

2016

Does the Death Penalty Require Death Row? The Harm of Legislative Silence

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Recommended Citation

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Does the Death Penalty Require Death Row? The Harm of Legislative Silence

MARAH STITH MCLEOD*

This Article addresses the substantive question, “Does the death penalty require death row?” and the procedural question, “Who should decide?”

In most capital punishment states, prisoners sentenced to death are held, because of their sentences alone, in far harsher conditions of confinement than other prisoners. Often, this means solitary confinement for the years and even decades until their executions.

Despite a growing amount of media attention to the use of solitary confinement, most scholars and courts have continued to assume that the isolation of death-sentenced prisoners on death row is an inevitable administrative aspect of capital punishment. To the extent scholars have written about death row, they have focused on its harshness. None has objected to the fact that prison administrators are the ones who have decided to maintain death row in most capital punishment states.

This Article addresses for the first time the authority of prison administrators to establish or retain death row. It begins by exploring the nature of this death row decision, and concludes that death row is rational only if its intended purpose is to punish. This conclusion leads to the second and more significant claim in the Article: that only legislatures are competent to require death row. This claim is grounded in the need for democratic legitimacy and public deliberation in the imposition of punishment, in the separation of powers, and in the principle of legality.

Death row should be abolished unless legislatures choose to retain it, expressly and deliberately, for retributive or deterrent reasons.

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“Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society’s simple unawareness or indifference.”¹

I. INTRODUCTION

Life on death row has been likened to torture.² The European Court of Human Rights famously refused to allow England to extradite a European

¹Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (objecting to the use of permanent solitary confinement for death row and certain other prisoners).

²See, e.g., Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) ¶ 91 (1989) (barring extradition to Virginia because “if extradited, [the capital defendant] faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment”); INT’L FED’N FOR HUMAN RIGHTS (FIDH) & CTR. FOR CONSTITUTIONAL RIGHTS (CCR), DISCRIMINATION, TORTURE, AND EXECUTION: A HUMAN RIGHTS ANALYSIS OF THE DEATH PENALTY IN CALIFORNIA AND LOUISIANA 4 (Oct. 2013), <http://ccrjustice.org/files/2013->

citizen to face capital charges in the United States because of the risk that the person would end up confined on Virginia's death row in inhuman conditions.³ In states like Virginia, death-sentenced prisoners are held in solitary confinement for the years and often decades leading up to their executions⁴—a condition so severe that, in the words of Justice Anthony Kennedy in a recent capital case, it may bring prisoners “to the edge of madness, perhaps to madness itself.”⁵ Many scholars and judges have attacked death row as barbaric and cruel; some even have concluded that death row inmates are being impelled to drop their appeals and “volunteer” for execution because life on death row is worse than death itself.⁶ In fact, over ten percent of the prisoners executed since 1976 have volunteered for execution.⁷

Death-Penalty-Report.pdf [<https://perma.cc/5UV7-GXE9>] (recounting death row deprivations and isolation); Angela April Sun, Note, “Killing Time” in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual, 113 COLUM. L. REV. 1585, 1598–99 (2013) (describing life on death row as psychological torture).

³*Soering*, 161 Eur. Ct. H.R. ¶ 91. Recently, the High Court of Ireland refused to extradite an Irish citizen to face terrorism-related charges in the United States, because he likely would face solitary confinement in the federal “supermax” prison. See *Att’y Gen. v. Damache* [2015] IEHC 339, ¶ 11.11.19 (Ir.) (“[T]he institutionalisation of solitary confinement . . . with its routine isolation from meaningful contact and communication with staff and other inmates, for a prolonged pre-determined period of at least 18 months and continuing almost certainly for many years, amounts to a breach of the constitutional requirement to protect persons from inhuman and degrading treatment and to respect the dignity of the human being.”).

⁴See *Prieto v. Clarke*, No. 1:12-CV-1199, 2013 WL 6019215, at *6 (E.D. Va. Nov. 12, 2013), *rev’d on other grounds*, 780 F.3d 245 (4th Cir. 2015) (describing Virginia’s death row policy under which every death-sentenced prisoner is locked alone for twenty-three hours a day in a single cell enclosed by walls and a solid metal door to prevent communication, eats all his meals alone in his cell, has no contact visits with family or friends, and is denied work and educational opportunities).

