prediction error—either. Though prediction error is a real and grave problem for just pursuit of the incapacitation rationale, it is a problem that can be significantly

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likely to do so at an older age. A prediction of future violence at original sentencing, based on prior criminal history, may be quite different from one years later, based on post-sentencing prison behavior. While these are not situations of demonstrable empirical error in sentencing, this Article views them as examples of prediction error—i.e., situations in which executions are justified by probabilities that no longer hold true.

<sup>16</sup> See, e.g., Dorland & Krauss, *supra* note 6, at 102–04 (arguing that states should remove the explicit consideration of future dangerousness from death sentencing because of prediction inaccuracy); Tex. Defender Serv., *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness* 47 (2004), [http://texasdefender.org/wp-content/uploads/TDS\\_Deadly-Speculation.pdf](http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf) [<https://perma.cc/D6N4-UHPQ>] (“[I]t is impossible to predict the future with the accuracy and consistency required of evidence that determines whether someone lives or dies.”).

<sup>17</sup> See, e.g., Berry, *supra* note 6, at 893; Meghan Shapiro, *An Overdose of Dangerousness: How ‘Future Dangerousness’ Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 *Am. J. Crim. L.* 145, 186–88 (2008); Dorland & Krauss, *supra* note 6, at 66–67; Edmondson, *supra* note 13, at 861.

<sup>18</sup> See *infra* Part II.A.1.

<sup>19</sup> See *infra* Part II.A.2.

reduced by reevaluating future dangerousness over time. Such review could be conducted every five years, for example, and would consider all the evidence, including probative information regarding a prisoner's behavior while incarcerated. A state commission or parole board could conduct such review. If a prisoner sentenced to death because of future dangerousness were found no longer to pose a threat, his death sentence would be reduced to life.<sup>20</sup> This reform would accord with an existing trend toward reevaluation of long-term sentences and renewed focus on risk and rehabilitation.<sup>21</sup> By reconsidering future dangerousness in this way, capital punishment jurisdictions can transform the bane of execution delay<sup>22</sup> into a source of greater fairness and consistency in capital sentencing.

Another reform critical to fairness in the current practice of capital punishment, and likely to be overlooked by those who ignore the incapacitation rationale, lies in procedural separation of the issues of desert and of future dangerousness. Today, all jurisdictions that consider future dangerousness in capital sentencing require or permit juries to consider future dangerousness at the same time as desert,<sup>23</sup>

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<sup>20</sup> This proposal does not require periodic reconsideration of a purely moral determination by the jury that the death penalty is deserved. Such reconsideration of desert could undermine respect for the jury as “the conscience of the community,” *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), could present practical problems if a new desert determination required a new jury (as Supreme Court cases suggest it would, see *infra* note 232 and accompanying text), and would undermine finality of sentences without evidence that the original decision was demonstrably wrong. Any arguments for nonetheless adopting such reconsideration of desert are beyond the scope of this Article.

<sup>21</sup> See, e.g., The Am. Law Inst., Model Penal Code: Sentencing, Proposed Final Draft § 305.6 (approved May 2017), <http://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017> [<https://perma.cc/RW98-A95E>] (suggesting principles for judicial reevaluation and reduction of long-term sentences once prisoners have served at least fifteen years); John Monahan, Risk Assessment in Sentencing, *in* Academy for Justice, a Report on Scholarship and Criminal Justice Reform 2 (Erik Luna ed., 2017), <https://ssrn.com/abstract=3024016> [<https://perma.cc/D54Z-EQ7S>] (citing trend toward focus on risk assessments in sentencing).

<sup>22</sup> *Thompson v. McNeil*, 556 U.S. 1114, 1115 (2009) (Stevens, J., dissenting from denial of certiorari) (“[A] punishment of death after significant delay is ‘so totally without penological justification that it results in the gratuitous infliction of suffering.’” (citation omitted)); *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari) (“[T]he longer the delay, the weaker the justification for imposing the death penalty in terms of punishment’s basic retributive or deterrent purposes.”).

<sup>23</sup> All states that require or permit the finder of fact to consider future dangerousness as an aggravating factor (or non-dangerousness as a mitigating factor) when deciding whether to impose the death penalty in light of the aggravating and mitigating factors necessarily merge the future dangerousness inquiry with the question of whether the death penalty is deserved.

creating a grave risk that the jury may choose death to avoid future danger regardless of desert. This problem can be avoided by considering future dangerousness only after the jury, as “the conscience of the community,” has made a finding of desert.<sup>24</sup>

The effect of a finding of future dangerousness then would depend on state priorities and moral choices. Some states might choose to limit imposition of the death penalty to those offenders who *both* deserve the death penalty *and* present a future danger (an approach currently taken by Texas and Oregon, though without adequate procedural separation between the desert and dangerousness inquiries).<sup>25</sup> A death penalty thus limited would be more rarely and consistently applied, because it would require both a moral decision that death is deserved as well as a reviewable empirical finding of future dangerousness.<sup>26</sup> Other states might choose to permit the death penalty for those offenders who *either* present a future danger *or* have committed particularly depraved offenses (an approach

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See, e.g., Idaho Code § 19-2515(7) (2017) (requiring the court to instruct the jury to consider any aggravating and mitigating circumstances and to tell the jury that “[i]f the jury does not find the existence of a statutory aggravating circumstance or if the jury cannot unanimously agree on the existence of a statutory aggravating circumstance, the defendant will be sentenced by the court to a term of life imprisonment with a fixed term of not less than ten (10) years.”) Texas and Oregon require the future dangerousness question to be answered separately, but then require the jury to decide whether mitigating factors nonetheless make the penalty inappropriate, requiring the jury to weigh future dangerousness and desert at the same time. See Or. Rev. Stat. Ann. § 163.150(1)(b) (West 2015); Tex. Code Crim. Proc. Ann. art. 37.071 § 2 (West 2006). Virginia law does not specify when future dangerousness must be considered; it only requires either future dangerousness or special vileness of the crime be found by the jury before any death sentence may be imposed. Va. Code Ann. § 19.2-264.4(C) (2008). This leaves Virginia prosecutors free to argue future dangerousness at any time in the penalty proceeding, and they have good reason to emphasize it before the jury makes its ultimate recommendation.

<sup>24</sup> *Witherspoon*, 391 U.S. at 519.

<sup>25</sup> *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

<sup>26</sup> Some have argued that a death penalty that is rarely imposed is arbitrary. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring); Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 *Colo. L. Rev.* 1069, 1114 (2013). That is true if a random handful of death-eligible persons are actually executed. It would not be true if only a small number of capital murderers were found to meet the dual requirements of desert and dangerousness. This Article does not attempt to quantify the precise number of capital offenders who would satisfy both conditions, because that enumeration would depend on personal normative judgments about desert and what risk society is willing to tolerate.

currently taken by Virginia, though also without proper procedural separation between the desert and dangerousness inquiries<sup>27</sup>).

No single approach to the relevance of future dangerousness is obviously right, because the proper choice depends on each jurisdiction's views about tolerable risk, the importance of desert, and the utility and morality of the death penalty. States reasonably may take different approaches according to the varied concerns of their constituencies and cultures. No capital punishment jurisdiction should adopt any approach, however, without first debating its harms and benefits, and none should permit its chosen substantive approach to be implemented without fair procedures.

The Article proceeds as follows: Part I recounts how future dangerousness became a dispositive factor in executions as an indirect result of the Supreme Court's demand for fairness and consistency in death sentencing, and how the Court condoned the role of future dangerousness in capital sentencing without careful analysis of the incapacitation rationale. Part II explains why the incapacitation rationale has been dismissed as invalid by scholars and some Justices on the Court; it addresses first the possibility of non-lethal alternatives, and then the problem of prediction error. Part III proposes reevaluation of dangerousness over time as a means to correct prediction error. It further argues for a clear separation of desert and future dangerousness, and offers several reforms that would make the consideration of future dangerousness in capital sentencing more fair and defensible.

This Article does not take a position on the death penalty itself, but acknowledges it as a present reality that, however lamentable, is unlikely to be abolished anytime soon. Thirty-one states, the federal government, and the military<sup>28</sup> authorize capital punishment, and two states recently reaffirmed their commitment to it.<sup>29</sup> The Supreme

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<sup>27</sup> See *infra* notes 272–273 and accompanying text.

<sup>28</sup> Death Penalty Info. Ctr., *Facts About the Death Penalty* (2018), <https://deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/8SRL-TN6T>].

<sup>29</sup> Referenda in Nebraska and California recently confirmed strong public support for the death penalty. Nebraska Referendum 426—Nebraska Death Penalty Repeal Veto—Results: Rejected, *N.Y. Times* (Aug. 1, 2017), <https://www.nytimes.com/elections/results/nebraska-ballot-measure-426-repeal-lb-268> (recounting that voters overrode a repeal bill by a margin of a 61.2% to 38.8%). See, e.g., Mark Berman, *Executions and Death Sentences Plummeted This Year as Capital Punishment Declined Nationwide*, *Wash. Post* (Dec. 24, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/12/24/executions-and-death->

Court likewise has sustained the death penalty's constitutionality and recently made it harder to challenge lethal injection protocol.<sup>30</sup> The Article addresses this reality, and seeks to engender reasoned debate and essential reforms without needlessly alienating abolitionists or advocates of capital punishment, whose joint effort will be critical to such reforms.

### I. DEATH AS INCAPACITATION

Future dangerousness became an explicit part of death penalty law in the United States as an unintended consequence of the Supreme Court's concerns with arbitrariness and inconsistency in capital sentencing. In *Furman v. Georgia*<sup>31</sup> in 1972, the Court invalidated the death penalty in all but one state.<sup>32</sup> The basic objection of the five Justices who joined in the result was that the death penalty was not being imposed in an even-handed manner.<sup>33</sup> The narrow common ground in the judgment left open the possibility that states could re-enact capital punishment, if they were able to "reform their method of

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sentences-both-plummeted-this-year-as-capital-punishment-dwindles-nationwide/?utm\_term=.f7a913681203 ("[E]ven as capital punishment has declined in both sentencing and practice, there were also signs this year of its persistence from lawmakers, judges and the public, reminders that the death penalty is far from fading away.").

<sup>30</sup> See, e.g., Maurice Chammah & Tom Meagher, A Long Decline in Executions Takes a Detour, *The Marshall Project* (Oct. 18, 2017), <https://www.themarshallproject.org/2017/10/18/a-long-decline-in-executions-takes-a-detour> [<https://perma.cc/F2NJ-DV4L>] (noting that "this year will be the first since 2009 in which there were more executions than the year before," largely due to the Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (refusing to invalidate a lethal injection protocol where the death-sentenced prisoner failed to show that it involved "a substantial risk of severe pain"))).

<sup>31</sup> 408 U.S. 238 (1972).

<sup>32</sup> Corinna Barrett Lain, Upside-Down Judicial Review, 101 *Geo. L.J.* 113, 125 n.69 (2012) ("Forty states had death-penalty statutes in 1972, but Rhode Island's statute was spared because it was (ironically) an obsolete 'mandatory' death-penalty provision and thus not subject to the Court's ruling. It was struck down four years later by *Woodson v. North Carolina*, 428 U.S. 280 (1976)." (citation omitted)).

<sup>33</sup> The Justices in the *Furman* majority wrote five separate concurring opinions. Justices Brennan and Marshall concluded that the death penalty was categorically unconstitutional. *Furman*, 408 U.S. at 305 (Brennan, J., concurring); id. at 360 (Marshall, J., concurring). In contrast, Justices Douglas, Stewart, and White left open the possibility of a constitutionally valid death penalty scheme. See id. at 256–57 (Douglas, J., concurring); id. at 309–10 (Stewart, J., concurring); id. at 313 (White, J., concurring).

deciding who dies”<sup>34</sup> in a way that prevented arbitrary or discriminatory sentencing.

Ironically, *Furman*’s attack on the death penalty interrupted a slow, majoritarian move toward abolition. Just before the Court’s decision in 1972, forty states and the federal government permitted the death penalty. At the same time, however, abolitionist arguments had gained favor, death sentencing had gone down, and there had been a *de facto* execution moratorium since 1967 due to capital case litigation.<sup>35</sup> *Furman* “set back the very cause it was intended to promote”<sup>36</sup> because it prompted state legislatures to reenact the death penalty with protections against arbitrariness that bore a fresh stamp of democratic legitimacy.

In the aftermath of *Furman*, states turned to future dangerousness as part of their attempt to craft statutes that authorized death sentences only on constitutional grounds and by constitutional procedures. As an indirect result of that crucial decision by the Supreme Court, the incapacitation rationale—discarded by most academics as irrelevant and unjust—became a primary driver of the death penalty as it exists today.

#### A. Future Dangerousness as a Reason for Execution

After *Furman*, pro-capital punishment legislators scrambled to draft death penalty legislation that would pass constitutional muster. Thirty-five state legislatures passed new capital punishment statutes within four years of *Furman*.<sup>37</sup> They addressed the arbitrariness problem in different ways. Some imposed mandatory capital punishment, overcoming the problem of inconsistent choices through a single, uniform choice. The Court later invalidated this mandatory approach in *Woodson v. North Carolina*,<sup>38</sup> which required juries to be allowed to consider “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.”<sup>39</sup>

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<sup>34</sup> James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *Fordham L. Rev.* 1607, 1608 (2006).

<sup>35</sup> Lain, *supra* note 32, at 127 (“[T]he *feel* of the death penalty in 1972, the zeitgeist of that historical moment, was that the abolition of capital punishment was just a matter of time.”).

<sup>36</sup> *Id.* at 132.

<sup>37</sup> See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (plurality opinion).

<sup>38</sup> 428 U.S. 280, 305 (1976) (plurality opinion).

<sup>39</sup> *Id.* at 304.

Other states sought to reduce the potential for arbitrariness and discrimination by giving juries more guidance about what factors to consider. Many enacted laws that authorized the jury to choose a death sentence only if it found at least one statutory aggravating factor and determined that the weight of the aggravating factor was not counter-balanced by any mitigating factors. The new statutes often provided for automatic appellate review of death sentences for non-arbitrariness and consistency across cases.<sup>40</sup>

Future dangerousness became an explicit and legally required part of capital cases in this post-*Furman* context. Texas was the first state to require consideration of future dangerousness in every capital sentencing. In reforming its death penalty statute, Texas narrowed the range of crimes that could be punished with death.<sup>41</sup> Unlike the states that limited the death penalty at the time of jury sentencing—by requiring at least one aggravating factor to elevate a first-degree murder into a capital offense—Texas limited the death penalty *ex ante*, by authorizing capital punishment for a narrower range of intentional murders.<sup>42</sup> If a defendant were convicted of one of those specified types of murder, the jury would then be asked three “special questions” in order to determine whether death was appropriate. One question was “whether there [was] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”<sup>43</sup> If the jury found beyond a reasonable doubt that the answer to each question was yes, a death sentence would be mandatory.<sup>44</sup> Because the other two questions were

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<sup>40</sup> Liebman & Marshall, *supra* note 34, at 1621.

<sup>41</sup> 1973 Tex. Gen. Laws 1122 (limiting capital homicides to intentional and knowing murders committed in five circumstances: murder of a peace officer or fireman; murder in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder for remuneration; murder while escaping or attempting to escape from a penal institution; and murder of a prison employee by a prison inmate).

<sup>42</sup> The Supreme Court has allowed states to narrow the death penalty in two ways: “The legislature may itself narrow the definition of capital offenses, as Texas . . . [has] done, . . . or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.” *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988).

<sup>43</sup> *Jurek v. Texas*, 428 U.S. 262, 269 (1976) (citing Tex. Code Crim. Pro. Ann. art. 37.071(b) (Supp. 1975–1976)); see also 1973 Tex. Gen. Laws 1125 (amending Tex. Code Crim. Pro. Ann. by adding art. 37.071).

<sup>44</sup> *Jurek*, 428 U.S. at 269.

essentially superfluous in light of a guilty verdict,<sup>45</sup> the dangerousness question became dispositive for a death sentence.<sup>46</sup> Texas thus explicitly incorporated predictions of dangerousness into capital sentencing, and, as described below, other states soon followed suit.<sup>47</sup>

### B. Judicial Approval

In *Jurek v. Texas* in 1976, the Supreme Court upheld the constitutionality of Texas's new capital punishment statute.<sup>48</sup> In a plurality opinion written by Justice Stevens, the Court focused on whether the jury had either too much discretion (condemned in *Furman* and *Gregg v. Georgia*<sup>49</sup>) or too little discretion (condemned in *Woodson*<sup>50</sup>).<sup>51</sup> It determined that Texas had adequately narrowed the jury's power to impose a death sentence by reducing the types of murders for which death could be imposed, while allowing the defendant to offer mitigating evidence for the jury to consider.<sup>52</sup>

Justice Stevens's plurality opinion considered the future dangerousness question in Texas's death penalty statute in order to resolve two issues. The first was whether the dangerousness inquiry offered a procedural opportunity for the defendant to offer mitigating evidence, and the Court concluded that it did.<sup>53</sup> The second was whether the future dangerousness inquiry was unconstitutionally

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<sup>45</sup> The other questions were "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *Id.*

<sup>46</sup> The Supreme Court has made clear that the aggravating factors under Texas capital punishment law are built into the statutory definition of capital crimes, and thus are determined in the guilt phase, whereas future dangerousness is a special question considered in the penalty phase. *Zant v. Stephens*, 462 U.S. 862, 875–76 n.13 (1983).

<sup>47</sup> See *infra* notes 62–68 and accompanying text.

<sup>48</sup> 428 U.S. at 276.

<sup>49</sup> 428 U.S. 153, 189 (1976) (plurality opinion) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.>").

<sup>50</sup> 428 U.S. 280, 301 (1976).

<sup>51</sup> *Jurek*, 428 U.S. at 271, 276.

<sup>52</sup> *Id.* at 276.

<sup>53</sup> See *id.* at 272, 276. See also *Woodson*, 428 U.S. at 304–05 (prohibiting a mandatory death penalty that did not allow the jury to consider mitigating factors).

vague and error-prone.<sup>54</sup> Here, the Court held that although it was “not easy to predict future behavior,” the future dangerousness question was not excessively vague or impossible for a jury to answer correctly.<sup>55</sup> The Court emphasized that dangerousness predictions are “an essential element” in all sorts of criminal justice decisions, including bail, non-capital sentencing, and parole, and that Texas juries had to perform a role “no different from the task performed countless times each day throughout the American system of criminal justice.”<sup>56</sup> “What is essential,” the Court explained, “is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.”<sup>57</sup> Notably, as Justice Marshall later observed, the *Jurek* Court only addressed the validity of “the *procedures* prescribed by the Texas scheme, but did not decide the *substantive* question of whether a prediction of future dangerousness is a proper criterion for determining whether a defendant is to live or die.”<sup>58</sup>

In *Barefoot v. Estelle* eight years later, the Court cited *Jurek* to assert that “the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty.”<sup>59</sup> It rebuffed challenges to the admissibility of expert testimony on future dangerousness, explaining that a contrary approach would “immediately call into question those other contexts in which predictions of future behavior are constantly made.”<sup>60</sup> The Court thus relied on *Jurek* for the idea that execution was a constitutionally appropriate response to the risk of future violence, even though the *Jurek* Court had not addressed that question.<sup>61</sup>

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<sup>54</sup> *Jurek*, 428 U.S. at 274–76.

<sup>55</sup> *Id.* at 274–75; see also *id.* at 279 (White, J., concurring) (“I agree with Justices Stewart, Powell, and Stevens that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them.”). In a later case, the Supreme Court reiterated that “from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct.” *Schall v. Martin*, 467 U.S. 253, 278 (1984).

<sup>56</sup> *Jurek*, 428 U.S. at 275–76.

<sup>57</sup> *Id.* at 276.

<sup>58</sup> *California v. Ramos*, 463 U.S. 992, 1023 n.9 (1983) (Marshall, J., dissenting).

<sup>59</sup> 463 U.S. 880, 896 (1983).

<sup>60</sup> *Id.* at 898.

<sup>61</sup> See *Jurek*, 428 U.S. at 276.