⁵*Ayala*, 135 S. Ct. at 2209. If a death-sentenced prisoner is brought to madness, however, he may not be executed. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”).

⁶See, e.g., *Comer v. Stewart*, 215 F.3d 910, 918 (9th Cir. 2000) (“The issue is whether [the prisoner’s] conditions of confinement constitute punishment so harsh that he has been forced to abandon a natural desire to live.”); AM. CIVIL LIBERTIES UNION (ACLU), A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 8 (July 2013), https://www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf [<https://perma.cc/5YBR-7S4Y>] (“Facing isolated conditions, helplessness, despair, and the anxiety and anguish of waiting to die for years on end, many death row prisoners take control in the only way they know: they drop their legal appeals and ‘volunteer’ for execution.”); Mona Lynch, *Supermax Meets Death Row: Legal Struggles Around the New Punitiveness in the US*, in THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES 66, 69 (John Pratt et al. eds., 2005) (“In the case of death row inmates, the decision to give up appeals and volunteer for execution is potentially the product of . . . suicidal urges brought on by the living conditions.”); Amy Smith, *Not “Waiving” but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 PUB. INT. L.J. 237, 253 (2008)

If prisoners were executed within weeks or months, as they were two hundred years ago,⁸ death row might not warrant such attention. But today, death-sentenced inmates await execution for an average of fifteen-and-a-half years⁹—the amount of time that other prisoners are confined as punishment for serious felonies.¹⁰ Of the approximately 3,000 prisoners on death row today, more are likely to die of natural causes than to be executed.¹¹ Execution delays

(explaining that “if the experience of living on death row creates some discernable [sic] pattern of psychological responses, volunteering for execution is likely only one of many possible outcomes”).

⁷See CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 6 (Spring 2015), <http://www.deathpenaltyinfo.org/documents/DRUSASpring2015.pdf> [<https://perma.cc/G597-6DG9>] (reporting 1404 executions since 1976); *Information on Defendants Who Were Executed Since 1976 and Designated as “Volunteers,”* DEATH PENALTY INFO. CTR. (Aug. 13, 2015), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers> [<https://perma.cc/G35G-49EE>] [hereinafter DPIC “Volunteers”] (listing 141 “volunteers” executed since 1976).

⁸Even 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).

⁹TRACY L. SNELL, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES 14 tbl.10 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf> [<https://perma.cc/K4YZ-2TYX>]. The most recent average recorded by the Bureau of Justice Statistics is nine years more than it was three decades ago. See *id.* (reporting that the average number of months from sentencing to execution was 74 in 1984, 122 in 1994, 132 in 2004, and 186 in 2013). Records from the Death Penalty Information Center reveal that the average time from sentence to execution for prisoners executed in 2014 was nearly eighteen years. See *Execution List 2014*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2014> [<https://perma.cc/D7X7-JV43>].

¹⁰*Cf.* ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 199 (4th ed. 2012) (“[B]ecause of super due process protections, capital offenders typically serve more than 20 percent of what otherwise might be a 50-year LWOP sentence before they are executed.”).

¹¹See DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 11 (2010) (describing “natural causes” as the primary cause of death on death row); Ernest van den Haag, Commentary, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1662 (1986) (explaining that “most convicts sentenced to death are likely to die of old age”). Execution is now unlikely for persons sentenced to death. Of the 8,466 defendants sentenced to death from 1973 to 2013, only 1,359 were executed. SNELL, *supra* note 9, at 19 tbl.16. Five hundred and nine died of other causes while still on death row. *Id.* And 3,586 were ultimately removed from death row due to court decisions or commutations. *Id.* Thus, most death-sentenced inmates can expect to spend years and even decades on death row, with a far greater likelihood that they will die on death row or be spared a death sentence than that they will be executed. See also James S. Liebman & Peter Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 319 (2011) (arguing that the real penalty is “life without the possibility of parole, but with a small chance of execution a decade [or more] later” (emphasis omitted)); Samuel R. Gross, Barbara O’Brien, Chen Hu & Edward H. Kennedy, *Rate of False*

have transformed the death penalty from relatively prompt execution into a de jure sentence of death and a de facto sentence of something close to life in prison.¹² The segregation and isolation of living on death row compounds the suffering imposed on these prisoners by their long de facto term of incarceration. The unique harms caused by solitary confinement recently have become the focus of intensive study and media attention, with calls to end the use of solitary confinement based on its debilitating psychological effects.¹³

Conviction of Criminal Defendants Who Are Sentenced to Death, 111 PROC. NAT'L ACAD. SCI. 7230, 7230 (2014) (noting "most death-sentenced defendants are removed from death row").