*C. The Influence of the Incapacitation Rationale*

After *Furman*, states were anxious to find a death penalty procedure that would survive Supreme Court review. Following *Jurek*, five additional states adopted statutes making future dangerousness a factor supporting a death sentence, if proven beyond a reasonable doubt.<sup>62</sup> These states incorporated future dangerousness in capital sentencing using similar or the same language as the Court had approved in *Jurek*.<sup>63</sup> But the states took different approaches to future dangerousness. In three states—Idaho, Oklahoma, and Wyoming—a finding of future dangerousness became a *sufficient* reason to impose the death penalty for first-degree murder.<sup>64</sup> The jury still had to consider mitigating evidence, but it needed no further aggravating factor to choose death. Oregon, like Texas, defined capital murder more narrowly, so that a guilty verdict already included aggravation;<sup>65</sup> in those states, future dangerousness became an additional requirement before a death sentence could be imposed.<sup>66</sup> In Virginia, future dangerousness became one of two alternative conditions that the state had to prove before a death sentence could be imposed.<sup>67</sup> Two additional states—Colorado and Washington—made lack of future dangerousness a statutory mitigating factor<sup>68</sup> (one that unfortunately opened the door to

<sup>62</sup> Act of Mar. 21, 1977, ch. 154, § 4, 1977 Idaho Sess. Laws 393 (amending Idaho Code § 19-2515); Act of May 8, 1981, ch. 147, § 1, 1981 Okla. Sess. Laws 280 (amending Okla. Stat. tit. 21, § 701.12); Act of Dec. 6, 1984, ch. 3, § 3, 1985 Or. Laws 22 (amending Or. Stat. §§ 163.005–145); Acts of Assembly, 1977 Va. Acts 45 (adding §§ 19.2–264.4); Act of Mar. 6, 1989, ch. 171, § 1, 1989 Wyo. Sess. Laws 295 (amending Wyo. Stat. § 6-2-102).

<sup>63</sup> See, e.g., *Smith v. Commonwealth*, 248 S.E.2d 135, 146 (Va. 1978) (“In 1977, following the pattern approved in *Jurek*, the General Assembly enacted the statutory complex *sub judice*.”).

<sup>64</sup> Idaho Code § 19-2515(1), (3)(b), (7)(a) & (9) (2017); Okla. Stat. tit. 21, §§ 701.9, 701.11–12 (2011); Wyo. Stat. Ann. § 6-2-102(a), (e) & (h) (2017).

<sup>65</sup> Act of Dec. 6, 1984, ch. 3, § 3, 1985 Or. Laws 21 (“Upon a finding that the defendant is guilty of aggravated murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment or death.”).

<sup>66</sup> See Or. Rev. Stat. Ann. § 163.095 (West 2015) (defining aggravated murder); Or. Rev. Stat. Ann. § 163.150(1)(b) & (f) (West 2015) (requiring a finding of future dangerousness); Tex. Penal Code Ann. § 19.03 (West 2011) (defining capital murder); Tex. Code Crim. Pro. Ann. art 37.071 § 2(b)(1) (West 2006) (requiring a finding of future dangerousness).

<sup>67</sup> Va. Code Ann. § 19.2-254.4(C) (Supp. 1982).

<sup>68</sup> See Act of Aug. 7, 1979, ch. 158, § 1, 1979 Colo. Sess. Laws 674 (providing, as a mitigating factor, that “[t]he defendant is not a continuing threat to society”); Act of May 14, 1981, ch. 138, § 7, 1981 Wash. Sess. Laws 539 (adding, as a “relevant factor[.]” for the jury

aggravating evidence of future dangerousness in rebuttal<sup>69</sup> and turned the jury's attention to future harm<sup>70</sup>).

This focus on future dangerousness was not a brief experiment. Not one of these states has removed future dangerousness from capital sentencing. In Idaho, Oklahoma, and Wyoming future dangerousness offers sufficient aggravation to make murder a capital crime;<sup>71</sup> in Virginia it is a required finding, unless a capital murder is found to have been especially vile;<sup>72</sup> in Texas and Oregon it is a requirement in addition to other aggravation;<sup>73</sup> and in Colorado and Washington non-dangerousness serves as a supposed mitigating factor.<sup>74</sup>

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to consider when contemplating leniency, “[w]hether there is a likelihood that the defendant will pose a danger to others in the future”).

<sup>69</sup> See, e.g., *People v. Hamilton*, 200 P.3d 898, 968 (Cal. 2009) (“Defendant argues the prosecutor engaged in misconduct when he characterized a sentence of life without the possibility of parole as a license to commit acts of violence . . . . [T]here was no misconduct . . . . It was a proper comment on defendant’s assertions that if given a sentence of less than death he would not be a threat to others in prison.”); *State v. Rupe*, 743 P.2d 210, 226 (Wash. 1987) (ruling that it was proper for the prosecutor to mention the possibility of commutation to rebut the defendant’s claim that he would not be dangerous to society if sentenced to life in prison).

<sup>70</sup> *Berry*, supra note 6, at 898 (contending that a defendant’s “inability to prove the absence of future dangerousness” may lead the jury to conclude “that the individual in question should receive the death penalty”).

<sup>71</sup> Oklahoma and Wyoming have made no amendments to the language regarding future dangerousness. Compare Act of May 8, 1981, ch. 147, § 1, 1981 Okla. Sess. Laws 280 with Okla. Stat. Ann. tit. 21, § 701.12 (West 2011) (same); compare Act of Mar. 6, 1989, ch. 171, § 1, 1989 Wyo. Sess. Laws 295 (amending Wyo. Stat. § 6-2-102) with Wyo. Stat. Ann. § 6-2-102 (2017). Idaho has amended its future dangerousness provision only to allow consideration of post-offense conduct as well. Compare Act of Mar. 28, 1977, ch. 154, § 4, 1977 Idaho Sess. Laws 393 (amending Idaho Code § 19-2515) (“The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.”) with Idaho Code § 19-2515 (2017) (“The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.”).

<sup>72</sup> Compare Act of Mar. 29, 1977, ch. 492, § 1, 1977 Va. Acts 735 with Va. Code Ann. § 19.2-264.4 (2015) (same).

<sup>73</sup> Compare Act of Dec. 6, 1984, ch. 3, § 3, 1985 Or. Laws 22 with Or. Rev. Stat. Ann. § 163.150 (West 2015) (same); compare Act of June 14, 1973, ch. 426, art. 3, § 1, 1973 Tex. Gen. Laws 1125 with Tex. Code Crim. Proc. Ann. art. 37.071 (West 2006) (same).

<sup>74</sup> Compare Act of May 14, 1981, ch. 138, § 7, 1981 Wash. Sess. Laws 539 with Wash. Rev. Code § 10.95.070 (2016) (same); compare Act of Aug. 7, 1979, ch. 158, § 1, 1979 Colo. Sess. Laws 674 with Colo. Rev. Stat. § 18-1.3-1201(4)(k) (2017) (same).

Neither federal courts nor state courts, meanwhile, have ordered states to stop considering future dangerousness in these ways. Most have deemed the constitutionality of such statutory provisions settled by the Supreme Court's decision in *Jurek*.<sup>75</sup> The Court itself has read *Jurek* broadly to allow future dangerousness to "be treated as establishing an 'aggravating factor' for purposes of capital sentencing"<sup>76</sup>—even though *Jurek* did not say that.<sup>77</sup> State courts, similarly, have declined to invalidate future dangerousness provisions after noting that *Jurek* approved them.<sup>78</sup>

Many state courts have allowed future dangerousness to play a dispositive role in capital sentencing, even without evidence of legislative support for the incapacitation rationale. Future dangerousness became a judicially approved non-statutory aggravating factor in eleven states<sup>79</sup>—as well as under federal law.<sup>80</sup> In

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<sup>75</sup> See, e.g. *Bassett v. Commonwealth*, 284 S.E.2d 844, 849 (Va. 1981) ("In [a previous decision] we noted that the continuing-threat provision of [the Virginia death sentencing law] mirrored a Texas provision approved in *Jurek v. Texas*, and we found no constitutional vagueness in the statutory language . . ." (citations omitted)); see also *United States v. Davis*, 912 F. Supp. 938, 945 (E.D. La. 1996) (citing *Jurek* for the conclusion that future dangerousness "is relevant and constitutional as a nonstatutory [aggravating] factor."). The Supreme Court itself has consistently relied on its approval of the Texas statute in *Jurek*.

<sup>76</sup> *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (citation omitted).

<sup>77</sup> *Jurek*, 428 U.S. at 270. The *Jurek* Court did not consider future dangerousness as an aggravating factor, because the definition of capital murder in Texas's death penalty scheme already limited the death penalty to specified types of aggravated intentional murder. *Id.* ("While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty . . . its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.") The Court therefore went beyond *Jurek* when it later concluded that future dangerousness could be treated as an aggravating factor sufficient to justify death for a first-degree murder. See *Skipper*, 476 U.S. at 5.

<sup>78</sup> See, e.g., *Smith v. Commonwealth*, 248 S.E.2d 135, 148 (Va. 1978) ("The language defining the first aggravating circumstance, *i.e.*, the potential 'dangerousness' of the defendant, is identical to that in the Texas statute upheld in *Jurek*. . . . We see no constitutional vagueness in that language.").

<sup>79</sup> *People v. Ervin*, 990 P.2d 506, 534 (Cal. 2000) ("[W]e have held that prosecutorial argument regarding defendant's future dangerousness is permissible when based on evidence of the defendant's conduct rather than expert opinion."); *Ross v. State*, 326 S.E.2d 194, 205 (Ga. 1985) ("Arguments addressing [future dangerousness] are not improper if based on evidence adduced at trial."); *State v. Clark*, 220 So. 3d 583, 655 (La. 2016) (authorizing testimony regarding future dangerousness at sentencing); *State v. Deck*, 303 S.W.3d 527, 544 (Mo. 2010) (en banc) (allowing the state to argue future dangerousness at capital sentencing, as long as the evidence "did not suggest or imply the jurors would be directly responsible or held accountable if [the defendant] harmed anyone else in the future"); *Schoels v. State*, 966 P.2d 735, 740 (Nev. 1998) ("[I]t was proper for the prosecution to

these jurisdictions, the jury may consider future dangerousness when deciding whether death is appropriate. At least one type of statutory aggravation is required for any death sentence, but future dangerousness can serve as an additional aggravating factor that tips the scales toward death. The Supreme Court has condoned this practice, holding in *Simmons v. South Carolina* that the state “is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff.”<sup>81</sup> In such cases, future dangerousness serves as a relevant factor just like “mental capacity, background, and age,” and the Court has not imposed any burden of proof on the prosecutor before the jury can take it into account as a non-statutory aggravating factor.<sup>82</sup>

Statutory reforms and judicial decisions have thus entrenched future dangerousness as a dispositive consideration in death sentencing,<sup>83</sup> under the lasting influence of the Supreme Court’s

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argue the future dangerousness of [defendant.]”); *State v. Williams*, 510 S.E.2d 626, 644 (N.C. 1999) (“[I]t is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of the defendant.”); *State v. Addison*, 87 A.3d 1, 119 (N.H. 2013) (“[I]nformation that relates to future dangerousness as a legitimate aggravating factor is relevant and admissible at capital sentencing.”); *State v. Beuke*, 526 N.E.2d 274, 280 (Ohio 1988) (holding that requiring specific jury instruction to review a non-statutory aggravating circumstance of future dangerousness would be reversible error, but “merely arguing such in summation” was permissible); *Commonwealth v. Trivigno*, 750 A.2d 243, 254 (Pa. 2000) (“[I]t is not error for the prosecutor to argue a defendant’s future dangerousness . . . .”); *State v. Tucker*, 478 S.E.2d 260, 270 (S.C. 1996) (“The defendant’s future danger to society is a legitimate interest at sentencing.” (citation omitted)); *State v. Young*, 853 P.2d 327, 353 (Utah 1993) (“A jury may legitimately consider a defendant’s character, future dangerousness, lack of remorse, and retribution in the penalty phase hearing.”).

<sup>80</sup> *United States v. Bin Laden*, 126 F. Supp. 2d 290, 303–04 (S.D.N.Y. 2001) (“[L]ower courts have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases under the [Federal Death Penalty Act], including instances where such factor is supported by evidence of low rehabilitative potential and lack of remorse.”), *aff’d sub nom.*, *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93 (2d Cir. 2008).

<sup>81</sup> *Simmons v. South Carolina*, 512 U.S. 154, 165 n.5 (1994).

<sup>82</sup> *Id.* at 163.

<sup>83</sup> The Supreme Court has

rejected the notion that “a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.” Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.

*Harris v. Alabama*, 513 U.S. 504, 512 (1995) (citations omitted).

plurality opinion in *Jurek*. Trial courts confronted with the use of future dangerousness in capital sentencing understandably have treated the validity of future dangerousness questions as settled, even though, as Professor William Berry has pointed out, “the Court has never explicitly addressed whether future dangerousness or incapacitation alone could be a valid basis for the death penalty.”<sup>84</sup>

The lethal consequences are difficult to overstate. Future dangerousness findings have played a dispositive role in each of the more than 550 executions in Texas and the two executions in Oregon since *Furman*.<sup>85</sup> Scholars who have studied the way the death penalty is imposed have described future dangerousness as a primary reason for executions. One has called future dangerousness “the strongest determinant of whether an individual receives the death penalty.”<sup>86</sup> Another has determined that future dangerousness served as a “sentencing factor . . . directly underlying at least half of all modern era executions and likely playing some role in the rest.”<sup>87</sup> Still another has written that “future dangerousness predominates and pervades capital-sentencing schemes across the country.”<sup>88</sup> Future dangerousness impacts federal death sentencing, too: one study found that prosecutors raised claims of future dangerousness in 77% of federal capital cases from 1995–2007.<sup>89</sup>

The incapacitation rationale, expressed through future dangerousness inquiries at capital sentencing, thus has become a

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<sup>84</sup> Berry, *supra* note 6, at 913.

<sup>85</sup> Execution Database, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/number-executions-state-and-region-1976> [<https://perma.cc/H2RB-LYYY>] (last visited May 28, 2018); Or. Rev. Stat. Ann. §§ 163.150(1)(b) & (f) (West 2015); Tex. Code Crim Proc. Ann. art. 37.071 §§ 2(b)(1), (g) (West 2006).

<sup>86</sup> Berry, *supra* note 6, at 893. In the same article, Berry stated that life without parole and solitary confinement “provide the very alternative to death that eliminates dangerousness as a valid reason for execution.” *Id.* at 904; see also *id.* at 906 (arguing that a risk of future dangerousness can be mitigated “by simply using the penitential structure already in place, solitary confinement in particular”). He did not address moral trade-offs and legal questions that that choice entails, as laid bare in Part II of this Article.

<sup>87</sup> Shapiro, *supra* note 17, at 146 (citation omitted). Shapiro contends that an inquiry into future dangerousness at sentencing distracts the jury from the more important question of desert and introduces an unacceptable risk of prediction error. She dismisses the incapacitation rationale for executions as indefensible. *Id.* at 168, 185.

<sup>88</sup> Edmondson, *supra* note 13, at 917.

<sup>89</sup> Mark D. Cunningham, Thomas J. Reidy, & Jon R. Sorensen, Assertions of “Future Dangerousness” at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence, 32 *L. & Hum. Behav.* 46, 47 (2008).

dominant and dispositive factor in executions. The Supreme Court's disruption of capital punishment in *Furman* resulted in statutory narrowing of the death penalty, and an unintended accompanying shift toward the instrumental question of future harm. Future dangerousness then gained widespread judicial acceptance based largely on the Supreme Court's decision in *Jurek*, even though the substantive question of whether "the goal of incapacitation may justify the death penalty"<sup>90</sup> was one that the *Jurek* Court did not decide. The dominant influence of future dangerousness today stems from these surprisingly tangled roots.

## II. TWO OBJECTIONS TO THE INCAPACITATION RATIONALE

Despite the historical and practical importance of the incapacitation rationale in capital sentencing, scholars tend to dismiss future dangerousness as an invalid reason for the death penalty. A critical review of death penalty literature and case law suggests two explanations. Each lies in a mistaken objection to the incapacitation rationale. One objection is based on the belief that incapacitation can be achieved just as effectively through non-lethal means; this leads some critics to conclude that the incapacitation rationale is irrelevant to death penalty debates. A second objection is based on the belief that predictions of violence are so unreliable that it would be arbitrary and unjust to premise any execution upon them. Each of these objections is seriously flawed. Current non-lethal alternatives turn out to require cruel and degrading forms of restraint, or else to be inadequate to stop future violence. The problem of prediction error, on the other hand, is significant, but can be addressed and mitigated through reevaluation of dangerousness over time. Accordingly, the incapacitation rationale cannot be treated as irrelevant or inherently unjust. It should be a core focus of academic and judicial discourse, both because future dangerousness is actually driving so many death sentences, and because it implicates moral and legal choices too challenging and consequential to ignore.

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<sup>90</sup> *California v. Ramos*, 463 U.S. 992, 1023 n.9 (1983) (Marshall, J., dissenting).

*A. Non-Lethal Alternatives*

Centuries ago, long-term incarceration did not exist as a feasible alternative to the execution of dangerous offenders.<sup>91</sup> Other punishments, such as exile or transportation to foreign lands,<sup>92</sup> sometimes offered an alternative means to protect society from these offenders, but these means required enforcement and resources.<sup>93</sup> The death penalty remained the clearest and most efficient mode of incapacitation.

The alternative of incarceration has since changed the debate. Many scholars and judges critical of capital punishment now discard the incapacitation rationale for capital punishment on the ground that carceral alternatives can also incapacitate. They contend that solitary confinement and life imprisonment without parole, in particular, offer practical, sufficient, and morally superior alternatives to execution.

Some of these critics contend that the risk of future violence by capital murderers is overblown. In his influential book, *The Limits of the Criminal Sanction*, Professor Herbert Packer argued that the incapacitation rationale cannot justify capital punishment because murderers as a class are unlikely to kill again. He argued that “[i]ncapacitation is a relevant claim only if it can be shown that a high proportion of people who engage in a particular form of conduct are likely to go on doing so unless restrained. Very few murderers kill again; that incapacitative claim is weak.”<sup>94</sup> In *Furman*, Justice Marshall made a similar argument:

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<sup>91</sup> See, e.g., John H. Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. Legal Stud. 35, 36 (1976) (stating that death and maiming “were the ordinary penalties for serious crime in the Western legal systems in the later Middle Ages” because they were easy to administer and did not require prisons or penitentiaries).

<sup>92</sup> *Id.* at 54 (“[T]he decline in England’s ‘penal death rate’ came about because of the development of an alternative to the blood sanctions: transportation of convicts for terms of labor as indentured servants in the overseas colonies.” (citation omitted)); *id.* at 58 (“The American revolutionary war interrupted England’s export of convicts in the 1770s. As a stopgap, which in fact lasted until the foundations of the modern prison system in the mid-nineteenth century, the government ‘decided to moor hulks on the Thames, put convicts in them and work them at hard labor.’” (citation omitted)).

<sup>93</sup> *Id.* at 59 (describing the transportation and galley systems that became alternatives to capital punishment as “an administrative feat, in organizing and refining relatively complex schemes to extract convict labor”).

<sup>94</sup> Herbert L. Packer, *The Limits of the Criminal Sanction* 269 (1968).

[I]f a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens.<sup>95</sup>

These criticisms are weak. One weakness lies in Packer's and Justice Marshall's idea that the incapacitation rationale for capital punishment is irrelevant if most murderers will not commit future crimes. The incapacitation rationale still may be relevant and important for a subcategory of murderers who remain dangerous. The problem of overbreadth can be readily addressed by making individual rather than categorical judgments about the future dangerousness of capital offenders, as this author has proposed elsewhere.<sup>96</sup> The incapacitation rationale does not become irrelevant simply because the risk is limited to a subset of capital murderers.

Another flaw lies in the apparent assumption, reflected in Packer's argument, that only fatal violence should be considered. In fact, from a utilitarian perspective, the incapacitation rationale need not be limited to preventing violence that is fatal. Society might benefit from executing a criminal even if he is predicted to commit only future rapes, for example, if the utility of preventing those rapes outweighs the harm of his execution.<sup>97</sup> The logic of the incapacitation rationale applies where future risks are non-lethal as well as lethal, unless one further concludes that even multiple non-lethal crimes can never be more harmful than an execution, that punishment must comply with a strong proportionality requirement, or that human life has value beyond mere utility.<sup>98</sup> Absent such constraints, the death penalty might be defended to prevent lesser harms—at least if the penalty is deserved as a predicate, retributive matter. That is, in fact,

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<sup>95</sup> *Furman*, 408 U.S. at 355 (Marshall, J., concurring) (citation omitted).

<sup>96</sup> Cf. Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 *Ohio St. L.J.* 525, 551 (2016) ("Security needs do not require a death sentence to be dispositive for automatic and permanent placement on death row. Individual assessments of death-sentenced offenders offer a way to determine which inmates require more restrictive confinement—assessments that are made routinely for noncapital prisoners." (citation omitted)).

<sup>97</sup> Cf. Richard J. Bonnie, et al., *Criminal Law* 21 (4th ed. 2015) ("By itself, incapacitation as a method of preventing future crimes by the incapacitated person may justify sentencing the thief to a term of life imprisonment.")

<sup>98</sup> Packer may have assumed such a constraint, but he did not spell out or explain it.

how most states approach the question of future dangerousness. Of the half-dozen states that have statutes making future dangerousness necessary or sufficient for the death penalty, only one—Idaho—requires the future danger to be lethal.<sup>99</sup> The other five—Texas, Virginia, Oklahoma, Oregon, and Wyoming—simply require a likelihood of future violence.<sup>100</sup>

A third mistake can be discerned in Justice Marshall's discussion of comparative rates of violence. He contends that if murderers tend to commit less violence in prison than inmates sentenced for non-lethal crimes, then incapacitation cannot justify the death penalty for murderers, given that we do not execute those non-lethal offenders. But the reason we do not execute persons who committed non-lethal crimes is because they do not deserve the death penalty.<sup>101</sup> Marshall's empirical claim that murderers as a class are less likely to commit violence in prison than prisoners who committed non-lethal crimes is therefore not decisive, even if it is accurate.<sup>102</sup>

Many critics reject the incapacitation rationale for reasons other than the flawed arguments described above. These critics often admit that some capital murderers remain dangerous and that their incapacitation is a legitimate concern, but argue that non-lethal punishments also incapacitate. Three Supreme Court Justices have espoused this view. Justice Stevens has argued that “[i]n capital sentencing decisions . . . incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of

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<sup>99</sup> Idaho requires that the defendant be found to have a “propensity to commit *murder* which will probably constitute a continuing threat to society.” Idaho Code § 19-2515(9)(i) (2017) (emphasis added).

<sup>100</sup> See supra notes 44, 64–66, 72–74 and accompanying text.

<sup>101</sup> The Court has permitted incapacitation without desert where its purpose is regulatory and non-punitive. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 365–66 (1997). The Court thus has condoned civil commitment. Its rule elsewhere against the execution of the intellectually disabled may imply, however, that incapacitation by means of death would not be permissible in a civil context, where desert is not an issue. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>102</sup> Studies have indicated that “a murder conviction is not predictive of a greater risk of prison violence relative to a conviction for some other offense.” Jon Sorensen & Mark D. Cunningham, *Conviction Offense and Prison Violence: A Comparative Study of Murderers and Other Offenders*, 56 *Crime & Delinquency* 103, 123 (2010). And “research has consistently found the true incidence of recidivism among murderers released from prison to be much lower than for other types of parolees.” Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 *J. Crim. L. & Criminology* 1251, 1254 (2000) (citation omitted).

parole is available”<sup>103</sup> (which it is in all states today<sup>104</sup>). He has conceded that incapacitation is a rational basis for punishment, and that it “would be served by execution,” but has contended that “in view of the availability of imprisonment as an alternative means of preventing the defendant from violating the law in the future, the death sentence would clearly be an excessive response to this concern.”<sup>105</sup> Similarly, Justice Breyer has rejected the incapacitation rationale on the ground that “the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates.”<sup>106</sup> Justice Marshall shared this objection as well.<sup>107</sup>

Critics of the incapacitation rationale also often invoke the option of solitary confinement. Justice Marshall contended that the death penalty could not “be seriously defended as necessary to insulate the public from persons likely to commit crimes in the future” because “[l]ife imprisonment and, if necessary, solitary confinement, would fully accomplish the aim of incapacitation.”<sup>108</sup> Berry has made the same point:

If death is the only way to incapacitate a particular offender, then future dangerousness can serve as a valid justification for capital punishment . . . [but] it is not difficult to minimize, if not eliminate, any risk of dangerousness by simply using the penitential structure already in place, solitary confinement in particular.<sup>109</sup>

Other scholars have described “better security” and “increased punishments like solitary confinement” as “alternatives” to the death penalty for dangerous prisoners.<sup>110</sup> Such scholars recognize that some capital offenders are truly dangerous, but see solitary confinement and life imprisonment as adequate and morally superior alternatives.

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<sup>103</sup> *Harris v. Alabama*, 513 U.S. 504, 517 (1995) (Stevens, J., dissenting).

<sup>104</sup> Shapiro, *supra* note 17, at 151 n. 23.

<sup>105</sup> *Spaziano v. Florida*, 468 U.S. 447, 477–78 (1984) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

<sup>106</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting).

<sup>107</sup> *California v. Ramos*, 463 U.S. 992, 1023 (1983) (Marshall, J., dissenting).

<sup>108</sup> *Id.*

<sup>109</sup> Berry, *supra* note 6, at 904, 906.

<sup>110</sup> Amy V. Coney & John H. Garvey, *Catholic Judges in Capital Cases*, 81 *Marq. L. Rev.* 303, 311–12 (1998) (hypothesizing why Pope John Paul II concluded that few executions, if any, would be necessary to the defense of society).

Critics who cite the existence of these non-lethal alternatives believe that they render the death penalty unnecessary and unjust, usually based on some form of what Professor Hugo Bedau called the principle of “minimal invasion.”<sup>111</sup> This principle holds that “[g]overnmental invasions of an individual’s privacy, liberty, and autonomy (or other fundamental values) are justified only if no less invasive practice is sufficient to achieve an important social goal.”<sup>112</sup> Critics like Bedau contend that the death penalty is “by its very nature . . . more severe, invasive, and irremediable than the alternative which, for all practical purposes in contemporary society, is long-term imprisonment.”<sup>113</sup> They conclude that only non-lethal punishments are morally permissible.<sup>114</sup>

A closer look at solitary confinement and life without parole, however, casts doubt on the underlying assumption that the death penalty is necessarily more “severe, invasive, and irremediable” than these non-lethal alternatives. The almost grotesque inhumanity of long-term solitary confinement may not be better than death, and life without parole may entail equally inhumane conditions in order to prevent prisoner violence. Furthermore, death sentences are much more closely scrutinized, and though only a death sentence is truly irrevocable, erroneous life sentences are much less likely to be corrected.

These considerations do not prove that the proposed non-lethal alternatives are actually worse than death, but they do show that their moral superiority—or even their moral permissibility—is far from clear. It is true that persons who believe that human life is sacred or inviolable may see non-lethal punishments as the only morally permissible ones. But such claims are rarely invoked explicitly in judicial or academic argument, and if they were, they would end

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<sup>111</sup> Hugo Adam Bedau, *The Minimal Invasion Argument Against the Death Penalty*, 21 *Crim. Just. Ethics* 3, 4 (2002).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* The Supreme Court likewise has opined that “[t]here is no question that death as a punishment is unique in its severity and irrevocability.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (citations omitted).

<sup>114</sup> See also Matthew H. Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and Its Consequences* 151–52 (2011) (“Because alternative sanctions of lesser severity can fully realize any legitimate incapacitative ends, the employment of the death penalty in pursuit of such ends is always impermissible under the Minimal Invasion Principle.”).

discussion of the death penalty on retribution and deterrence rationales as well. This Article is not intended to challenge those who hold such a belief. Instead, it disputes the claim that the existence of non-lethal alternatives, without more, renders the incapacitation rationale irrelevant to death penalty discourse. The choice is far more morally and legally complex.

### *1. Solitary Confinement*

Critics who argue that the death penalty is unnecessary because of solitary confinement rarely stop to consider the severity and cruelty of that alternative in making this claim. However, an enormous body of research and scholarship has revealed that extraordinary harms follow from prolonged and even short-term solitary confinement. Critics describe it as a form of torture.<sup>115</sup> Studies have demonstrated that extreme psychological, physical, and spiritual damage can result from such isolation. Some prisoners go insane; others become violent; others fall into severe depression; some commit suicide.<sup>116</sup> One study found prisoners in solitary confinement five times more likely to commit suicide than other prisoners. In order to kill themselves “in a bare cell . . . [s]ome prisoners have resorted to jumping head-first off their bunks; others have bitten through the veins in their arms.”<sup>117</sup> For those who remained alive after years in solitary confinement, their ability to interact safely with others outside isolation was reduced, if not eliminated. Such confinement may impair a person’s ability to reason, undercutting his capacity for self-reflection, self-control, and rehabilitation. The enduring deprivation of social interaction may take away what is quintessentially human—a person’s ability to reason and relate to others—and may completely destroy the human mind and spirit.

Courts have expressed grave concerns regarding the moral and legal permissibility of prolonged solitary confinement. The European

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<sup>115</sup> See, e.g., Atul Gawande, *Hellhole*, *The New Yorker*, Mar. 30, 2009 (arguing that “[w]hether in Walpole or Beirut or Hanoi, all human beings experience isolation as torture,” and calling solitary confinement “legalized torture”).

<sup>116</sup> See, e.g., James Ridgeway & Jean Casella, *What Death Penalty Opponents Don’t Get: There Are Fates Worse Than Death*, *The Marshall Project* (Nov. 30, 2014), <https://www.themarshallproject.org/2014/11/30/what-death-penalty-opponents-don-t-get> [<https://perma.cc/QML7-RU5V>].

<sup>117</sup> *Id.*

Court of Human Rights famously refused to extradite a capital defendant to the United States to face a death penalty trial in Virginia, because the court feared he would be subjected to solitary confinement and other “inhuman or degrading” conditions while on death row.<sup>118</sup> Though the United States Supreme Court has never forbidden solitary confinement for dangerous prisoners, it has long recognized the extraordinary harms that can follow from such isolation. In the 1890 case of *In re Medley*, the Court noted that even a short period of solitary confinement can cause irreparable harm to the prisoner.<sup>119</sup> The Court observed that these harms befell prisoners who were isolated in cells of “considerable size;”<sup>120</sup> today, prisoners are held in solitary confinement for twenty-three hours a day in cells often “no larger than a typical parking spot.”<sup>121</sup> In a recent opinion criticizing the use of solitary confinement, Justice Kennedy described how prisoners living in such conditions are given only one hour of out-of-cell time a day, and “allowed little or no opportunity for conversation or interaction with anyone.”<sup>122</sup> He warned that these conditions may bring prisoners “to the edge of madness, perhaps to madness itself.”<sup>123</sup>

The Supreme Court has taken an increasingly hard line against the practice of prolonged solitary confinement in the non-capital context.<sup>124</sup> In *Wilkinson v. Austin*, the Supreme Court held that a maximum security inmate had a due process interest in avoiding placement in solitary confinement, and that the state could not put

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<sup>118</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 91 (1989). The European Court described these conditions as a “death row phenomenon” that violates Article 3 of the European Convention on Human Rights. *Id.* at ¶¶ 56, 99, 111.

<sup>119</sup> 134 U.S. 160, 168 (1890).

<sup>120</sup> *Id.*

<sup>121</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring); see also, e.g., Am. Civil Liberties Union of Tex., *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* 2 n.9 (Feb. 2015), [https://www.aclutx.org/sites/default/files/field\\_documents/SolitaryReport\\_2015.pdf](https://www.aclutx.org/sites/default/files/field_documents/SolitaryReport_2015.pdf) [<https://perma.cc/9AU9-722Z>] (“The average size of a solitary-confinement cell in Texas is sixty square feet . . .”).

<sup>122</sup> *Ayala*, 135 S. Ct. at 2208 (Kennedy, J., concurring).

<sup>123</sup> *Id.* at 2209 (Kennedy, J., concurring) (internal quotation marks omitted).

<sup>124</sup> Challenges to long-term solitary confinement by death row prisoners have usually failed. See, e.g., *Prieto v. Clarke*, 780 F.3d 245, 254–55 (4th Cir. 2015) (holding that death-sentenced prisoners have no due process right to challenge permanent solitary confinement on death row because death row is “tethered” to any death sentence).

him there without justification and without periodic review.<sup>125</sup> In separate opinions, Justice Kennedy, Justice Breyer, and Justice Stevens have criticized the practice of long-term solitary confinement, and have raised the possibility of imposing constitutional limits if states do not curb its use on their own.<sup>126</sup>

Lower courts have condemned solitary confinement in even more emphatic terms. The Third Circuit recently held that prisoners sentenced to life in prison “have a due process right to be free from indefinite conditions of solitary confinement.”<sup>127</sup> The court explained that “scientific research and the evolving jurisprudence has made the harms of solitary confinement clear: Mental well-being and one’s sense of self are at risk. We can think of few values more worthy of constitutional protection than these core facets of human dignity.”<sup>128</sup> The court pointed to studies showing that “psychological stressors such as isolation can be as clinically distressing as physical torture” and cited a case involving a prisoner who had “deteriorated to the point of *social death* as a direct result of his continued isolation.”<sup>129</sup> In that case, “the damage of indefinite solitary confinement was . . . severe, certain, and irreparable.”<sup>130</sup>

Such condemnation of solitary confinement is not an anomaly. As the Third Circuit explained, it was only “add[ing] [its] jurisprudential voice to th[e] growing chorus” of academic and judicial opponents of long-term solitary confinement.<sup>131</sup> Just recently, a federal district court enjoined Virginia prison administrators from subjecting even *death row* prisoners to extended solitary confinement, because such

<sup>125</sup> 545 U.S. 209, 214, 230 (2005) (holding that inmates had a due process liberty interest in avoiding assignment to a “highly restrictive form of solitary confinement” in the state’s supermax prison).

<sup>126</sup> See, e.g., *Ayala*, 135 S. Ct. at 2208–10 (Kennedy, J., concurring) (objecting to the inhumanity of long-term solitary confinement); *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting from the denial of a stay of execution) (noting the “human toll” and “terrible psychiatric price” of extended solitary confinement and urging the Court to decide whether extended isolation survives Eighth Amendment scrutiny (citations omitted)); *Thompson v. McNeil*, 556 U.S. 1114, 1115 (2009) (Stevens, J., respecting the denial of certiorari) (deeming the “dehumanizing effects” of long-term isolation “undeniable”).

<sup>127</sup> *Williams v. Sec’y Pa. Dep’t of Corrs.*, 848 F.3d 549, 574–75 (3d Cir. 2017) (citation omitted) (internal quotation marks omitted).

<sup>128</sup> *Id.* at 574 (citations omitted).

<sup>129</sup> *Id.* (citing *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 774 (M.D. Pa. 2016)) (internal quotation marks omitted).

<sup>130</sup> *Id.* at 573 (describing the district court’s decision).

<sup>131</sup> *Id.* at 574.

confinement takes away “a core element of what it means to be human.”<sup>132</sup> The court defended its injunction on the ground that deliberate indifference to the “potential harm that the lack of human interaction on death row could cause” would violate the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>133</sup>

The growing chorus of solitary confinement critics includes religious leaders, as well. Pope Francis, for example, recently condemned the use of solitary confinement—and more broadly “high security prisons”—as an affront to human dignity.<sup>134</sup> Similarly, Anthony Granado, policy advisor to the U.S. Conference of Catholic Bishops, has stated: “Punishment is just and right, but we don’t want to dehumanize people and make them worse . . . They are created in the image and likeness of God.”<sup>135</sup> For such critics, solitary confinement is not a morally acceptable safeguard against prisoner violence. The voices of these critics are being heard: over the last five years, several states and the federal government have taken significant steps to reduce the use of solitary confinement, particularly for juveniles and the mentally ill.<sup>136</sup>

One would think that so debilitating a condition as solitary confinement at least would be adequate to completely incapacitate prisoners and protect others. But even that is not true. Studies and cases have shown that even prisoners in solitary confinement can continue to perpetrate violence, particularly if they are part of organized gangs. A lengthy report on criminal activity in a California super-maximum security prison discovered that gang members, held

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<sup>132</sup> *Porter v. Clarke*, 290 F.Supp.3d 518, 530 (E.D. Va. 2018) (citing the report of a clinical psychologist, who explained that long-term solitary confinement causes psychological damage and that the coping mechanisms that prisoners adapt to deal with prolonged isolation may cause still further harm) (internal quotation marks omitted).

<sup>133</sup> *Id.* at 532.

<sup>134</sup> Pope Francis, Address of Pope Francis to the Delegates of the International Association of Penal Law (Oct. 23, 2014), [https://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco\\_20141023\\_associazione-internazionale-diritto-penale.html](https://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.html) [<https://perma.cc/ZY92-XE3A>] (arguing that “high security prisons” amount to a “form of torture” inconsistent with “the *pro homine* principle, meaning the dignity of the human person above every thing else”).

<sup>135</sup> Matt Hadro, Why There’s a Backlash Against Solitary Confinement in U.S. Prisons, *Crux* (Dec. 26, 2016), <https://cruxnow.com/cna/2016/12/26/theres-backlash-solitary-confinement-u-s-prisons/> [<https://perma.cc/6ZUM-S756>].

<sup>136</sup> See, e.g., Priyanka Boghani, Reducing Solitary Confinement, One Cell at a Time, *P.B.S. Frontline* (Apr. 18, 2017), <https://www.pbs.org/wgbh/frontline/article/reducing-solitary-confinement-one-cell-at-a-time/> [<https://perma.cc/JZ28-XVKU>].

in isolation and unable to interact with or see one another, continued to communicate using bedsheet strings to “fish” notes down prison hallways, and smuggled gang orders out of prison within documents made to seem like privileged legal communications.<sup>137</sup> Despite efforts, prison officials were unable to stop this activity.<sup>138</sup>

Long-term solitary confinement does not present an easy alternative to the death penalty. For murderers who are extremely dangerous and who cannot be confined safely except by solitary confinement or execution,<sup>139</sup> it is not clear that solitary confinement is the more morally or legally acceptable alternative. It may be that restraining a person in near-total isolation corrodes his mind and spirit so dreadfully that it may be at greater odds with the “concept of human dignity at the core of the [Eighth] Amendment”<sup>140</sup> than would be his execution.

Only if one believes that human life is intrinsically sacred or inviolable,<sup>141</sup> or worth preserving even at the cost of human happiness or sanity, can one conclude that solitary confinement may or ought to be chosen instead of execution to incapacitate enduringly

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<sup>137</sup> Lesley Stahl, *Gangs Thrive in Maximum-Security Prison*, CBS News (May 12, 2005), <https://www.cbsnews.com/news/gangs-thrive-in-maximum-security/>; see also *infra* note 195 and accompanying text (citing reports of violence on death row).

<sup>138</sup> Stahl, *supra* note 137.

<sup>139</sup> See, e.g., U.S. Dep’t of Justice, *Final Report: Report and Recommendations Concerning the Use of Restrictive Housing 1* (Jan. 2016) (concluding “that there are occasions when correctional officials have no choice but to segregate inmates from the general population, typically when it is the only way to ensure the safety of inmates, staff, and the public and the orderly operation of the facility.”).

<sup>140</sup> *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (plurality opinion).

<sup>141</sup> The idea that human life has inestimable or unique value, or must be respected as inviolable for some other reason apart from any utilitarian considerations, explains many of the concerns relating to the death penalty, though it is not always recognized by those who raise these concerns. For example, the risk of executing an innocent person raises far more concern than an erroneous sentence of life without parole (or even many erroneous sentences of life without parole), though error in non-lethal sentences is much less likely to be corrected, see *infra* notes 150–155. Similarly, concern regarding racial discrimination in capital sentencing has been cited as a reason to abolish the death penalty, but abolition has not been suggested for a host of other punishments imposed more frequently and with, quite possibly, as much unfairness. For persons who claim life is sacred, the difference requires no further explanation. But must our society conclude that human life has inestimable or unique value? The Supreme Court has said yes, but its reason is unsatisfying: “Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). That begs the question of why the finality of death matters so much, particularly since non-capital sentencing errors are much less likely to be corrected.

dangerous capital offenders. Faith or natural law theory may lead some to embrace the sacredness and inviolability of human life, but such premises are not shared by all in our secular society. Reasonable persons seeking in good faith the welfare of society and the promotion of human dignity may end up disagreeing as to whether the death penalty should be replaced with solitary confinement, even assuming that condition can fully incapacitate.