¹²In 2014, a district judge held that in California a death sentence had become not death but "life in prison with the remote possibility of death," and found this penalty unconstitutional. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014) (emphasis omitted) ("[F]or most [prisoners], systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death. As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary." (emphasis omitted)), *rev'd sub nom.* *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015); *see also id.* ("California juries have imposed the death sentence on more than 900 individuals since 1978. Yet only 13 of those 900 have been executed by the State. Of the remainder, 94 have died of causes other than execution by the State, 39 were granted relief from their death sentence by the federal courts and have not been resentenced to death, and 748 are currently on Death Row, having their death sentence evaluated by the courts or awaiting their execution." (footnote omitted)). The Ninth Circuit Court of Appeals recently reversed the district court's decision in *Jones*, on the ground that it depended on a "new" constitutional rule of criminal procedure that the federal court lacked authority to apply on collateral review. *See Jones v. Davis*, 806 F.3d 538, 552 (9th Cir. 2015).

¹³*See, e.g.,* THE LIMAN PROGRAM, YALE LAW SCH. & ASS'N OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 59 (Aug. 2015) [hereinafter ASCA-LIMAN SURVEY], https://www.law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf [<https://perma.cc/A6RV-E2JP>]; Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), <http://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html> [<https://perma.cc/SRX7-C55K>]; Editorial, *Solitary Confinement Is Cruel and All Too Common*, N.Y. TIMES (Sept. 2, 2015), <http://www.nytimes.com/2015/09/03/opinion/solitary-confinement-is-cruel-common-and-useless.html> [<https://perma.cc/L6W8-X5N3>]; Paige St. John, *California Agrees to Move Thousands of Inmates Out of Solitary Confinement*, L.A. TIMES (Sept. 1, 2015), <http://www.latimes.com/local/lanow/la-me-ln-california-will-move-thousands-of-inmates-out-of-solitary-20150901-story.html> [<https://perma.cc/ZPT4-V2U3>]; Timothy Williams, *Prison Officials Join Movement to Curb Solitary Confinement*, N.Y. TIMES (Sept. 2, 2015), <http://www.nytimes.com/2015/09/03/us/prison-directors-group-calls-for-limiting-solitary-confinement.html> [<https://perma.cc/ZW9Y-5ZYK>].

This Article will focus primarily on the solitary confinement of death-sentenced prisoners, because such isolation is experienced by so many death row prisoners and is the type of confinement that most starkly contrasts with the treatment of noncapital prisoners.

Yet death row, and the isolation it typically entails,¹⁴ often is treated as an inevitable administrative aspect of a death sentence. To the extent that scholars and courts have focused on death row, they have objected primarily to the degree of its harshness and its crippling psychological effects.¹⁵ None has challenged the fact that prison administrators are the ones that have chosen to establish death row, without any legislative mandate.¹⁶ Just recently, the Fourth Circuit held in a Virginia case that “tethered to the death sentence in Virginia is pre-execution confinement on death row.”¹⁷ The court stated that, “Virginia law mandates that all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row . . . because of the crime they have committed and the sentence they have received.”¹⁸ In fact, although death-sentenced prisoners in Virginia and elsewhere are sent

The arguments in the Article would also apply, however, to less harsh conditions of death row confinement.