## 2. *Life Without Parole*

But solitary confinement is not the only non-lethal alternative. Many commentators point to life imprisonment as the logical and adequate alternative to execution for prisoners who will remain violent. A closer examination of this alternative reveals two significant problems. On the one hand, life in prison may not incapacitate truly dangerous prisoners.<sup>142</sup> On the other hand, if it does incapacitate them, that is most likely because it entails the same kinds of isolation and restraint that make solitary confinement so inhumane. For threatening, capital offenders, this non-lethal alternative still leaves us with agonizing future choices of either dangerous inadequacy or torturous restraint.

Turning first to the question of adequacy, it is readily apparent that life without parole may not prevent dangerous capital offenders from committing future violence.<sup>143</sup> A lengthy report by the American Civil Liberties Union (“ACLU”) described the violence that prisoners sentenced to life without parole routinely encounter: “More than 75 percent (76.9 percent) of the prisoners surveyed by the ACLU reported that they had been assaulted or had witnessed other prisoners being assaulted [or] raped . . . .”<sup>144</sup> The report found that the “day-to-day lives [of life without parole prisoners] are marked by lack of privacy, shakedowns, lockdowns, full-body searches, and extensive

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<sup>142</sup> See *infra* notes 143–146 and accompanying text.

<sup>143</sup> See, e.g. *Arave v. Creech*, 507 U.S. 463, 465–66 (1993) (“Thomas Creech has admitted to killing or participating in the killing of at least 26 people . . . Creech has said repeatedly that, unless he is completely isolated from humanity, he likely will continue killing . . . Creech’s most recent victim was David Dale Jensen, a fellow inmate in the maximum security unit of the Idaho State Penitentiary. When he killed Jensen, Creech was already serving life sentences for other first-degree murders.”).

<sup>144</sup> Am. Civil Liberties Union, *A Living Death: Life Without Parole for Nonviolent Offenses* 187 (Nov. 2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=189> [<https://perma.cc/GU77-WGFE>].

and intrusive control over every aspect of their lives . . . . They witness—and constantly fear—violence, assault, sexual abuse, and rape.”<sup>145</sup> One prisoner recounted:

I have seen men with their throats cut, their bellies cut open with their guts hanging out . . . and I have seen men with knives stuck deep into their skulls and more. I have seen men stomped into vegetative states and with all their teeth kicked out. A man died in my arms.<sup>146</sup>

It is evident that life without parole, without more, is not fully incapacitating. Life-long incarceration protects those outside prison walls from dangerous inmates but leaves fellow inmates vulnerable to attack without means of self-protection or the ability to retreat.

To stem this violence, prisoners sentenced to life without parole are frequently subjected to solitary confinement.<sup>147</sup> Studies reveal that unless (and perhaps even if) life without parole is coupled with severe restrictions and isolation, it may not suffice to protect others from very dangerous capital offenders. This requires us again to ask whether this alternative is really more defensible than execution—a question that depends on competing normative commitments such as the state’s moral and constitutional<sup>148</sup> duty to protect those in its custody and service, the importance of human dignity, and the value of human life. One cannot reach a deliberate and reasoned approach to those trade-offs if one simply ignores the threat of future danger on the ground that life without parole is an option.

Those who cite life without parole as a reason to ignore the incapacitation rationale for execution seem to overlook another facet of inhumanity in that alternative, as well. Like the death penalty, life without parole reflects an absolute and irrevocable condemnation of the prisoner. It denies him all hope of social rehabilitation or restoration to the human community. In a recent case barring life without parole for juvenile offenders, the Supreme Court concluded that such offenders are not sufficiently culpable to deserve a penalty

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 188 (quoting prisoner Paul Free).

<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994) (“[A]s the lower courts have uniformly held . . . ‘prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners’ . . . . Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” (citations omitted)).

that “forfeits altogether the rehabilitative ideal” and that represents “an irrevocable judgment about that person’s value and place in society.”<sup>149</sup> The hopelessness of life without parole,<sup>150</sup> made more cruel when coupled with solitary confinement, has led some critics to denounce it as a “living death”<sup>151</sup> and even “worse than death.”<sup>152</sup>

Those who conclude that the death penalty is unnecessarily harsh also rely too heavily upon the assertion that the death penalty is irremediable. The matter is more complicated. It is true that only execution is irrevocable. But capital sentencing errors are far more likely to be remedied than errors in non-capital sentences, because death sentences receive special scrutiny. The Supreme Court has held that due process requires “heightened reliability” for a sentence of death.<sup>153</sup> Statistics bear out the results. One study found that federal habeas petitions were granted in capital cases at a rate thirty-five times higher than in non-capital cases.<sup>154</sup> Another found that “courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue.”<sup>155</sup> In contrast, life

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<sup>149</sup> *Graham v. Florida*, 560 U.S. 48, 74 (2010).

<sup>150</sup> In theory, a state might seek intramural rehabilitation of those sentenced to life without parole and to death. Indeed, that was an aim of the death penalty in early America. See McLeod, *supra* note 96, at 552–53. And one scholar recently argued that society should care more about the rehabilitation of death-sentenced prisoners. See Meghan Ryan, *Death and Rehabilitation*, 46 U.C. Davis L. Rev. 1231, 1282–83 (2013). To others, life without parole sentences and death sentences have no such aim. See, e.g., Brandon Garrett, *The Moral Problem of Life-Without-Parole Sentences*, *Time* (Oct. 26, 2017), <http://time.com/4998858/death-penalty-life-without-parole/> (noting that 50,000 prisoners in America are serving life without parole “sentences that offer them no possibility of release or rehabilitation”).

<sup>151</sup> Am. Civil Liberties Union, *supra* note 144. There are prisoners who would prefer death to life in prison without parole. William A. “Corky” Snyder was one: he “waived the presentation of any mitigating evidence and urged the jury to sentence him to death.” *Snyder v. State*, 893 So. 2d 488, 505 (Ala. Crim. App. 2003). This author assisted in representing Snyder on post-conviction review in the Alabama courts, and tried to persuade him to fight for his life. Snyder had a powerful claim for relief from his death sentence, but he knew that would mean life in prison. He committed suicide on July 12, 2011, his appeal still pending.

<sup>152</sup> Ridgeway & Casella, *supra* note 116.

<sup>153</sup> *Sumner v. Shuman*, 483 U.S. 66, 72, 85 (1987).

<sup>154</sup> See Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 10 (Aug. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf> [<https://perma.cc/J5XW-WPXV>] (finding that the federal habeas petitions were granted in capital cases at a rate thirty-five times higher than in non-capital ones).

<sup>155</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., dissenting). Justice Breyer has observed that this disparity “must reflect the fact that courts scrutinize capital cases more

without parole sentences “receive no special consideration on appeal, which limits the possibility they will be reduced or reversed.”<sup>156</sup> When it comes to error, a death sentence can make a vital difference.

Death sentences also garner the scrutiny of abolitionist attorneys. The story of death row exoneree Joseph Amrine illustrates how important that can be. Amrine was convicted of killing a fellow prisoner, though he was innocent. Amrine realized that only a death sentence would garner the attention of abolitionist attorneys and offer him hope of eventual freedom. If he were sentenced to life in prison, he would die in prison. So Amrine asked the jury for death, and the jury granted his wish.<sup>157</sup> Over the years that followed, his case captured the attention of abolitionist attorneys and death penalty critics, and he was exonerated.<sup>158</sup> In the end, his death sentence saved his life.

These considerations reveal that the proposed non-lethal alternatives are not the obviously superior alternatives to the death penalty that scholars like Bedau have claimed.<sup>159</sup> They are extremely severe, and may bring condemnation and suffering to the offender that are even less revocable than a sentence of death.

Furthermore, even with all this harshness, the non-lethal alternative of life without parole may be inadequate to protect the lives and safety of others. It may protect those who live in free society outside

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closely,” though, in his view, “it likely also reflects a *greater likelihood of an initial wrongful conviction*,” because the “horrendous” nature of capital murders leads to “intense community pressure . . . to secure a conviction.” Id.

<sup>156</sup> Am. Civil Liberties Union of N. Cal., *The Truth About Life Without Parole: Condemned to Die in Prison*, <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison> [<https://perma.cc/5JLM-4ZZS>] (last visited Apr. 15, 2018).

<sup>157</sup> Backed into a Corner, Interview with Joseph Amrine by Ira Glass, *This American Life* by WBEZ (originally aired Apr. 15, 2005), <https://www.thisamericanlife.org/radio-archives/episode/287/transcript> [<https://perma.cc/RB9N-UGV4>].

<sup>158</sup> Lee Strubinger, *Professor’s Documentary Saved Innocent Man from Death Row*, *Vidette Online* (Feb. 2, 2012), [http://www.videtteonline.com/features/professor-s-documentary-saved-innocent-man-from-death-row/article\\_ad798d99-16a5-570a-a07f-4f151d1706fa.html](http://www.videtteonline.com/features/professor-s-documentary-saved-innocent-man-from-death-row/article_ad798d99-16a5-570a-a07f-4f151d1706fa.html) [<https://perma.cc/7FAY-JQS8>].

<sup>159</sup> Substitution of life without parole for the death penalty has brought simultaneously an expansion of the offenses subject to life without parole: “It is clear that life without parole’s purpose of offering an alternative to the death penalty, has far outstripped its proponents’ goal. The result is not an abandonment of the death penalty, but an embrace of permanent incarceration for noncapital crimes.” Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 *Harv. L. Rev.* 1838, 1852 (2006).

the prison walls, for the risk of prisoner escape may be small<sup>160</sup> and can be mitigated through perimeter security measures; but it may not ensure safety for those who live in the society within the prison walls—inmates, prison guards (who are often unarmed<sup>161</sup>), medical staff, chaplains, and the visiting families and friends of prisoners. Some might have little sympathy for violent criminals who may be potential victims, but “[b]eing violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”<sup>162</sup> Some number of capital murderers are likely to commit future acts of violence against their fellow prisoners or prison guards,<sup>163</sup> and government has the right and the responsibility to

<sup>160</sup> Some evidence exists regarding the rate of violence perpetrated during escapes, but there is little disaggregation of the data for capital and non-capital prisoners. See, e.g., Richard F. Culp, Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data, 85 *Prison J.* 270, 285, 287 (2005). Anecdotes are easier to find. See, e.g., *Beard v. Kindler*, 558 U.S. 53, 55–58 (2009) (recounting the petitioner’s escape after arrest, second escape after conviction for capital murder, and third escape after recapture).

<sup>161</sup> See, e.g., Dana Liebelson, The Shooting Gallery, Huff. Post, <http://highline.huffingtonpost.com/articles/en/the-shooting-gallery/> [<https://perma.cc/4KFR-D5PV>] (last visited Apr. 16, 2018) (“Multiple corrections experts confirmed that it is rare for a guard inside a prison have access to a gun, let alone shoot one . . . . Only 15 states out of 50 responded to requests to provide details on their prison firearms policies. None of them—including the large prison systems of Texas and Ohio—reported using guns for everyday inmate management.”); Barnini Chakraborty, ‘My Son Might Be Here’: After Tragedy, Prison Guards Being Allowed to Carry Pepper Spray, Fox News Politics (March 21, 2015), <http://www.foxnews.com/politics/2015/03/21/prison-guard-pepper-spray.html> [<https://perma.cc/B4F6-UJ88>] (“Ironically, security guards at malls and office buildings across the country have more self-defense tools at their disposal than most correction officers guarding dangerous criminals.”).

<sup>162</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citation omitted).

<sup>163</sup> Some statistics offer insight into rates of violence. Perhaps most informative is a study conducted after Missouri eliminated its death row and integrated former death-row prisoners into the general prison population. Researchers found that 22.8% of the death-sentenced prisoners committed violent misconduct on average per year of the study. Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri, 23 *Behav. Sci. & L.* 307, 314 (2005). A study of Texas death row prisoners found that they committed 505 serious offenses in a twelve-year period. J. Keith Price, Roselyn K. Polk & Robert E. Beckley, Criminal Acts of Violence Among Capital Murder Offenders in Texas, 3 *J. Crim. & Crim. Just. Res. & Educ.* (2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.564.7644&rep=rep1&type=pdf> [<https://perma.cc/M5PD-DHDV>]. A book tracing the lives of the death row prisoners whose sentences were commuted in light of *Furman* provides further insight. See Joan M. Cheever, *Back from the Dead* (2006). The book recounts that of the 589 inmates whose sentences were commuted from death to life, 322 had been released on parole by 2006. *Id.* at 4. Fourteen of those *Furman*-commuted inmates had killed again by that year; five had killed

protect prisoners and guards from them, particularly if prison restrictions render these potential victims exposed and defenseless.<sup>164</sup>

Where then does this leave us? For one, it is clear that non-lethal alternatives do not render the incapacitation rationale for capital punishment irrelevant. Future violence cannot be avoided by such non-lethal means without different and perhaps more severe harms. That does not mean that society must impose the death penalty on dangerous murderers rather than accept their likelihood of continued violence or subject them to torturous forms of restraint.<sup>165</sup> However, just as the death penalty should not remain part of our law only as “the product of habit and inattention rather than an acceptable deliberative process,”<sup>166</sup> neither should these alternatives be embraced without reasoned deliberation and a clear view of the harms that they entail.

Justices Stewart, Powell, and Stevens recognized in their plurality opinion in *Gregg v. Georgia* that the Supreme Court “may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.”<sup>167</sup> A decision regarding the relative inhumanity and harms of lethal and non-lethal alternatives is one that current constitutional jurisprudence leaves to legislatures. That makes good sense; the fraught moral choice to defend certain lives over others should be made,<sup>168</sup> if it must be made, by the branch that is most representative of the mores of the people as a whole.

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while released on parole, and nine had killed while still in prison. *Id.* at 206. Another ten of the prisoners who had not been released had committed suicide. *Id.* at 36. See also James W. Marquart & Jonathan R. Sorensen, A National Study of the *Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 *Loy. L.A. L. Rev.* 5, 27 (1989) (finding that in the fifteen years after *Furman*, 239 *Furman*-commuted prisoners had been released from prison and that “[s]even . . . *Furman*-commuted prisoners were responsible for seven additional murders”).

<sup>164</sup> See *supra* note 161.

<sup>165</sup> Cf. Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions and Life-Life Tradeoffs, 58 *Stan. L. Rev.* 703, 704–05 (2005) (suggesting that the death penalty may be morally required if it deters future murders and saves lives, despite their personal moral concerns about capital punishment).

<sup>166</sup> *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (statement of Stevens, J., respecting the denial of certiorari) (citation omitted).

<sup>167</sup> 428 U.S. 153, 175 (1976) (plurality opinion).

<sup>168</sup> Some people may conclude that concern for human dignity and human life actually morally requires the execution of capital murderers to protect others. Cf. Sunstein and Vermeule, *supra* note 165, at 705 (“[O]n certain empirical assumptions, capital punishment

*B. Prediction Error*

There remains, however, a second core objection to the incapacitation rationale for execution that merits consideration. Many scholars and judges reject the incapacitation rationale because they believe that the science of predicting violence is simply too flawed to provide a just ground for taking a human life. Unlike the objection based on non-lethal alternatives, which too-readily assumes that non-lethal options are morally and legally superior, this error-based objection is rooted in empirical study. Prediction error is a formidable concern and many critics believe that it renders the incapacitation rationale hopelessly unjust. The following paragraphs recount some of the scholarly objections to prediction methodology, and explain how expanding periods of execution delay have brought prediction errors and other problems to light.

More than three decades ago, researchers warned the Supreme Court in *Barefoot v. Estelle* that dangerousness predictions in capital cases were far more often wrong than right.<sup>169</sup> Scholars have argued that certain common methods of predicting dangerousness are inherently unreliable.

Some critics have claimed, for example, that juries should never be allowed to base their dangerousness predictions on clinical evaluations (which derive primarily from in-person evaluations rather than from statistics).<sup>170</sup> One such scholar, Professor Erica Beecher-Monas, has explained: “A decision as important as a death sentence simply cannot be based on bunkum . . . . [J]udicial gatekeeping to prevent jury confusion is a minimum for fundamental fairness.

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may be morally required, not for retributive reasons, but rather to prevent the taking of innocent lives.”).

<sup>169</sup> 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting) (citing research indicating “‘that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior,’ even among populations of individuals who are mentally ill and have committed violence in the past” (citations omitted)).

<sup>170</sup> Actuarial (statistical) methods of evaluation differ significantly from clinical ones. See John Monahan, Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility, 57 Wash. & Lee L. Rev. 901, 902 (2000) (“One, a formal method, uses an equation, a formula, a graph, or an actuarial table to arrive at a probability, or expected value, of some outcome; the other method relies on an informal, ‘in the head,’ impressionistic, subjective conclusion, reached . . . by a human clinical judge.” (citing William M. Grove & Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy, 2 Psychol., Pub. Pol’y, & L. 293, 294 (1996)).

Clinical predictions of future dangerousness cannot meet these standards. Actuarial testimony can barely squeak through.”<sup>171</sup>

Other critics have condemned Supreme Court precedents allowing juries to consider testimony by experts who have not personally examined the defendants and who base their conclusions on hypotheticals.<sup>172</sup> Still others have attacked the Court’s precedents permitting expert testimony on the question of future dangerousness, contending that juries are too quick to defer to “experts.”<sup>173</sup> Though the Court has rejected any categorical bar on expert testimony, lower courts in some cases have excluded expert testimony on future dangerousness for this reason.<sup>174</sup>

These critics have focused, with rare exceptions, on the difficulty of obtaining accurate predictions of future dangerousness at original sentencing. They have failed to take into account the effects of execution delay. This omission has prevented academic discourse from shedding light on the full problem of prediction error, as well as on a promising remedy. To appreciate this point, one must begin by considering the dramatic expansion and scope of execution delay. Since the Court’s decisions in *Furman* and *Gregg*, the time between

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<sup>171</sup> Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 Wash. & Lee L. Rev. 353, 415 (2003). The reason states nonetheless allow clinical evaluations may be intuitive—for so severe a penalty as death, one may want to have an individualized, personalized decision. Indeed, this is what the Supreme Court mandated in *Woodson v. North Carolina*. See 428 U.S. 280, 304 (1976) (“While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)). But the problem is that clinical, in-person evaluations are often wrong and may be less reliable than statistical evaluations. Beecher-Monas, *supra*, at 415. The debate becomes one of individualized sentencing versus accuracy.

<sup>172</sup> See, e.g., *Barefoot*, 463 U.S. at 903 (discussing and rejecting the argument that testimony on the issue of future dangerousness may not be made based on a defendant’s responses to “hypothetical questions”).

<sup>173</sup> See, e.g., *id.* at 916 (Blackmun, J., dissenting) (“In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist’s words, equates with death itself.”).

<sup>174</sup> See, e.g., *People v. Murtishaw*, 631 P.2d 446, 470 (Cal. 1981) (en banc) (“One can imagine few matters more prejudicial at the penalty trial than testimony from an established and credentialed expert that defendant, if sentenced to life without possibility of parole, would be likely to kill again.”).

sentencing and execution has increased at least sixfold. Findings of future dangerousness at capital sentencing now precede actual execution by years and often decades. Whereas forty years ago, a sentence of death meant execution within a few years,<sup>175</sup> prisoners executed in 2017 waited on death row for more than twenty years, on average.<sup>176</sup>

Such delay exposes prediction errors. It reveals that some prisoners who are sentenced to death based on findings of future dangerousness become docile prisoners or are rehabilitated before their executions. Future dangerousness was the initial reason for their death sentences, but before their executions, they have ceased to be a threat. Courts today have no means of saving their lives.

Consider the case of James Vernon Allridge. Allridge was sentenced to death after a Texas jury found a probability that he would continue to commit crimes. In fact, Allridge became a model inmate. He complied with prison rules, developed skills as a writer and artist, and—according to former guards—made his prison unit a safer place through his calming influence.<sup>177</sup> When Allridge was executed at the age of forty-one, seventeen years after the jury determined beyond a reasonable doubt that he probably would

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<sup>175</sup> David Garland has written that “[b]efore the 1960s, the average time that American inmates spent awaiting execution was . . . measured in weeks and months rather than in years and decades.” David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* 46 (2010). Even as late as 1960, prisoners sentenced to death could expect execution within an average of two years. See Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 *Seton Hall L. Rev.* 147, 181 (1998); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2764–65 (2015) (Breyer, J., dissenting) (citing Aarons as support for the proposition that historically execution delays averaged about two years). Even in the years after the Court’s *Furman* and *Gregg* decisions, most prisoners were executed within a year or two of sentencing. See *supra* note 246.

<sup>176</sup> See *infra* Appendix III: Execution Delay in 2017. The average execution delay in 2017 was 1.45 years longer than the average execution delay in 2016, reflecting a continuing upward trend. See *infra* Appendix II: Execution Delay in 2016 (showing that executions in 2016 occurred after an average delay of 18.96 years) with *infra* Appendix III: Execution Delay in 2017 (showing that executions in 2017 occurred an after average delay of 20.41 years).

<sup>177</sup> See Jordan Smith, *No Mercy: The Case of James Allridge Raises Familiar Questions About the Texas Justice System*, *Austin Chron.* (Aug. 20, 2004), <https://www.austinchronicle.com/news/2004-08-20/no-mercy/> [<https://perma.cc/8J5M-XZL8>]; see also Jessica L. Roberts, *Futures Past: Institutionalizing the Re-Examination of Future Dangerousness in Texas Prior to Execution*, 11 *Tex. J. C.L. & C.R.* 101, 101–03 (2005) (recounting Allridge’s non-violence and rehabilitation in prison).

commit future criminal acts of violence, the evidence profoundly undermined that factual predicate for execution. The problem was not hidden: news accounts publicized Allridge's appeals for clemency based on the apparent error in the jury's prediction<sup>178</sup> of future violence.<sup>179</sup>

The more recent case of Duane Buck exposes the same problem. Buck was sentenced to death after a Texas jury predicted his future dangerousness. He has not committed a single disciplinary infraction over the last twenty years on death row—a fact pointed out in media accounts regarding his case.<sup>180</sup> His model behavior in prison suggests the jury was wrong.<sup>181</sup>

The execution of prisoners based on predictions of violence that are shown to be wrong is unjust and threatens the rule of law. Such executions are unjust because the predicate for execution no longer holds true. If predictions purportedly made “beyond a reasonable doubt”<sup>182</sup> and with human life on the line cannot be trusted, citizens may conclude that the criminal justice system as a whole is unreliable

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<sup>178</sup> Here, the word “error” refers to the situation in which the fact-finder at sentencing determined that the offender would likely commit future violence (thus meeting a requirement for execution), but a later evaluation based on more probative accumulation of evidence shows that he is not likely to commit future violence (and therefore does not meet the requirement for execution). Such “error” can occur even if the person still presents some risk of future violence, just not enough to meet the threshold required by state law for a death sentence.

<sup>179</sup> See, e.g., Michael Graczyk, *Remorseful Store Clerk Killer Set To Die*, Plainview Daily Herald (Aug. 25, 2004), <http://www.myplainview.com/news/article/Remorseful-store-clerk-killer-set-to-die-8896435.php> [<https://perma.cc/4Z59-VP82>]; Smith, *supra* note 177; Howard Witt, *Death Row Inmate Says He's Changed*, Chi. Tribune (Aug. 25, 2004), [http://articles.chicagotribune.com/2004-08-25/news/0408250253\\_1\\_texas-defender-service-texas-death-row-criminal-appeals](http://articles.chicagotribune.com/2004-08-25/news/0408250253_1_texas-defender-service-texas-death-row-criminal-appeals) [<https://perma.cc/47JC-KK7F>].

<sup>180</sup> See, e.g., Errol Morris, *Who Is Dangerous, and Who Dies?*, N.Y. Times (June 7, 2017), [https://www.nytimes.com/2017/06/07/opinion/errol-morris-interview-death-penalty.html?mcubz=1&\\_r=0](https://www.nytimes.com/2017/06/07/opinion/errol-morris-interview-death-penalty.html?mcubz=1&_r=0); see also Elizabeth Hinton, *How a Racist Myth Landed Duane Buck on Death Row*, L.A. Times (Oct. 4, 2016), <http://beta.latimes.com/opinion/op-ed/la-oe-hinton-duane-buck-future-crime-20161004-snap-story.html> (“Buck has been a model prisoner for more than two decades.”); NAACP Legal Def. Fund, *Duane Buck: Sentenced to Death Because He Is Black* (Dec. 5, 2012), <http://www.naacpldf.org/case-issue/duane-buck-sentenced-death-because-he-black> [<https://perma.cc/BY5U-SSGZ>] (describing Buck as “a role model for his fellow prisoners”).

<sup>181</sup> A recent Supreme Court decision has finally given Duane Buck some hope that the jury's original future dangerousness finding will be overturned, though not because his model prison conduct showed the decision was wrong but because the jury's decision may have resulted from racial bias. See *Buck v. Davis*, 137 S. Ct 759, 767 (2017).

<sup>182</sup> Tex. Code Crim. Proc. Ann. art. 37.071 §§ 2(b)–(c) (West Supp. 1980–81).

and unfair. They may understand that some prediction error is inevitable, but condemn the state for failing to correct it once it has become, in the words of Justice Marshall, “unmistakably clear.”<sup>183</sup> It would not be unreasonable for citizens to see this omission—however unintentional it may be—as a reflection of indifference to the value of human life, particularly the lives of the poor and underprivileged who end up on death row.

Not only has execution delay enabled us to witness the real examples of apparent prediction error, but it complicates the incapacitation argument for capital punishment for another reason: execution delay allows such a prisoner to live for many years prior to execution, in the very condition that the jury deemed inadequate to contain his violence. The problem is well illustrated by the case of Thomas Knight. Knight abducted and killed a businessman and his wife in Florida. He was charged with first-degree murder, but escaped from jail, and allegedly killed a shopkeeper while on the loose.<sup>184</sup> After his recapture, he went on a “rampage” in the jail, tearing up his bed and attempting “to set the mattress . . . on fire.”<sup>185</sup> Knight was finally convicted and sentenced to death, after which he exhausted his direct appeals. Later, while on death row,<sup>186</sup> he killed a prison guard by stabbing him in the chest with a sharpened spoon. After many more years of litigation,<sup>187</sup> he was finally executed.<sup>188</sup>

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<sup>183</sup> *Evans v. Muncy*, 498 U.S. 927, 930 (1990) (Marshall, J., dissenting from denial of certiorari) (“The only difference between Wilbert Evans’ case and that of many other capital defendants is that the defect . . . has been made unmistakably clear for us even before his execution is to be carried out.”).

<sup>184</sup> David Ovalle, *Thomas Knight, Who Killed Miami Couple and a Prison Guard, Executed*, *Miami Herald* (Jan. 7, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article1959035.html> [<https://perma.cc/S9PQ-NWBG>].

<sup>185</sup> *Knight v. Dugger*, 863 F.2d 705, 714 (11th Cir. 1988).

<sup>186</sup> Knight was at the time pursuing habeas relief in the Florida courts. *Id.* at 706. That made it all the more remarkable that he did not refrain from violence. See, e.g., *Prieto v. Clarke*, 2013 WL 6019215, at \*8 (E.D. Va. Nov. 12, 2013), *rev’d on other grounds*, 780 F.3d 245 (4th Cir. 2015), *cert. pet’n dismissed as moot*, 136 S.Ct. 319 (2015) (“Death row inmates have obvious incentives to behave well and take rehabilitation seriously, including the possibility that . . . a habeas petition might be granted . . .”).

<sup>187</sup> Ruling on later claims, the Eleventh Circuit remarked: “To learn about the gridlock and inefficiency of death penalty litigation, look no further than this appeal.” *Muhammad v. Secretary*, 733 F.3d 1065, 1066 (11th Cir. 2013).

<sup>188</sup> Ovalle, *supra* note 184. Justice Breyer voted to bar his execution on the ground that such long delay left his execution without a penological rationale. *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from the denial of certiorari) (arguing that “the longer the delay, the weaker the justification for imposing the death penalty in terms of

Knights' execution finally incapacitated him, but not before he had an opportunity to kill again.

Execution delay thus makes a death sentence less effective as a means of preventing future violence. The states did not face this concern when they first incorporated future dangerousness in capital sentencing. At that time, prisoners sentenced to death waited only a few years before execution.<sup>189</sup> Perversely, prisoners sentenced to death today on grounds of future dangerousness are often incarcerated during the years when they are most dangerous and executed when their likelihood of future violence is diminished, sometimes substantially.

States may attempt to reduce delay by expediting capital case review, but that has proven difficult.<sup>190</sup> Absent such expedited review, execution delay will continue to cripple the death penalty as a mode of incapacitation and reduce the marginal incapacitative benefit it offers over life without parole. This problem is one of degree, however; the death penalty may still provide a protective benefit. The problem of prediction error is different; the claim critics make is that prediction error renders the incapacitation rationale for execution inherently arbitrary and unjust.

The problem of prediction error is severe, but it is not intractable. The final Part of this Article reveals that the problem of prediction error can be dramatically reduced by reevaluating future dangerousness during execution delays. The Article concludes with proposals for reforms to make the use of future dangerousness in capital sentencing substantially more consistent, fair, and defensible.

### III. REHABILITATING THE INCAPACITATION RATIONALE

Contrary to the assumption of most scholars who have addressed future dangerousness in capital sentencing, the problem of prediction error at sentencing is not irremediable. Dangerousness assessments can be made more accurate and fair if they are reevaluated periodically over time. As this Article will explain, this reevaluation

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punishment's basic retributive or deterrent purposes" without mentioning the incapacitation rationale).

<sup>189</sup> See *supra* note 175.

<sup>190</sup> Alabama recently passed a bill to shorten execution delays by requiring capital offenders to file appeals and post-conviction petitions simultaneously. See *infra* note 247 and accompanying text.

would not create an endless flood of litigation. Because reexamination of dangerousness predictions is feasible and essential to accuracy, it is the moral duty of legislatures to mandate such reevaluation.

*A. Reevaluating Dangerousness over Time*

Under current law, future dangerousness assessments are fixed at original sentencing. No provision exists in any capital punishment statute that requires or even envisions the periodic reevaluation of dangerousness over time. Thus, a jury's original prediction of dangerousness becomes irrevocably fixed at a time many years and often decades before the death sentence will be carried out. This approach excludes a wealth of probative evidence gained over the years in which a capital inmate lives a highly scrutinized life in prison—years in which his behavior may be far more informative than his prior conduct outside of prison or than stale statistical estimates. Prison records may reveal his commission of disciplinary infractions, or his abstention from them, as well as his involvement in any potentially rehabilitative activities available to death row prisoners (such as work, restitution, education, expressions of remorse, or religious conversion). Such evidence would be powerful, individualized information that could enhance the accuracy of future dangerousness assessments.

Moreover, to the extent that capital defendants' future conduct is predicted only based on their past conduct while outside prison, as is the case in many jurisdictions,<sup>191</sup> such predictions may not reflect how defendants will function and adapt once immersed in a regulated, supervised prison environment.<sup>192</sup> An individual's own

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<sup>191</sup> Courts have also interpreted statutes to focus on pre-offense conduct. For example, the Virginia Supreme Court stated in 1978 that

[i]n our view, [the future dangerousness aggravating factor] is designed to focus the fact-finder's attention on prior criminal conduct as the principal predicate for a prediction of future "dangerousness." If the defendant has been previously convicted of "criminal acts of violence", i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable "probability", i.e., a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future.

Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978).

<sup>192</sup> This is not necessarily true for prisoners who commit their capital offenses while in prison. Murders committed in prison are often among those deemed sufficiently aggravated

conduct within prison would be a much stronger predictor of his proclivity toward violence in a prison environment.<sup>193</sup>

Some might argue that post-sentencing conduct is not revealing. A prisoner may be held in stricter confinement, for example, as a result of his death sentence, and thus have fewer opportunities to commit violence. Post-sentencing prison rule compliance on death row thus may offer only an imperfect picture of how a prisoner might behave if taken off death row. But even death row offers opportunities for violence if prisoners are so disposed. That is evident from cases like that of Thomas Knight, who murdered a prison guard while on death row in Florida.<sup>194</sup> And death rows are often the scenes of violence, sometimes sustained bouts of violent incidents.<sup>195</sup>

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to be eligible for capital punishment. See Ala. Code Ann. § 13A-5-40(a)(6) (2015); Colo. Rev. Stat. § 18-1.3-1201(5)(a) (2017); Fla. Stat. § 921.141(6)(a) (2017); Ga. Code Ann. § 17-10-30(b)(9) (2013); Ind. Code Ann. § 35-50-2-9(b)(9)(A) (2016); Kan. Stat. Ann. § 21-3439(3) (2008); Ky. Rev. Stat. Ann. § 532.025(2)(a)(5) (LexisNexis 2014); Miss. Code Ann. § 97-3-19(2)(b) (2014); Mo. Rev. Stat. § 565.032.2(9) (2016); Mont. Code Ann. § 46-18-303(1)(a)(i) (2017); Nev. Rev. Stat. Ann. § 200.033(1) (LexisNexis 2012); N.H. Rev. Stat. Ann. § 630:1(I)(d) (LexisNexis 2017); N.C. Gen. Stat. § 15A-2000(e)(1) (2017); Ohio Rev. Code Ann. § 2929.04(A)(4) (LexisNexis 2014); Okla. Stat. Ann. tit. 21, § 701.12(6) (West 2011); Or. Rev. Stat. Ann. § 163.095(2)(b) (West 2017); 42 Pa. Stat. and Cons. Stat. Ann. § 9711(d)(10) (West 2017); S.D. Codified Laws § 23A-27A-1(8) (2016); Tenn. Code Ann. § 39-13-204(i)(8) (2014); Tex. Penal Code Ann. §§ 19.03(a)(5)-(6) (West 2017); Utah Code Ann. § 76-5-202(1)(a) (LexisNexis 2017); Va. Code Ann. § 18.2-31(3) (2014); Wash. Rev. Code § 10.95.020(2) (2016); Wyo. Stat. Ann. § 6-2-102(h)(i)(A) (2017).

<sup>193</sup> Cf. *People v. Murtishaw*, 631 P.2d 446, 470 (Cal. 1981) (en banc) (barring expert testimony on future dangerousness in the instant case but acknowledging that “a reliable prediction is possible” in some other situations, such as “if the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence”).

<sup>194</sup> *Supra* notes 184–188 and accompanying text.

<sup>195</sup> See, e.g., *Guard Attacked by Double-Murderer on California Death Row*, U.S. News & World Report (Apr. 20, 2017), <https://www.usnews.com/news/best-states/california/articles/2017-04-20/guard-attacked-by-double-murderer-on-california-death-row> (“Officials say a guard on California’s death row has been injured by a condemned inmate who previously killed two of his fellow prisoners.”); Evelyn Nieves, *Rash of Violence Disrupts San Quentin’s Death Row*, N.Y. Times (May 22, 2001), <http://www.nytimes.com/2001/05/22/us/rash-of-violence-disrupts-san-quentin-s-death-row.html?mcubz=1> (“In the last 18 months . . . a group of death row inmates have become increasingly hostile and violent. Classified as Grade B’s for their unruly behavior and gang affiliations and housed apart from other death row prisoners in a three-story building . . . these inmates have attacked guards 67 times in a year and a half . . .”); *Guards on Death Row Face Escalating Dangers*, L.A. Times (April 21, 2001), <http://articles.latimes.com/2001/apr/21/news/mn-53814> [<https://perma.cc/D24W-8LXE>] (“Over the last 18 months, officials say, Grade-B inmates have committed 67 attacks . . . They include one attempted stabbing, 15 kicks and five slashings with crude prison-made knives and razors.”); Lisa L. Colangelo Corky Siemaszko, *Death*

Furthermore, death row prisoners sometimes find people outside of the prison to commit violence for them. As a district judge recently explained in upholding a future dangerousness finding in a federal capital case: “[A] prisoner might also pose a danger if he is capable of arranging for people outside the prison to engage in violent activity on his behalf—a danger that would be especially present here if, as the Government alleges, [the defendant] holds a high position in the Bloods criminal organization.”<sup>196</sup> Wyoming’s most recent execution was of Mark Hopkinson, who from prison arranged the killing of an informant against him.<sup>197</sup> In light of the existence of opportunities for violence even on death row, a prison record reflecting only good behavior would be at least somewhat probative of non-dangerousness.<sup>198</sup>

But current law does not provide for reevaluation of dangerousness based on prison behavior. No requirement exists by statute or court mandate that necessitates a fresh look at whether a prisoner remains dangerous after sentencing and before execution. Consideration of later evidence of non-dangerousness arises, if at all, only by the happenstance of a resentencing proceeding in which a judge permits such evidence, or, more often, as a basis for requesting clemency. These mechanisms offer no guarantees, and no explicit legislative provision endorses non-dangerousness as a basis for subsequent removal of a death sentence.

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Row Inmate Killed in Jail Fight, N.Y. Daily News (Sept. 8, 1999), <http://www.nydailynews.com/archives/news/death-row-inmate-killed-jail-fight-article-1.856345> [<https://perma.cc/5TCA-GASZ>] (recounting that a prisoner on death row in New Jersey had been “killed in a prison fight by another notorious murderer”); David Kocieniewski, Death Row Inmate Said to Beat and Kick Another to Death in New Jersey Prison, N.Y. Times (Sept. 8, 1999) (recounting that a death row prisoner was murdered by another death row prisoner who “ha[d] a long history of assaulting guards and inmates”).

<sup>196</sup> *United States v. Wilson*, 923 F. Supp. 2d 481, 487 (E.D.N.Y. 2013); see also Stahl, *supra* note 137 (“Pelican Bay State Prison is a super-maximum penitentiary in Northern California. And yet with all the surveillance and isolation, gangs still run thriving criminal enterprises out on the streets—from within the fortress.”).

<sup>197</sup> See *Hopkinson v. State*, 632 P.2d 79, 89 (Wyo. 1981); see also Hopkinson Is Put to Death, *Deseret News* (Jan. 22, 1992), <https://www.deseretnews.com/article/205729/hopkinson-is-put-to-death-in-wyoming.html> [<https://perma.cc/4NZZ-TXAB>] (describing Hopkinson’s case and execution).

<sup>198</sup> See Jon Sorensen & Robert D. Wrinkle, No Hope for Parole: Disciplinary Infractions Among Death-Sentenced and Life-Without-Parole Inmates, 23 *Crim. Just. & Behav.* 542, 547 (1996).

In fact, some of the states that statutorily mandate consideration of future dangerousness in capital sentencing specify that the original sentencing jury must decide whether the prisoner is dangerous based only on conduct *prior to* and *during* the capital offense. This might seem to be a reasonable restriction, because a defendant has a strong incentive and may be able to behave well in the relatively limited time leading up to sentencing, even if he is likely to commit future violence later on. Far more concerning is the lack of reevaluation of future dangerousness in light of probative, post-sentencing behavior—including a prisoner’s conduct after he has exhausted his appeals and has only dimmed hopes for relief. Such probative evidence might well have convinced finders of fact that death row prisoners James Vernon Allridge and Duane Buck no longer presented the dangers that Texas juries originally thought supported their executions—had finders of fact been asked to evaluate that later evidence.<sup>199</sup> The lack of attention to post-sentencing evidence has lethal effects.

How could subsequent, post-sentencing conduct be taken into account? Commentators have proposed procedures. In 2004, the Texas Defender Service suggested that a hearing could be required “immediately preceding an inmate’s execution in which the accuracy of the jury’s prediction in that particular case could be evaluated.”<sup>200</sup> In a 2005 article, Professor Jessica Roberts presented a similar proposal for future dangerousness to be reviewed “on the eve of execution.”<sup>201</sup> Specifically designed for Texas, Roberts constructed her proposal to “keep[] the Texas capital sentencing structure intact (in order to preserve the crucial participation of the jury)” but task the Board of Pardons and Parole with reevaluating future dangerousness just prior to execution, with the prisoner bearing the burden to disprove dangerousness.<sup>202</sup>

Though it would reduce the risk of error, this approach has several major flaws. One problem is a practical one: allowing a prisoner to

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<sup>199</sup> This is not to suggest that a finder of fact necessarily would have found, in light of post-sentencing evidence, that these prisoners were no longer likely to commit future violence.

<sup>200</sup> Tex. Defender Serv., *supra* note 16.

<sup>201</sup> Roberts, *supra* note 177, at 133.