¹⁴A survey conducted by the Association of State Correctional Administrators (ASCA) confirmed the widespread existence of death row and the severe restrictions on death row inmates. See ASCA SURVEY: INMATES SENTENCED TO DEATH HOUSING POLICY 1–8 (Feb. 2013) [hereinafter ASCA HOUSING POLICY SURVEY], <http://www.asca.net/system/assets/attachments/5520/WA%20-%20Death%20Penalty%20Housing.pdf?1362689706> [<https://perma.cc/TDE4-338B>]. As scholars and courts have recognized, death row conditions may be significantly more severe than prison conditions for noncapital inmates, and may involve solitary confinement as well as segregation. See, e.g., *Prieto v. Clarke*, No. 1:12-CV-1199, 2013 WL 6019215, at *1 (E.D. Va. Nov. 12, 2013) (“Conditions on death row are more restrictive than incarceration in the general population housing units at [Virginia’s Sussex I State Prison], which is a maximum-security facility. The former amount to a form of solitary confinement: On average, plaintiff must remain in his single cell for all but one hour of the day.”), *rev’d on other grounds*, 780 F.3d 245 (4th Cir. 2015); Elizabeth Compa, Cecelia Trenticosta Kappel & Mercedes Montagnes, *Litigating Civil Rights on Death Row: A Louisiana Perspective*, 15 LOY. J. PUB. INT. L. 293, 313 (2014) (“The disparity between conditions on death row and other parts of the prison in Virginia is not unusual.”).

After a death warrant has been issued and execution is imminent, special conditions of confinement may be imposed. See e.g., 61 PA. STAT. AND CONS. STAT. ANN. § 4303 (West 2010) (mandating solitary confinement with no visitors except by court order other than prison staff, lawyer, and spiritual advisor). This Article does not include such post-warrant confinement within its description of “death row.”

¹⁵ See *supra* notes 2–6 and accompanying text.

¹⁶ Some scholars have argued for amelioration or elimination of death row, but have argued that prison administrators should make this change. See e.g., Robert Johnson & John L. Carroll, *Litigating Death-Row Conditions: The Case for Reform*, in PRISONERS AND THE LAW 8-3, 8-22 (Ira P. Robbins ed., 2015) (stating that it would “be ideal if more correctional administrators would voluntarily and spontaneously adopt a humane approach to death-row confinement”); Andrea D. Lyon & Mark D. Cunningham, “Reason Not the Need”: Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make It Unlawful?, 33 AM. J. CRIM. L. 1, 2–4 (2005) (arguing that prison administrators should not continue to automatically and permanently isolate prisoners on death row because security does not require it).

¹⁷ *Prieto v. Clarke*, 780 F.3d 245, 254 (4th Cir. 2015).

¹⁸ *Id.*

automatically and permanently to death row, few jurisdictions require death row by statutory law. In Virginia, and in most states,¹⁹ death row is imposed only as a prison policy. In the words of capital punishment scholar David Garland, death row is “an administrative arrangement with no specific legal authority.”²⁰

This Article addresses for the first time the authority of prison administrators to establish death row. The analysis begins with a consideration of the nature of the decision to establish death row, and concludes—contrary to prevailing assumptions—that death row cannot be justified for administrative reasons. Instead, it may be justified only based on a punishment rationale. This conclusion leads to the second and more significant conclusion in the Article, which is that legislatures alone are competent to require death row.

To understand the nature of the death row decision, the Article asks what possible purposes such confinement may serve, focusing on the traditional aims of incapacitation, rehabilitation, retribution, and deterrence. The first of these, incapacitation, closely tracks the primary administrative rationale for death row, which is prison security.

Mounting evidence has undermined the claim that death row is needed for prison security. The most powerful evidence comes from Missouri, which eliminated death row over twenty years ago.²¹ After Missouri abolished death row, and began to evaluate its death-sentenced prisoners individually to determine their proper custody level, it discovered that the vast majority of them did not require isolation.²² And a follow-up study showed that after

¹⁹ The Fourth Circuit stated that “Virginia law” requires death row for any death-sentenced prisoner. *Id.* But the “law” the court was referring to is only the policy of the Virginia Department of Corrections, a policy that Virginia capital punishment statutes do not require and which the department may change if it wishes. See VA. CODE ANN. § 53.1-32.1 (2013) (providing that the Director of Corrections shall establish a system of prisoner evaluation and classification, with no mention of rules for death-sentenced prisoners). Equating statutory law and prison policy in this context perpetuates the mistaken view that death row is an inevitable aspect of a death sentence. Even if policies have a binding effect on the state, they should be distinguished from statutory laws. *Cf., e.g.,* *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (stating that liberty interests may arise under “state laws or policies”). Indeed, such a distinction will be important because statutory law may be used for purposes that prison policy may not (such as to establish punishment for prisoners’ original crimes).