<sup>202</sup> *Id.* at 131–35. Roberts seems to think that legislative action would not be needed. See *id.* at 135. In this regard, her proposal could raise serious democratic legitimacy concerns, and might violate the separation of powers. See *infra* Part III at page 1168–69.

present a future dangerousness challenge on the eve of execution could “unleash an endless stream of litigation,” as the state of Virginia argued in response to a prisoner’s plea for judicial reevaluation.<sup>203</sup> Even Justice Marshall admitted that “[i]t may indeed be the case that a State cannot realistically accommodate postsentencing evidence casting doubt on a jury’s finding of future dangerousness.”<sup>204</sup> The concern is well-founded. Constitutional due process would entitle a death-sentenced prisoner to appellate review of a denial of relief.<sup>205</sup> Though such a system might seem similar to appeals from the denial of parole in non-capital cases, which are routine and do not engender endless litigation, the situation is different when a scheduled execution is at stake. Review on the “eve of execution” would create logistical problems for a state planning an execution that are not implicated for appeals raised by prisoners in long-term custody. Furthermore, capital case decisions receive special scrutiny to ensure “heightened reliability.”<sup>206</sup> These two features would make reevaluation on the eve of execution extremely costly and a major threat to the finality of death sentences. It is very unlikely that such a reform would be politically feasible in any capital punishment jurisdiction.

Perhaps, statutory action would not be needed for this reform. Roberts, in fact, suggested that the Texas Board of Pardons and Parole could begin to reevaluate future dangerousness on its own. This suggestion raises two concerns, however. First, it could be impracticable: parole board members would be reluctant to invite costly and potentially “endless” litigation without legislative approval; such a move might be political suicide. Second, any

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<sup>203</sup> *Evans v. Muncy*, 498 U.S. 927, 929–30 (1990) (Marshall, J., dissenting from the denial of certiorari) (describing Virginia’s argument against review of a future dangerousness finding based on post-sentencing prison behavior).

<sup>204</sup> *Id.* at 312. To Justice Marshall, the moral conclusion was clear: “[I]f it is impossible to construct a system capable of accommodating *all* evidence relevant to a man’s entitlement to be spared death—no matter when that evidence is disclosed—then it is the *system*, not the life of the man sentenced to death, that should be dispatched.” *Id.*

<sup>205</sup> *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (requiring “minimum procedures . . . to insure that the state-created right is not arbitrarily abrogated”). For parole hearings, which likewise consider future dangerousness, due process requires limited judicial review. See, e.g., *In re Rosenkrantz*, 59 P.3d 174, 205 (Cal. 2002) (“[T]he judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law . . .”).

<sup>206</sup> *United States v. Davis*, 912 F. Supp. 938, 948 (E.D. La. 1996).

decision to override decisions by a citizen jury should be democratically legitimate; legislative decisions would be more legitimate and directly representative of the people's priorities than decisions by parole boards comprised of appointed executive officials.

One other scholar, Meghan Shapiro, has proposed a way to reevaluate future dangerousness in light of post-sentencing evidence. Shapiro has argued that the little-known writ of *audita querela* should be used for that purpose.<sup>207</sup> Her proposal has serious flaws, however. Originally adopted to allow a civil judgment to be challenged based on a "matter arising subsequent to entry of judgment,"<sup>208</sup> today "[t]he writ [of *audita querela*] is generally moribund and it is unlikely that *audita querela* [sic] will have any post-conviction application."<sup>209</sup> No court has allowed such a writ to be used to challenge a finding of future dangerousness in capital sentencing. Indeed, state courts dismissed a petition for the writ of *audita querela* filed years earlier by Shapiro's father on behalf of death row prisoner Wilbert Evans, who claimed that his role in quelling a prison riot showed he was no longer dangerous.<sup>210</sup> The writ would not provide a consistent and adequate vehicle for review.<sup>211</sup>

Shapiro's approach also would raise democratic legitimacy and separation-of-powers concerns. In the absence of a statutory or constitutional right to review, courts would be "loathe to overturn" a sentence that "has been lawfully imposed," as the Fourth Circuit remarked when denying Evans's request for reevaluation.<sup>212</sup> Its

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<sup>207</sup> Shapiro, *supra* note 17, at 184.

<sup>208</sup> James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 *Yale L.J.* 623, 666–67 (1946).

<sup>209</sup> Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act*, 30 *Am. J. Crim. L.* 171, 220 (2003); see also *Shin v. United States*, No. CR 04-00150 SOM, 2017 WL 2802866, at \*22 (D. Haw. June 28, 2017) (stating that a writ of *audita querela* may not be considered unless "new evidence is discovered and other remedies are unavailable" and that such conditions are necessary but not sufficient to grant the writ); *United States v. Chandler*, 183 F. Supp. 3d 1158, 1162 (N.D. Ala. 2016) ("The courts of appeals have expressed varying levels of skepticism about whether *audita querela* is available at all in criminal proceedings . . .").

<sup>210</sup> *Evans v. Muncy*, 916 F.2d 163, 165 (4th Cir. 1990) (per curiam).

<sup>211</sup> Cf. *Chandler*, 183 F. Supp. 3d at 1161 (observing that "the only consistency in [the writs'] application was that they applied at the whim of the presiding judge"); *Klapprott v. United States*, 335 U.S. 601, 614 (1949) ("[F]ew courts ever have agreed as to what circumstances would justify relief under these old remedies.").

<sup>212</sup> *Evans*, 916 F.2d at 167.

decision emphasized that a federal court should not “freely substitute [its] own judgment for that of sentencing juries or state executives” and “thereby throw into question every capital conviction resting on the aggravating circumstance of future dangerousness.”<sup>213</sup> Concern for democratic legitimacy, federalism, and the separation of powers make the writ of *audita querela* a problematic remedy on normative as well as practical grounds.

A far better avenue exists that no scholar has proposed so far: periodic reevaluation of future dangerousness, enacted as a statutory mandate. This approach would reduce more significantly and consistently the risk of error, while commanding democratic legitimacy. State law should prescribe when reevaluation must occur. A sensible interval would be short enough to allow for at least one reevaluation before execution but long enough to offer probative evidence of prison behavior. Five years could be a good choice, because virtually no execution occurs before that time.<sup>214</sup>

Periodic review would focus on the offender’s prison disciplinary records and any other relevant evidence. A prisoner might offer actuarial data suggesting that his older age has made him a lesser threat, for example.<sup>215</sup> The proceeding could entail lay testimony, and expert testimony, provided it were deemed sufficiently reliable.<sup>216</sup>

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<sup>213</sup> *Id.*

<sup>214</sup> The shortest period between sentencing and execution for any prisoner in 2017 was eight years, Execution List 2017, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/execution-list-2017> [<https://perma.cc/6BHV-YP2T>] (last visited May 28, 2018); in 2016, it was seven, Execution List 2016, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/execution-list-2016> [<https://perma.cc/9KPU-GYDS>]. See *infra* Appendix III: Execution Delay in 2017 and *infra* Appendix II: Execution Delay in 2016. Even in the case of death penalty “volunteers,” who waive their appeals, executions tend to be long delayed. “Volunteer” Steven Spears spent nine years on death row before his recent execution. See Information on Defendants Who Were Executed Since 1976 and Designated as “Volunteers,” Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers> [<https://perma.cc/PA5G-R87V>] (last visited May 28, 2018); see also Execution List 2016, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/execution-list-2016> [<https://perma.cc/X3HU-R9DC>] (last visited May 28, 2018) (showing that Steven Spears spent nine years on death row).

<sup>215</sup> See, e.g., Alec Buchanan et al., Resource Document on Psychiatric Violence Risk Assessment, *Am. J. Psychiatry Data Supp.* 3 (Mar. 2012), [https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/resource\\_documents/rd2011\\_violencerisk.pdf](https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/resource_documents/rd2011_violencerisk.pdf) [<https://perma.cc/B62L-GT84>] (asserting that “crimes of violence are more often committed by younger males”).

<sup>216</sup> The Supreme Court has declined to place any categorical ban on lay or expert testimony. The future dangerousness decision upheld by the Court in *Jurek v. Texas* was

Deference should not be granted to the original determination of future dangerousness at sentencing, because that would hinder accuracy. The burden of proof and standard of proof should mirror those used at original sentencing. If the state could not demonstrate a probability of future violence, then the prisoner's sentence should be reduced to life in prison.<sup>217</sup>

A prisoner found to remain a future threat would have a right to limited judicial review of that determination under due process precedents.<sup>218</sup> To avoid adding to existing execution delays, a state could require a prisoner to appeal an adverse determination within a short period of time, perhaps ninety days, and could schedule his execution for a year or two later, leaving ample time for judicial review.

Those steps would offer a reasonable and practical process for reevaluating future dangerousness. But an equally important question remains: *Who* should decide whether future dangerousness remains? Must a new jury be convened? This question can be answered best by considering first the nature of the dangerousness decision. The purpose of the inquiry is to make an empirical determination: an accurate prediction. It is true that predictions of dangerousness can be wrong, but the potential for error confirms that they also can be *right*. That a prediction of future violence is difficult to make with perfect accuracy does not change its character as an empirical determination. Future dangerousness is a question that requires consideration of

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based entirely on lay testimony, see 428 U.S. 262, 267 (1976), and the Court has permitted determinations of future dangerousness to be based on expert testimony, see *Barefoot v. Estelle*, 463 U.S. 880, 897–98 (1983). State and federal court and parole authorities, however, should scrutinize proposed evidence and screen out potentially unreliable sources. See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. U. L. Rev. 1, 10–11 (2003) (urging “caution when making predictions of anti-social behavior” and arguing that “[o]nly the best prediction methods should be used”).

<sup>217</sup> States that do not offer life with the possibility of release for capital murders should resentence such a prisoner to life without parole. States might choose to make life without parole the only alternative, rather than allowing the possibility of release, for retributive reasons. They also might do so for incapacitation reasons, concluding that even if a prisoner is no longer a future danger when confined, he may commit violence if released. Importantly, such prisoners determined no longer to present a threat of future violence in prison would not need to be subjected to prolonged solitary confinement to protect others. See *supra* note 147 and accompanying text.

<sup>218</sup> See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Review may be more exacting if the right at stake is considered constitutional. E.g., *Ford v. Wainwright*, 477 U.S. 399, 413 (1986).

facts—such as prior crimes, characteristics that correspond to higher rates of violence, and statements of a desire to kill again. The correct answer reflects statistical probabilities, not moral values. That explains why the Supreme Court has remarked that certain facts, such as an offender’s “inability to learn from his mistakes” due to a mental defect “suggest[] a ‘yes’ answer to the question of future dangerousness.”<sup>219</sup>

Statutes regarding future dangerousness are often problematically vague, but this too does not change the empirical or factual nature of the dangerousness question. Most statutes that make future dangerousness part of capital sentencing ask whether there is “a probability” that the defendant would commit future violence. This violence must endanger “society.” Both of these terms have left ambiguities for courts and juries to resolve. One scholar has described future dangerousness as only a “partially empirical” determination because of that ambiguity.<sup>220</sup> But such ambiguity is not inherent in the future dangerousness inquiry. The law may—and should—state clearly what risk of harm is sufficient to justify a finding of future dangerousness. That way the question will be purely, not partially, empirical, and will invite only one correct answer.

The future dangerousness determination contrasts with decisions that are *moral* or normative in nature. Such decisions do not admit of demonstrably correct answers, but instead turn on judgments about the relative value of various goods. The jury’s determination about whether a capital defendant should be granted leniency, for example, is a quintessentially *moral* or normative decision. It involves questions regarding which purposes of punishment to prioritize, and whether mercy should play a role in sentencing. It requires jurors to consider questions such as whether abuse that a defendant suffered as a child warrants leniency even if that evidence does not explain the

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<sup>219</sup> *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989).

<sup>220</sup> Brian Sites, Comment, *The Dangers of Future Dangerousness in Death Penalty Use*, 34 Fla. St. U. L. Rev. 959, 961 (2007) (“Using risk assessments . . . , juries decide the larger, normative aspect of a future dangerousness decision: how much risk is sufficient to conclude that the defendant will be a future danger to society? In other words, if a risk assessment expert testifies that there is a 52% chance that a defendant will commit a crime in the future, the jury must decide if that chance is ‘enough’ under the applicable law.”).

defendant's crime or mitigate his culpability.<sup>221</sup> The "individualized assessment of the appropriateness of the death penalty is a moral inquiry."<sup>222</sup> The answer chosen is legitimate not because it is correct, but because it "express[es] the conscience of the community."<sup>223</sup>

In a democracy, moral decisions that admit of no demonstrably right answer are legitimate if they embody the collective judgment of the community. Those judgments may be expressed through the criminal laws, enacted by legislators held accountable to the people through elections.<sup>224</sup> They also may be expressed through the judgments of a jury. The role of the jury in representing moral norms is its most essential function.

The jury's role as an empirical fact-finder is less important. To be sure, the jury has served a historical function of resolving questions of *fact* at trial, a traditional role embodied in the Sixth Amendment and Article III of the Constitution. But that role arose at a time when the jury was drawn from a usually close-knit community and was familiar with the facts of the crime; it was the most informed decisionmaker. Today, jury members do not have personal knowledge of the charged crimes; indeed, those who do will be struck for cause. Furthermore, the fact-finding role of the jury, while protected by the Constitution, has been greatly undermined by the widespread practice of plea bargaining. In this context, it would be strange to insist that the jury must make the new reevaluation determination under this newly proposed procedure.

It is much more important for the jury to retain its role in deciding whether a death sentence is morally deserved, a determination that virtually all capital punishment jurisdictions require to be imposed not only by a jury, but by a *unanimous* jury vote.<sup>225</sup> The moral

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<sup>221</sup> The Court has stated that a defendant has a right to present "mitigating" evidence that does not explain or excuse the crime committed. See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). At the same time, trial courts have no constitutional obligation to advise the jury that it may exercise "mercy." *Johnson v. Texas*, 509 U.S. 350, 371–72 (1993).

<sup>222</sup> *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

<sup>223</sup> *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

<sup>224</sup> See *Penry*, 492 U.S. at 331 ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").

<sup>225</sup> All capital punishment jurisdictions but Alabama require that decision not only to be made by a jury, but to be made by a unanimous one. See Death Penalty Info. Ctr., Florida Legislature Passes Bill Eliminating Non-Unanimous Jury Recommendations for Death Penalty, <https://deathpenaltyinfo.org/node/6702> [<https://perma.cc/HAW6-4V5R>] (last visited Mar. 10, 2018).

judgment as to life or death must be democratic, and it requires a demonstrable social consensus as to what is morally appropriate.<sup>226</sup>

Empirical reevaluation of future dangerousness, in contrast, need not and should not turn on questions of moral desert.<sup>227</sup> A parole board, judge, or commission would be just as capable of reaching a correct answer based on factual evaluations.<sup>228</sup> This means that states have several avenues to provide for reevaluation of dangerousness, making reform more feasible and perhaps more likely to be empirically correct.

This may lead some to wonder whether dangerousness predictions ever must be made by a jury—even at *original* sentencing. Until relatively recently, the Supreme Court “never suggested that jury sentencing is constitutionally required” in capital cases.<sup>229</sup> To the contrary, the Court recognized that “judicial sentencing should lead, if anything, to even greater consistency . . . since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.”<sup>230</sup> The Supreme Court later reversed course, holding in *Apprendi v. New Jersey* that “any fact that increases the penalty for a crime beyond the

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<sup>226</sup> One might ask why we ever allow judges to impose sentences that reflect moral (as opposed to empirical) judgment. In an ideal world, the jury would determine all normative questions, while empirical ones could and perhaps should be made by a judge (such as what restrictions are needed for specific deterrence or incapacitation of an offender). It may be too difficult to involve juries in sentencing non-capital cases, however—though some jurisdictions have tried, and several scholars have so urged. See, e.g., Nancy J. King, *How Different Is Death—Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 Ohio St. J. Crim. L. 195, 214 (2004); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L.J. 951, 954–56 (2003). To the extent that moral choices can be cordoned off from empirical ones, and feasibly made by juries, they ought to be so determined in all cases. For purposes of this Article, however, it is only essential to explain why the core determination of desert implicit in capital sentencing should be made by the jury, but the empirical prediction of dangerousness may be made by an expert body.

<sup>227</sup> States may require the future dangerousness decision to be unanimous in order to avoid error in favor of death, a separate goal from the measurement of normative consensus.

<sup>228</sup> Perhaps one might want to ensure that any errors are committed in a manner that is maximally democratically legitimate, so that society as a whole might share in the blame. This would suggest that reevaluation should be done by a jury, assuming that there is still a possibility of predictive error.

<sup>229</sup> *Proffitt v. Florida*, 428 U.S. 242, 252 (1976); see also *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (reiterating that “neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence”).

<sup>230</sup> *Proffitt*, 428 U.S. at 252. Judges also might be less inclined to overvalue the testimony of experts, when it comes to claims regarding the risk of future violence.

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>231</sup> It went on to apply this rule to capital-case aggravating factors in *Ring v. Arizona*,<sup>232</sup> constitutionalizing the jury’s role in the initial sentencing decision.

A jury might not be constitutionally obligatory, however, if the future dangerousness question were addressed in a different way. If capital punishment jurisdictions made clear that future dangerousness may not serve as the sole aggravating factor that elevates first-degree murder into a capital crime,<sup>233</sup> but instead that a lack of future dangerousness is a reason to withhold an otherwise deserved death penalty, existing precedent might not require that decision to be made by a jury. Already under current law, for example, the death penalty is prohibited if a court determines that an offender is incompetent, whether that determination is made at the time of original sentencing, or on the eve of execution.<sup>234</sup> Judges, not juries, also decide whether a person has become insane prior to execution and therefore may not be executed.<sup>235</sup> Those decisions, which neither elevate the penalty nor pertain to the question of desert, do not require a jury determination. Neither should the decision to withhold an otherwise deserved death penalty because a defendant does not present a future threat.

Nor would a jury be needed for the sake of democratic legitimacy. Death sentences would still reflect the will of the people because the jury would have decided that death was deserved. Life sentences too would reflect a democratic decision—either the jury’s conclusion that

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<sup>231</sup> 530 U.S. 466, 490 (2000).

<sup>232</sup> 536 U.S. 584, 609 (2002). Justice Scalia concurred in the judgment, believing, on the one hand, that *Furman* imposed an illegitimate burden on the states to narrow the death penalty, but agreeing, on the other hand, that a fact increasing punishment must be found by a jury. *Id.* at 610 (Scalia, J., concurring).

<sup>233</sup> Death penalty statutes in most states and all federal jurisdictions require additional aggravation besides future dangerousness, before the death penalty may be imposed. Some states, like Texas, Oregon, and Virginia, build additional aggravation into the definition of capital offenses. See *supra* notes 41, 65 & 67. Other jurisdictions, including federal ones, require statutory aggravation and treat future dangerousness only as a non-statutory aggravating factor. See *supra* notes 79–80. Only the laws of Idaho, Oklahoma, and Wyoming permit future dangerousness to serve as the sole aggravating factor that makes first-degree murder subject to the death penalty. See *supra* note 64.

<sup>234</sup> *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) (holding that “[p]rior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition” and permitting a prisoner to raise a new competency challenge after his execution date had been set).

<sup>235</sup> *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986).

the offender did not deserve execution, or the legislature's decision that the offender could be safely punished by non-lethal means. Either conclusion would reflect a deliberate and democratic choice. Even if courts insist that juries decide any future dangerousness issue at original sentencing, they have no reason to require a jury for post-sentencing reevaluation of future dangerousness. The fact that a jury would not be needed is important, because it would make the reevaluation process more efficient and feasible, without reducing its benefits. Such reevaluation would correct many prediction errors that could undermine public faith in the criminal justice system. It would signal the state's commitment to preserving human life where that can be done without risking others. It also would give death-sentenced prisoners an extraordinary incentive to behave and learn non-violent approaches to the conflicts and stresses of prison life.

Review can only remedy errors in one direction, it must be noted. The Court's understanding of the Double Jeopardy and Due Process Clauses prevents any correction of false negatives in jury sentencing (as when the jury declines to find a defendant dangerous, and he goes on to commit violence).<sup>236</sup> If a death-sentenced prisoner is found no longer to present a sufficient risk of future violence and his death sentence is lifted, the state may be barred from executing him even if he reverts to violence. That is not entirely settled, and perhaps the problem could be avoided if a state were merely to suspend, rather than commute, the death sentence of a person found no longer dangerous. The state could continue periodically reevaluating him for dangerousness to determine whether suspension of his death sentence remains appropriate.<sup>237</sup> But that is a constitutionally dubious propos-

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<sup>236</sup> The American Law Institute's recently approved draft of the Model Penal Code sentencing provisions allows only for reductions in long sentences, likely based on these same Double Jeopardy and Due Process concerns. See The American Law Institute, Model Penal Code: Sentencing, Proposed Final Draft § 305.6(5) (approved May 2017), <http://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017> [<https://perma.cc/RW98-A95E>].

<sup>237</sup> An analogous question arises in the context of a capital prisoner who becomes incompetent prior to execution. The Supreme Court's decision in *Panetti v. Quarterman* bars the execution of any prisoner who is incompetent, regardless of whether he was competent during his offense, trial, and sentencing. 551 U.S. 930, 934–35 (2007). Therefore, courts must review claims of incompetency prior to execution, without regard to whether the claims were raised in prior filings in state or federal court. *Id.* at 945. But that does not mean that a single finding of incompetency requires immediate vacatur of a death sentence. Federal Judge Priscilla Owen has explained: “[A] determination that a defendant [has become]

ition, and one that surely would invite litigation.<sup>238</sup> But that is a constitutionally dubious proposition, and one that surely would invite litigation.

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incompetent to be executed would not vacate the sentence of death. The sentence would remain, but, as a constitutional matter, it could not be enforced unless and until the defendant became competent to be executed.” *Green v. Thaler*, 699 F.3d 404, 421 (5th Cir. 2012) (Owen, J., concurring).

Similarly, capital punishment jurisdictions that predicate death sentences on future dangerousness could treat a finding that a capital prisoner no longer presents a future threat as a reason to suspend, but not to vacate, his death sentence. That approach would avoid locking into place a life sentence for a capital prisoner who behaves well for a time, but who, after additional years, could again become a threat. (The Ex Post Facto Clause might prohibit resentencing a prisoner to death based on the same offense that led to his original death sentence.)

Alternatively, a capital punishment jurisdiction could avoid the risk of error in favor of life by vacating a death sentence only after *two* or perhaps *three* temporally dispersed findings that a prisoner no longer presents a future threat. If a defendant no longer is a future danger, there is much less reason to keep him confined on death row. Whether his death sentence is suspended or vacated, a non-dangerous prisoner could be released into the general prison population. Taking this approach would present a more humane course than entirely ignoring a first finding that a prisoner no longer presents a future threat.

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Drafters of a statutory amendment requiring reevaluation of future dangerousness could take inspiration from provisions of law that already require reevaluation of dangerousness in contexts such as parole and civil commitment. A person subjected to civil commitment in the federal system, for example, is routinely reevaluated and is entitled to “annual reports concerning [his] mental condition . . . and containing recommendations concerning the need for his continued commitment.”<sup>239</sup>

Legislatures have at least two reasons to enact such a reevaluation reform. The first is for the sake of fairness and justice. Death sentences predicated on future dangerousness may become indefensible if a prisoner turns out to be a model inmate and no longer poses a threat. Furthermore, the courts may be more likely to bar an execution if the original reason for it (such as the need for incapacitation) no longer applies. Justice Marshall was prepared to grant relief in the case of Wilbert Evans, for example, on the ground that he “face[d] an imminent execution that even the [state] appear[ed] to concede [wa]s indefensible in light of the undisputed facts proffered by Evans.”<sup>240</sup> States might decide to avoid the risk of having such executions deemed unconstitutional by providing a mechanism for periodic review. A state interested in promoting justice and avoiding court interference would have at least two reasons to enact this critical reform.

Some may still doubt that legislatures in capital punishment states will entertain such reforms, given that the reforms could make the death penalty even more costly and procedurally complex.<sup>241</sup> That view is unproductive and overly pessimistic. States routinely provide for post-conviction relief in capital cases, though such relief is not constitutionally required,<sup>242</sup> and have taken other steps to increase fairness. Many require the appointment of two experienced defense attorneys for a capital defendant,<sup>243</sup> even though the Supreme Court has required only one. Some may provide these safeguards to guard

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<sup>239</sup> 18 U.S.C. § 4247(e)(1)(B) (2012).

<sup>240</sup> *Evans v. Muncy*, 498 U.S. 927, 927 (1990) (Marshall, J., dissenting from denial of certiorari).

<sup>241</sup> See also *Knight v. Florida*, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in the denial of certiorari) (blaming the Court for “arm[ing] capital defendants with an arsenal of ‘constitutional’ claims with which they may delay their executions”).

<sup>242</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987).

<sup>243</sup> See, e.g., Ark. Admin. Code § 160.00.2 (2017); Ohio Admin. Code § 120-1-10 (2017).

against judicial interference,<sup>244</sup> but it is plausible to think that states, like most of the American public, actually care that their capital punishment systems be just, fair, and constitutional. And even if they were to enact reforms solely to avoid judicial rebuke, those reforms would still be valuable.

It is true that legislatures have thus far failed to require such reevaluation to date. But this may reflect ignorance and inertia in the face of changed conditions rather than any kind of conscious or callous disregard of the problem of prediction error. The decades of execution delay seen frequently today, and which have exposed prediction errors, were unheard of when legislatures made future dangerousness an explicit part of capital sentencing. In the decade before *Furman*, executions occurred a year or two after sentencing,<sup>245</sup> and even most of the executions that took place in the half-decade following *Gregg* occurred within one or two years of sentencing.<sup>246</sup>

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<sup>244</sup> States that create avenues for state post-conviction relief expose themselves to an additional layer of federal review with regard to federal claims, because the Supreme Court has discretion to review the decision of the highest state court rejecting such relief. See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737, 1742–43, 1745–46 (2016) (reversing the Georgia Supreme Court’s decision regarding a state habeas petition). In such appeals, the Court is not bound by the deferential standard of review prescribed by Congress for federal habeas cases. 28 U.S.C. § 2254(e) (2012). This presents real costs for the states; Justice Alito recently noted that the Supreme Court lately has “evidenced a predilection for granting review of state-court decisions denying postconviction relief.” *Foster*, 136 S. Ct. at 1761. States have, however, a competing incentive to create habeas procedures in order to limit federal review. See Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal F. 315, 319.

<sup>245</sup> See Aarons, *supra* note 175, at 181.

<sup>246</sup> Gary Gilmore’s execution in 1977 took place three months and ten days after his death sentence was imposed; Jesse Bishop’s execution in 1979 was conducted one year, eight months, and twelve days after his sentence; and Steven Timothy Judy’s execution in 1981 occurred one year and twelve days after his sentence. John Spinkelink’s execution in 1979 followed five years, five months, and five days after his sentence, but less than three years after the Supreme Court reapproved the death penalty in *Gregg*. See *infra* Appendix I: Execution Delay 1976-1983. All states that now require the consideration of future dangerousness codified that requirement by 1989. Delay between sentencing and execution in 1984 was, on average, only about six years, and in 1989 it was still less than eight years. Tracy L. Snell, *Capital Punishment, 2013 – Statistical Tables*, U.S. Dep’t of Justice 12, 14 tbl.10 (2014). And, notably, when Wyoming became the final state to make future dangerousness a statutory aggravating factor in 1989, it simultaneously sought to ensure a speedier process by providing for “automatic review” in the state supreme court and ordering that “[s]uch review by the supreme court shall have priority over all other cases.” Act of Mar. 6, 1989, ch. 171, § 1, 1989 Wyo. Sess. Laws 295 (amending Wyo. Stat. § 6-2-103(a)).

The enormous delay between sentencing and execution that today is a fixture of death penalty procedure was beyond the horizon and beyond the pale when future dangerousness was enacted into death penalty laws in America. The states' failure to address prediction error in the past does not mean they would disregard it in the future, once made aware of its consequences and the possibility of correcting it during execution delays.

Now is an ideal time to invite legislatures to consider sentencing reevaluation proposals. Legislatures have become increasingly aware of the occurrence and problem of execution delay. Alabama recently enacted a law designed to speed up appellate and post-conviction review in capital cases.<sup>247</sup> The California Supreme Court approved a similar law passed as a ballot proposition.<sup>248</sup> It is now an opportune moment, as legislatures and the public are increasingly focused on execution delay, to further highlight how execution delay presents an opportunity for meaningful reform.

Periodic future dangerousness review in capital cases would fit within a larger movement today toward "second look" resentencing. The movement has garnered prominent allies; Justice Anthony Kennedy joined an ABA Roundtable on "Second Look" Sentencing Reforms in 2009.<sup>249</sup> In May 2017, members of the American Law Institute voted to approve reforms to the Model Penal Code's

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<sup>247</sup> Alabama Fair Justice Act, 2017 Ala. Laws Act 2017-417 (S.B. 187) (signed into law on May 26, 2017), <http://alisondb.legislature.state.al.us/alison/searchableinstruments/2017RS/bills/SB187.htm> [<https://perma.cc/XVE3-9ULZ>] (requiring prisoners to seek appellate and post-conviction review at the same time).

<sup>248</sup> Death Penalty Reform and Savings Act, Proposition 66, 2016 Cal. Legis. Serv. A-150 (West) (approved by voter referendum in November 2016). Notably, the California Supreme Court approved the constitutionality of the voter proposition but took the teeth out of its provisions designed to speed up executions. See *Briggs v. Brown*, 400 P.3d 29, 34 (Cal. 2017), as modified on denial of reh'g (Oct. 25, 2017) ("Petitioner's constitutional challenges do not warrant relief. However, we hold that in order to avoid serious separation of powers problems, provisions of Proposition 66 that appear to impose strict deadlines on the resolution of judicial proceedings must be deemed directive rather than mandatory."). Other states have sought to speed up capital case review, as well. Colorado has required streamlined habeas and appellate processes, with a two-year limit on all review. See John Ingold, *Colorado Law to Speed Up Death Penalty Is Failing, Advocates on Both Sides Say*, *Denver Post* (July 25, 2016) <http://www.denverpost.com/2016/07/25/colorado-death-penalty-law-failing/> [<https://perma.cc/TBB9-ZKV5>]. The Colorado Supreme Court has created an exception to the two-year limit, however, again prolonging litigation. See *id.*

<sup>249</sup> See Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 *Fed. Sent'g Rep.* 211, 218 (2009).

(“MPC”) sentencing provisions.<sup>250</sup> The revisions would encourage courts to reevaluate and reduce long-term sentences. Though they apply only to prison sentencing, and not death sentences, the “principles” they articulate support a similar kind of review for death sentences. The proposed revisions include:

- Sentence reevaluation once any prisoner has served 15 years of a long-term prison sentence;<sup>251</sup>
- Subsequent reevaluation of the prisoner’s sentence at least every 10 years;<sup>252</sup>
- Notification to prisoners of their reevaluation opportunities;<sup>253</sup>
- State-funded counsel for prisoners in the reevaluation process;<sup>254</sup>
- Reevaluation in light of present circumstances and punishment goals<sup>255</sup> (including rehabilitation and “incapacitation of dangerous offenders”<sup>256</sup>); and
- A mechanism for limited review of resentencing decisions.<sup>257</sup>

Notably, these measures are designed to allow for reevaluation without protracted litigation if a prisoner does not receive a lower sentence after a second-look review. The draft states that, “[t]here shall be a mechanism for review of decisions under this provision, which *may be discretionary* rather than mandatory.”<sup>258</sup> Limits on review might similarly be introduced to reevaluation in capital cases.

Admittedly, there would be costs associated with this approach. Death row prisoners will use every opportunity to try to save or

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<sup>250</sup> The Am. Law Inst., Model Penal Code: Sentencing, Proposed Final Draft (approved May 2017), <http://robinainstitute.umn.edu/publications/model-penal-code-sentencing-proposed-final-draft-approved-may-2017> [<https://perma.cc/RW98-A95E>].

<sup>251</sup> Id. § 305.6(1).

<sup>252</sup> Id. § 305.6(2).

<sup>253</sup> Id. § 305.6(3).

<sup>254</sup> Id.

<sup>255</sup> Id. § 305.6(4).

<sup>256</sup> Id. § 1.02(a)(ii).

<sup>257</sup> Id. § 305.6(8).

<sup>258</sup> Id. (emphasis added).

extend their lives. The price may be worth paying, however, to avoid unjust executions and to preserve public faith in the criminal process.

Other objections to reevaluation more broadly include the concern, voiced most powerfully by Professor Meghan Ryan, that reevaluation of sentencing decisions necessarily harms and overrides democratically legitimate choices.<sup>259</sup> Ryan's criticism is a powerful one, but the same objection cannot be made to undermine the proposal in this Article. Death sentences predicated on grounds other than future dangerousness would not be subjected to review. The reevaluation process proposed for future dangerousness-based sentences would not permit a redetermination of desert. It would review only the empirical assessment of future risk. This is in keeping with what Professor John Monahan has recognized to be a larger "resurgence of interest in risk assessment in criminal sentencing."<sup>260</sup> Thus, the reform proposed in this Article reflects many of the laudable principles articulated in the MPC revisions, without mirroring what is arguably their greatest normative flaw.

Some may wonder why prediction error cannot be corrected through the normal process of executive clemency. At least two compelling arguments can be made against that approach. The first goes to the adequacy of the clemency process. Clemency petitions already often include pleas for leniency based on the good conduct of prisoners on death row, but they are rarely granted on this ground.<sup>261</sup> Relying on gubernatorial mercy would leave what should be a consistent and mandatory practice designed to prevent unjustified executions to the mercy of discretionary politics. Governors could face strong pressures from victims' families, capital punishment advocates, and law enforcement entities not to commute sentences.<sup>262</sup> These pressures could lead governors to exercise clemency only rarely and inconsistently. That is precisely how clemency is exercised today.

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<sup>259</sup> Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 *Brook. L. Rev.* 149, 151–52 (2015).

<sup>260</sup> Monahan, *supra* note 21, at 2.

<sup>261</sup> See Shapiro, *supra* note 17, at 182–83 (describing clemency as an insufficient remedy for erroneous future dangerousness predictions). No state has protocol that makes non-dangerousness a presumptive basis for clemency. *Id.* at 182 n.196 and accompanying text.

<sup>262</sup> The inconsistency and inadequacy of clemency likely explains why the proposed drafters of the revised MPC advocated statutory reforms to ensure meaningful and consistent reevaluation of long-term sentences.

A second argument against relying on executive clemency lies in concern for the rule of law. Any reduction of a death sentence would unsettle expectations of the victim's family and the community. It would seem that the just outcome, approved by the jury as the representative and conscience of the community, had been overridden by new—and not necessarily legitimate—considerations. This would produce uncertainty and distrust of the judicial system. A legal decision to require periodic reevaluation of future dangerousness would mitigate these concerns in three ways. First, it would provide the community with *ex ante* notice that prisoners no longer found to present future dangers will not be executed. Second, it would make reevaluation mandatory and consistent for all death sentences based on incapacitation. Third, it would offer a greater foundation in democratic choice and democratic legitimacy than would a decision by the executive.

Reevaluating future dangerousness as proposed above would help avoid prediction errors and would promote fairer capital sentencing decisions. It should be coupled with carefully crafted rules on what evidence and testimony may be admitted to demonstrate future dangerousness, and clarification of any statutory terms that could engender confusion or methodological inconsistency across cases.<sup>263</sup>

### *B. Reforming Capital Sentencing Procedures*

Thus far, the Article has demonstrated three core points: first, that the incapacitation rationale has become a primary reason for death sentences on the ground and, for that reason and others, deserves to be taken seriously; second, that scholars and judicial critics have relied on two mistaken objections to reject the incapacitation rationale and give it little further thought; and third, that the first objection (prediction error) can be addressed by reevaluating dangerousness over time and the second objection (non-lethal alternatives) deserves far more circumspect analysis in light of the trade-offs involved. This last Section of the Article discusses related flaws in the way that the incapacitation rationale is currently pursued

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<sup>263</sup> Legislatures are in the best position to clarify terms such as “probability” and “society” in existing future dangerousness provisions, see *infra* note 295 and accompanying text, and they have a moral duty to make the scope of these provisions clear, even if courts do not force them to clarify the law on pain of its invalidation.

in capital punishment sentencing, and proposes reforms to correct these deficiencies.

Perhaps the most significant flaw is that current sentencing procedures create a risk that the death penalty will be imposed without a jury decision that it is deserved. All capital punishment jurisdictions that permit juries to consider future dangerousness<sup>264</sup> currently ask juries to consider future dangerousness at the same time as desert. That procedure creates a dangerous possibility that if the offender presents a future threat, the jury will choose to impose a sentence of death solely upon that consideration. One scholar has written that “when dangerousness is considered alongside other aggravation there will always be a risk that it will replace culpability-based aggravation in the ultimate sentencing decision by shifting a juror’s focus entirely to a fear of responsibility for future violence.”<sup>265</sup> This concern has led some critics to conclude that future dangerousness should be banished altogether.<sup>266</sup>

Entirely eliminating future dangerousness from capital sentencing is not necessary to ensure proper consideration of desert, however. Instead, future dangerousness and desert can be considered separately and sequentially. Indeed, there is no compelling reason why capital sentencing proceedings must be structured in a way that requires or invites the jury to consider both at the same time. There are two possible ways in which sentencing procedures could separate the inquiries. One would be to analyze future dangerousness first, prior to the question of desert. However, if a jury decides that an offender presents a future threat, it may not be able to ignore that finding when considering desert. For this reason, a second option would be more effective and fair: the jury should answer the moral question of desert first, based on all of the aggravating and mitigating evidence, and only if it decides that the death penalty is deserved should it proceed to the question of future dangerousness. By requiring the jury to consider desert before danger, states can guard against executions that are not deserved.

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<sup>264</sup> See *supra* notes 43, 62, 71, 79–80.

<sup>265</sup> See, e.g., Shapiro, *supra* note 17, at 168.

<sup>266</sup> See, e.g., Dorland & Krauss, *supra* note 6, at 103–04 (arguing that states should remove the explicit focus on future dangerousness from death sentencing, because it “potentially removes the jury’s attention from the issues of mitigation and ‘deservedness’”).

One may not be able to eliminate entirely the influence of future risk from the consideration of desert, unfortunately. Research suggests that most jurors take into account an offender's risk of future violence in making a capital sentencing decision, regardless of whether prosecutors put future dangerousness explicitly at issue.<sup>267</sup> To mitigate this tendency, judges should instruct juries *not* to consider future dangerousness during the culpability inquiry (unless a defendant himself invites the inquiry by arguing that he is not a future danger). They should advise juries that during the assessment of aggravating and mitigating evidence, the sole task is to determine whether the defendant deserves to die on grounds of his culpability.<sup>268</sup> Florida judges follow this approach already: they instruct juries not to consider future dangerousness when considering desert.<sup>269</sup> Though they do so because Florida law prohibits consideration of future dangerousness altogether, the same instructions would be beneficial in jurisdictions seeking only to separate the two inquiries.

Those who advocate capital punishment on the theory that executions serve as a general deterrent to capital crimes may resist the separation of desert and future dangerousness, because the reforms are likely to reduce the number of death sentences. The reforms would reduce death sentences by avoiding those death sentences that currently are being imposed based on the jury's fear of future violence alone. By proposing procedural reforms to ensure an independent decision that the death penalty is deserved, fewer offenders will end up eligible for death. Those who do not like this narrowing must ask whether they are willing to execute persons who do not deserve to die, simply to deter others.

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<sup>267</sup> John H. Blume, Stephen P. Garvey, & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 *Cornell L. Rev.* 397, 398–99 (2001). Based on their research, Blume and his co-authors argue that juries should always be advised if a defendant will be ineligible for parole, *id.*, not merely when the state puts future dangerousness "at issue." See, e.g., *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (plurality opinion) (holding that due process requires the sentencing jury be informed a defendant is parole ineligible when defendant's future dangerousness is at issue).

<sup>268</sup> A well-crafted instruction would remove any misplaced sense of legal responsibility on the part of the jury to consider future dangerousness and would bring home to the jury its responsibility for reaching a decision based on desert. See *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (barring the state from advising the jury that the appellate court would make the ultimate sentencing decision).

<sup>269</sup> See, e.g., *Allen v. State*, 137 So. 3d 946, 961 (Fla. 2013).

Few would openly embrace that position, and it is hard to imagine the Supreme Court would allow states to advance it.