²⁰ GARLAND, *supra* note 11, at 46. Garland did not explore or discuss whether prison administrators’ role in establishing death row is acceptable as a normative or legal matter.

²¹ Litigation over Missouri’s death row conditions—which were far worse than conditions in the general prison population—led a federal court to order their amelioration by consent decree. Missouri’s prison administrators instead chose to eliminate death row and to confine the death-sentenced prisoners like noncapital prisoners. See *infra* note 75 and accompanying text.

²² Eighty-four percent of death-sentenced prisoners in Missouri’s prison system ended up in general population housing, with twenty-one percent housed in the “honor dorm” for the best-behaved inmates. Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Is*

elimination of death row in Missouri, the death-sentenced inmates committed less violent misconduct than prisoners in the same institution who had been sentenced to lesser terms.²³ Missouri's experience—and other studies of prison violence²⁴—reveals that the automatic and permanent isolation on death row of all death-sentenced prisoners leads to substantial needless suffering for many prisoners.²⁵

The lack of an adequate security rationale for isolating all death-sentenced prisoners does not mean that death row cannot be justified, however. The Article next considers whether death row may serve the purposes of rehabilitation, retribution, or deterrence. It concludes that retribution and

Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri, 23 BEHAV. SCI. & L. 307, 316 (2005). Another six percent of death-sentenced prisoners were placed in special protective custody, not based on claims that they posed special risks to others but based on a determination that these death-sentenced prisoners themselves were likely to be victimized. *Id.*

²³“Violent misconduct was considered to include murder/manslaughter, attempted murder/manslaughter, forcible sexual assault, major assault, and minor assault.” *Id.* at 313. Prisoners sentenced to death, life without parole, and terms allowing for parole were considered separately. *Id.* at 312. The study found that death-sentenced inmates were 60.6% as likely to engage in violent misconduct as parole-eligible prisoners (and life-without-parole prisoners were only 50% as likely). *Id.* at 315. Death-sentenced inmates had a 0% rate of committing murders, manslaughters, or attempted murders per year, while life-without-parole inmates had a 0.42% rate and parole-eligible inmates had a 0.23% rate. *Id.* at 314.

²⁴See *infra* notes 119–120 and accompanying text.

²⁵Two scholars have called for the abolition of death row in light of the Missouri study. Mark Cunningham penned an article with law professor and law school dean Andrea Lyon arguing that “[i]f death-sentenced inmates represent a *more*, rather than less, manageable group of maximum security prisoners, then there is no apparent remaining legitimate penological justification for their confinement as a class in arduous death row conditions.” Lyon & Cunningham, *supra* note 16, at 4. Lyon and Cunningham attacked the “draconian” conditions of death row as based not on sound penal policy but what they consider to be a false “mythology” that death-sentenced prisoners are depraved and malevolent. *Id.* at 2.

Insofar as this Article also contends that a security rationale does not justify death row, it aligns with much of what Lyon and Cunningham argue in greater detail in their article. But the analysis here differs in substantial ways from Lyon and Cunningham's claims. Lyon and Cunningham conclude that death row may violate the Eighth Amendment when it involves severe forms of isolation, because such isolation is unnecessary for security. See *id.* at 13; see also *infra* note 279 (discussing Lyon and Cunningham's Eighth Amendment argument). But they fail to consider whether death row isolation serves other legitimate purposes such as retribution or deterrence. This Article shows that these other aims of punishment offer plausible reasons—the *only* plausible reasons—for retaining death row. This leads to a second and more significant conclusion overlooked by scholars and death row litigants to date: that prison administrators lack the institutional competence to establish death row, because they lack the proper authority to prescribe punishment. The Article reveals that death row imposed by administrative command—as it is in most states today—should be declared invalid on structural constitutional grounds.

deterrence are plausible reasons for retaining death row. An advocate of retributive justice might contend that prisoners who have committed the worst crimes should be held in conditions that reflect the gravity of their offenses.²⁶ Pursuit of deterrence might lead others to support death row in the hope that prospective capital murderers would fear the certainty of cruel death row conditions, even if they might discount the possibility of execution long in the future. The point here is not that death row *ought* to be retained for these reasons, but only that these punishment purposes offer conceivable reasons why some might want to preserve it.