Procedurally separating the desert and dangerousness inquiries will improve the fairness of capital sentencing. The law also must clearly state the implications of the separate findings as to capital desert and future dangerousness. A finding that the defendant deserves to die should be a basic predicate for any death sentence. A future dangerousness finding could be dealt with in at least two defensible ways. One approach would be to make future dangerousness, like desert, a precondition for execution. Texas and Oregon currently take this approach. This option would ensure that two rationales for execution—retribution and incapacitation—support any death sentence, thus reducing “the risk of wholly arbitrary and capricious action.”<sup>270</sup> Jurisdictions might adopt this approach on the theory that human life should be taken only when necessary to protect other human lives.<sup>271</sup>

An alternative approach would allow a future dangerousness finding to serve as one possible reason for execution, but not the only one. This second approach would allow for the execution of truly horrible murderers (such as Hitler), regardless of whether they pose a future danger in prison. To accomplish this result, a capital punishment jurisdiction could authorize executions based on a threshold finding of desert, plus *either* a finding of future dangerousness *or* a finding of special culpability. Virginia has adopted an approach that is quite similar to this. The Virginia death penalty statute allows the death penalty to be considered only for specified types of aggravated first degree murder,

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<sup>270</sup> Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

<sup>271</sup> For example, until very recently the Catechism of the Catholic Church stated: “Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.” Catechism of the Catholic Church § 2267 (2d ed.) (1995). In August 2018, Pope Francis announced that the Catechism would be revised to hold the death penalty “inadmissible” in all cases, emphasizing that alternative “systems of detention have been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.” Hannah Brockhaus, Vatican Changes Catechism Teaching on Death Penalty, Calls It ‘Inadmissible,’ Catholic News Agency (Aug. 2, 2018), <https://www.catholicnewsagency.com/news/vatican-changes-catechism-teaching-on-death-penalty-calls-it-inadmissible-28541> [<https://perma.cc/KQ3B-TYLL>]. Whereas the former Catechism anticipated that situations where execution would be necessary to stop an offender from killing in the future would be “very rare, if not practically non-existent,” Catechism of the Catholic Church § 2267 (2d ed.) (1995) (internal quotation marks omitted), the new Catechism appears to rest on the factual assumption that such situations never arise.

which are then defined as “capital murder.”<sup>272</sup> The statute then requires, for any sentence of death, that the state *additionally* prove that the offender *either* presents a future danger *or* has committed a particularly vile offense.<sup>273</sup> Virginia’s law still suffers from a key flaw in that it allows simultaneous consideration of desert and future dangerousness, but that flaw can be removed by the reforms described above.<sup>274</sup>

Some critics still may insist that future dangerousness should be eliminated from capital sentencing. While some may hold this view due to problems such as prediction error, others may reach this conclusion based on ideas of retributive justice. These critics might worry that a focus on future dangerousness will displace the primacy of retributive justice in punishment and replace it with “a regime single-mindedly concerned with the prediction of crime and the incapacitation of criminals.”<sup>275</sup> A capital sentencing regime that takes future dangerousness into account need not ignore desert, however. Indeed, the reforms outlined above would ensure that both are considered, and that desert remains the fundamental question. If the law chooses to spare the lives of some capital murderers, because they no longer threaten others, that choice can be made without denying their culpability. By separating the desert and dangerousness inquiries and first determining desert,

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<sup>272</sup> Va. Code Ann. § 18.2-31 (2014) (defining capital murder).

<sup>273</sup> Va. Code Ann. § 19.2-264.4 (2015) (requiring the future dangerousness or the finding of a vile offense).

<sup>274</sup> In Virginia, judges arguably could require the separate inquiries under existing law. Virginia authorizes the death penalty for specified categories of aggravated murder. Va. Code Ann. § 18.2-31 (2014). In the capital penalty phase, Virginia law requires the jury to consider “evidence . . . which the court deems relevant to sentence,” and states that this evidence “may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense.” Va. Code Ann. § 19.2-264.4(B). The law *separately* states that the death penalty “shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt” that the defendant either presents a future danger or that his capital crime was particularly “vile, horrible, or inhuman.” *Id.* § 19.2-264.4(C). A judge could require the jury to decide the future dangerousness question only after considering whether the offender deserves the death penalty, as a predicate matter, in light of the aggravating circumstances of the crime and any mitigating evidence. But even in Virginia, it would be better to sequence the procedure in that manner by legislative command, to ensure that such a narrowed penalty reflects legislative intent and possesses democratic legitimacy.

<sup>275</sup> O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, 82 N.Y.U. L. Rev. 1265, 1329 (2007); see also Edward Feser & Joseph M. Bessette, *By Man Shall His Blood Be Shed: A Catholic Defense of Capital Punishment* 47 (2017) (objecting that “modern secular thinkers” tend to deny “goodness and badness *themselves* as objective features of the world”).

states can make clear which capital defendants deserve death but nonetheless receive mercy.

Some critics might still be unsatisfied with the proposed reforms. They might object that the death penalty should be strictly limited to the very “worst of the worst,” rather than those who either commit very depraved crimes, or who are enduringly dangerous. While in theory this approach may make sense—and indeed the Supreme Court has itself embraced it—implementing this idea would be extremely difficult. It is nearly impossible to rank the depravity of capital offenses because of the incommensurate nature of the harms and immorality they reflect. Can one assert, definitively, who is most culpable among murderers? The one who has tortured and killed a young child, or another who has bombed a church, or another who has murdered his victim out of racial hatred? Which is worse depends entirely on personal moral judgments made by individual jurors (as well as prosecutors and judges). If a juror has a child of his own he may find the killing of a child incomparably cruel. Indeed, some may find even non-lethal crimes against children to be worse than certain types of murder. Justice Alito has expressed “little doubt that, in the eyes of ordinary Americans, the very worst child rapists . . . are the epitome of moral depravity.”<sup>276</sup> Others, equally focused on moral depravity, might disagree.

A recent capital case highlighted the futility of trying to ascertain the truly “worst” offenders. In *Glossip v. Gross*, the Court rejected a challenge to a lethal injection protocol. In a dissent, Justice Breyer called into question the constitutionality of the death penalty itself on the ground that the worst offenders were not necessarily the ones who were executed. He condemned the states’ failure “to make the application of the death penalty less arbitrary by restricting its use to . . . ‘the worst of the worst.’”<sup>277</sup> “Despite the *Gregg* Court’s hope for fair administration of the death penalty,” he concluded, “40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the ‘reasonable consistency’ legally necessary to reconcile its use with the Constitution’s commands.”<sup>278</sup>

To prove his point about the arbitrariness of the death penalty, Justice Breyer discussed the results of an empirical study of capital cases in

<sup>276</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 467 (2008) (Alito, J., dissenting).

<sup>277</sup> *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting) (internal quotation marks omitted).

<sup>278</sup> *Id.* (Breyer, J., dissenting).

Connecticut that suggested that the death penalty was not being imposed on the worst offenders.<sup>279</sup> The researchers began with a pool of 205 cases in which the offenders could have been charged with capital crimes, and showed that only nine were ultimately sentenced to death; the other 196 offenders avoided the death penalty through plea bargains, acquittals, or lesser sentences.<sup>280</sup> Of those nine, the researchers concluded that only one “was indeed the ‘worst of the worst’” and, even so, “no worse than” many of the offenders for whom the prosecutor did not seek execution.<sup>281</sup>

Justice Thomas wrote separately to rebut Justice Breyer’s argument. He rejected Justice Breyer’s claim that the death penalty was being imposed arbitrarily because it was not being narrowed to the *worst* of the worst: “In my decades on the Court, I have not seen a capital crime that could not be considered sufficiently ‘blameworthy’ to merit a death sentence.”<sup>282</sup> For Justice Thomas, the death penalty did not have to be limited to the worst of the worst; it was enough to limit the penalty to those who are bad *enough*. Justice Thomas went on to castigate Justice Breyer for relying on “pseudoscientific”<sup>283</sup> studies to prove his points. He noted that the Connecticut study had used law students to assess the “egregiousness” of capital murders based only on case summaries,<sup>284</sup> without an “opportunity to assess the credibility of witnesses, to see the remorse of the defendant, [or] to feel the impact of the crime on the victim’s family.”<sup>285</sup> These law students, Justice Thomas added, did not bear “the burden of deciding the fate of another human being” and did not represent “the community whose sense of security and justice may

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<sup>279</sup> Id. (citing John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. Emp. Legal Stud. 637, 678–79 (2014)).

<sup>280</sup> Of the 205 cases that could have been charged as capital crimes, prosecutors charged a capital felony in only 141 cases (69% of the 205 cases) and allowed forty-nine of those charged with a capital felony to plead guilty to a non-capital offense. Donohue, *supra* note 279, at 641–43. Of the ninety-two defendants still facing capital charges (45% of the 205), sixty-six were convicted of a capital offense (32% of the 205). Id. Twenty-eight faced a death penalty sentencing hearing (14% of the 205), and twelve received the death penalty (6% of the 205). Id. Three death sentences were overturned on appeal, leaving nine prisoners sentenced to death (4% of the 205). Id.

<sup>281</sup> *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting) (citing Donohue, *supra* note 279, at 678–69).

<sup>282</sup> Id. at 2752 (Thomas, J., concurring).

<sup>283</sup> Id.

<sup>284</sup> Id. at 2751.

<sup>285</sup> Id.

have been torn asunder by an act of callous disregard for human life.”<sup>286</sup> Justice Thomas showed that the ranking of the egregiousness of capital crimes reflected no more than the subjective moral judgments of the study’s authors. These judgments included the questionable claims that it was more depraved to kill a prison guard than to kill a police officer, for example, and more depraved to kill to make a political statement than to kill out of racial hatred.<sup>287</sup> Justice Thomas concluded that any effort to rank the depravity of capital crimes is “arbitrary, not to mention dehumanizing.”<sup>288</sup>

Indeed, it is not possible to definitively rank such moral egregiousness. There is no demonstrably right approach to those intrinsically moral judgments. This makes aggravating factors such as the “egregiousness” or “heinousness” of a murder—a common aggravating factor in capital punishment statutes today—a poor mode of narrowing jury discretion to avoid disparities and arbitrariness. And it dooms to failure any effort to eliminate discrepancies in capital sentencing by reserving the death penalty for the “worst of the worst.”

The Constitution does not require the death penalty to be distributed only on desert-based grounds, moreover. The Court has held that “[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.”<sup>289</sup> Thus, a state may narrow death-eligibility based on the risk of future harm as well as desert. As the California Supreme Court has explained, “[a] special circumstance [supporting the death penalty] is not unconstitutional merely because it does not apply to every defendant who may be otherwise deserving of the death penalty.”<sup>290</sup>

This reading of the Constitution is not without controversy, however, and the debate warrants a closer look. While on the Court, Justice Souter argued that “*within* the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst.’”<sup>291</sup> Justice Breyer likewise

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 2752.

<sup>288</sup> *Id.*

<sup>289</sup> *California v. Ramos*, 463 U.S. 992, 1008 (1983).

<sup>290</sup> *People v. Ledesma*, 140 P.3d 657, 719 (Cal. 2006) (rejecting a challenge under the Eighth and Fourteenth Amendments to the Federal Constitution to an aggravating factor in the California capital sentencing scheme).

<sup>291</sup> *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (emphasis added).

contended that “the application of the death penalty” must be limited “to those whom Justice Souter called ‘the worst of the worst.’”<sup>292</sup> These Justices have cited the Court’s statement in *Roper v. Simmons* and *Atkins v. Virginia* that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”<sup>293</sup> But that statement can be read to mean simply that capital murder must be defined more narrowly than first-degree murder, so that only certain aggravated types of murders are eligible for execution. In fact, that is what other Supreme Court decisions, such as *Jurek*, already made clear: a death penalty statute that narrows the range of crimes eligible for death based on “aggravating circumstances” and allows the jury to consider “mitigating circumstances” before determining that death is appropriate sufficiently narrows the death penalty decision.<sup>294</sup> The Constitution does not mandate that any further narrowing be based on culpability. Any other reading would conflict with the *Jurek* Court’s decision upholding the constitutionality of Texas’s sentencing scheme, which allowed the death penalty only for particularly aggravated forms of murder *and* then further limited the penalty to those offenders who presented a future danger. Not only is this the better reading of the Court’s precedents, but it is the only reading that imposes on the states a task that they can actually accomplish.

Thus, future dangerousness may be considered as a further distribution criterion, once the jury decides that the death penalty is deserved. States can then take several measures to foster consistency across cases, such as to more clearly define future dangerousness for death penalty purposes. State statutes currently define it as a “probability” that the defendant would “commit criminal acts of violence that would constitute a continuing threat to society.”<sup>295</sup> They should also explain what a “probability” of future violence means. They might even decide to require a higher standard, perhaps “virtual

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<sup>292</sup> *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting *Marsh*, 548 U.S. at 206 (Souter, J., dissenting)).

<sup>293</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

<sup>294</sup> *Jurek v. Texas*, 428 U.S. 262, 273–74 (1976)

<sup>295</sup> See *supra* notes 43, 63–65, 71–73 and accompanying text (citing statutes).

certainty,” as suggested by one scholar.<sup>296</sup> In a similar vein, states should clarify whether a threat to “society” encompasses a risk to fellow inmates and prison guards, or only to persons outside of prison walls. This Article has contended that the lives of all persons, inside and outside of prison, should be taken into account. There is no one right answer to these questions; any decision necessarily turns on how much risk a community is willing to tolerate and how willing it is to take a human life to protect itself. The key is that any decision should reflect reasoned public and legislative debate, and should not result simply from decades of legislative inertia.

Meaningful reforms will require honest and open legislative and public debate regarding the incapacitation rationale and the way that it is currently pursued in capital sentencing procedures. If academic and judicial commentators wish to promote such reforms and help them bear fruit, they too must begin to take seriously the incapacitation rationale.<sup>297</sup>

#### CONCLUSION

This Article has challenged the dominant view among scholars and judges that the incapacitation rationale for the death penalty is irrelevant and indefensible, and has exposed some of the costs of ignoring its importance. The incapacitation theory implicates profound and complex moral questions, which must be answered if we are to reduce arbitrariness and injustice in the practice of capital punishment today. The arguments and reforms outlined in this Article are designed to illuminate a path forward.

Capital punishment opponents, however, may be unsatisfied with any reforms that fall short of total abolition. Some may even fear that reforms designed to improve the fairness of capital punishment will make the death penalty less likely to be abolished.<sup>298</sup> In fact, prominent scholars and abolition advocates have expressed this view. But resisting reforms that would make the death penalty more fair and defensible

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<sup>296</sup> Slobogin, *supra* note 216, at 53; see also *id.* at 4 (arguing that preventative detention should reflect a “*proportionality principle*,” requiring that “the degree of danger be roughly proportionate to the proposed government intervention”).

<sup>297</sup> Deference should not be granted to the initial finding of fact if additional evidence comes to light that changes the equation.

<sup>298</sup> Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 *Ohio St. L.J.* 417, 418 (2002).

would make us complicit in unjust capital sentences caused by the lack of reform. A reasonable abolitionist might conclude that no life-promoting end goal justifies sacrificing the lives of human beings now before our eyes. That is particularly true when the end goal is far from assured. As abolitionists Professors James Liebman and Lawrence Marshall have observed, “even those who believe that ‘none is best’ can recognize that ‘less is better’”<sup>299</sup>—or at least they should.

In the end, one’s view of the proper role of future dangerousness in capital punishment depends on normative judgments about the value of future security, human life, human dignity, procedural fairness, accuracy, and consistency. A reasoned perspective may also require additional empirical evidence regarding the risk of error, the possibility of reform, and the existence of more humane forms of confinement. Reasonable people may in good faith choose different approaches, in light of these moral and empirical considerations. Some may conclude that neither execution nor solitary confinement should be permitted, as this author would. Others may conclude that future dangerousness should continue to play a role in capital punishment, but may favor one or more of the reforms the Article suggests to make its use more consistent and defensible. None of these conclusions can be reached in a thoughtful and reasoned way without honest and informed analysis about the risk of future danger and the options for addressing it. It is past time that scholars and courts take seriously the moral and legal dimensions of the incapacitation rationale.

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<sup>299</sup> Liebman & Marshall, *supra* note 34, at 1675.

**Appendix I:  
Execution Delay 1976-1983<sup>300</sup>**

<b>Name</b>	<b>State</b>	<b>Sentence Date</b>	<b>Execution Date</b>	<b>Execution Delay (Years)</b>
Gary Gilmore	UT	10/7/1976	1/17/1977	0.28
John Arthur Spenkelink	FL	12/20/1973	5/25/1979	5.43
Jesse Walter Bishop	NV	2/10/1978	10/22/1979	1.70
Steven Timothy Judy	IN	2/25/1980	3/9/1981	1.03
Frank J. Coppola	VA	9/26/1978	8/11/1982	3.88
Charles Brooks Jr.	TX	12/3/1977	12/7/1982	5.01
John Louis Evans	AL	4/27/1977	4/22/1983	5.99
Robert A. Sullivan	FL	11/12/1973	11/30/1983	10.05
John Eldon Smith	GA	1/30/1975	12/15/1983	8.87
Robert Wayne Williams	LA	4/20/1979	12/14/1983	4.65

<sup>300</sup> Sources on file with author.

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Jimmy Lee Gray	MS	12/12/1976	9/2/1983	6.72
Average Delay Across 11 Executions				4.88

**Appendix II:  
Execution Delay in 2016<sup>301</sup>**

<b>Name</b>	<b>State</b>	<b>Sentence Date</b>	<b>Execution Date</b>	<b>Execution Delay (Years)</b>
Oscar Bolin	FL	10/30/1992	1/7/2016	23.19
Richard Masterson	TX	5/15/2002	1/20/2016	13.68
Christopher Brooks	AL	11/10/1993	1/21/2016	22.20
James Freeman	TX	11/10/2008	1/27/2016	7.21
Brandon Jones	GA	10/11/1979	2/3/2016	36.31
Gustavo Garcia	TX	1/8/1992	2/16/2016	24.11
Travis Hittson	GA	3/17/1993	2/17/2016	22.92
Coy Wesbrook	TX	9/2/1998	3/9/2016	17.52

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<sup>301</sup> Sources on file with author.

Adam Ward	TX	6/27/2007	3/22/2016	8.73
Joshua Bishop	GA	2/13/1996	3/31/2016	20.13
Pablo Vasquez	TX	3/30/1999	4/6/2016	17.02
Kenneth Fults	GA	5/22/1997	4/12/2016	18.89
Daniel Lucas	GA	9/17/1999	4/27/2016	16.61
Earl Forrest	MO	12/17/2004	5/11/2016	11.40
John Conner	GA	7/14/1982	7/15/2016	34.00
Barney Fuller	TX	7/21/2004	10/5/2016	12.21
Gregory Lawler	GA	3/3/2000	10/19/2016	16.63
Steven Spears	GA	3/22/2007	11/16/2016	9.65
William Sallie	GA	3/30/1991	12/6/2016	25.68
Ronald Smith	AL	10/6/1995	12/8/2016	21.17
Average Delay Across 20 Executions				18.96

**Appendix III:  
Execution Delay in 2017<sup>302</sup>**

<b>Name</b>	<b>State</b>	<b>Sentence Date</b>	<b>Execution Date</b>	<b>Execution Delay (Years)</b>
Christopher Wilkins	TX	3/12/2008	1/11/2017	8.83
Ricky Gray	VA	10/23/2006	1/18/2017	10.24
Terry Edwards	TX	11/21/2003	1/26/2017	13.18
Mark Christeson	MO	10/8/1999	1/31/2017	17.32
Rolando Ruiz	TX	1/20/1995	3/7/2017	22.13
James Bigby	TX	3/25/1991	3/14/2017	25.97
Ledell Lee	AR	10/16/1995	4/20/2017	21.51
Jack Jones	AR	4/17/1996	4/24/2017	21.02
Marcel Williams	AR	1/14/1997	4/24/2017	20.28
Kenneth Williams	AR	8/30/2000	4/27/2017	16.66
J.W. Ledford	GA	11/14/1992	5/17/2017	24.51

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<sup>302</sup> Sources on file with the author.

Thomas Arthur	AL	2/19/1983	5/26/2017	34.27
Robert Melson	AL	5/16/1996	6/8/2017	21.07
William Morva	VA	8/25/2008	7/6/2017	8.87
Ronald Phillips	OH	10/5/1993	7/26/2017	23.81
TaiChin Preyor	TX	3/14/2005	7/27/2017	12.37
Mark Asay	FL	11/18/1988	8/24/2017	28.77
Gary Otte	OH	10/6/1992	9/13/2017	24.94
Michael Lambrix	FL	3/22/1984	10/5/2017	33.54
Robert Pruett	TX	4/30/2002	10/12/2017	15.45
Torrey McNabb	AL	2/19/1999	10/19/2017	18.67
Patrick Hannon	FL	8/5/1991	11/8/2017	26.26
Ruben Cardenas	TX	2/20/1998	11/8/2017	19.72
Average Delay Across 23 Executions				20.41