Once one recognizes that death row might be retained for punishment reasons, the inquiry must turn to *who* should decide. Only legislatures are suited to decide whether to retain death row, for at least three reasons. First, legislatures have the greatest claim to democratic legitimacy in answering moral questions that do not admit of any empirically correct answer—such as the proper quantum of retributive punishment or whether to pursue retribution or deterrence in the first place. Second, the separation of powers grants legislatures alone the power to prescribe punishment.²⁷ Third, prior statutory authorization of punishment is needed to satisfy the principle of legality. Each of these three considerations demands express legislative imprimatur before death row may be retained.

Legislatures, moreover, may not be allowed simply to delegate the power to establish death row to prison administrators. In many states, the power to impose punishment is nondelegable under the constitutional separation of powers.²⁸ And even in those states in which such delegation might be permitted, the Article contends, it would be unwise to entrust the death row decision to prison administrators. For prison administrators may choose to retain death row simply because such restrictive custody makes it psychologically easier for them to command and oversee the execution process, and not for legitimate purposes.

The foregoing arguments present a substantial challenge to the death row status quo. Courts should be prepared to hold existing death row policies *ultra vires* and void, at least in those states that retain a strict separation of powers. Legislatures then may choose whether to enact statutes to preserve death row. Some may decide not to reinstate death row, perhaps because of its cruelty or its expense. Others may decide to authorize sentencing authorities to impose death row only in certain severe cases or only for a limited time. Some will do nothing due to legislative gridlock. All of these results would be permissible, and preferable, to the status quo of illegitimate administrative action.

²⁶See ROBERT BLECKER, *THE DEATH OF PUNISHMENT: SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST* 279, 282 (2013) (arguing for harsher prison conditions for death row prisoners to reflect the greater severity of their crimes).

²⁷Several state courts have held that this power to punish may not be delegated to executive branch officials. See *infra* notes 205, 212 and accompanying text.

²⁸See *infra* note 206 and accompanying text.

Some may object to this argument for legislative choice. Two main objections seem most likely. One goes to the breadth of the argument: Will legislatures be expected to micromanage all other decisions by prison administrators? This objection would reflect a legitimate reluctance to intrude upon prison decisions based on administrators' experience and expertise. But death row placement differs in important ways from most or all decisions made by prison administrators. Three features typically set death row apart: its permanence, its categorical imposition, and its severity. These three characteristics reveal why death row is not a choice properly made by prison administrators, why we should care, and why reallocating power over death row to legislatures would not lead to micromanagement of the array of routine prison rules.

The other likely objection goes to the consequences of an argument for legislative choice: Would not lawmakers be even less humane than prison administrators? William Stuntz famously explored the pathological politics of criminal law and the tendency of politicians to impose ever harsher penalties in order to appear tough on crime.²⁹ This objection, however, overlooks the importance of public deliberation and democratic legitimacy in the prescription of punishment, limitations imposed by the separation of powers, and the principle of legality's requirement of statutory authorization when punishment is prescribed.³⁰ These crucial considerations do not depend on the consequences of legislative choice.

The consequentialist critique also may be wrong on its own terms. More democratic decisions regarding death row might not lead to greater inhumanity. Historically, legislatures have adopted more humane methods of execution, for example.³¹ It would be hard to imagine legislatures being significantly harsher regarding death row than prison administrators have been to date. And even if some politicians would ignore humanitarian concerns,

²⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001).

³⁰ Considerations of legitimacy and legality are closely linked. The Inter-American Court of Human Rights applied this understanding, for example, in a requested advisory opinion regarding what "law" might permissibly impose restrictions on human rights under the American Convention on Human Rights. See *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, Inter-Am. Ct. H.R. (ser. A) No. 6, ¶ 37 (May 9, 1986). The court explained that,

[F]or purposes of interpretation of [the relevant article of the Convention], the concepts of legality and legitimacy coincide, inasmuch as only a law that has been passed by democratically elected and constitutionally legitimate bodies and is tied to the general welfare may restrict the enjoyment or exercise of the rights or freedoms of the individual.

Id.

³¹ See *Glossip v. Gross*, 135 S. Ct. 2726, 2731–32 (2015) (recounting legislative efforts to find "the most humane" manner of executing death-sentenced prisoners (quoting *In re Kemmler*, 136 U.S. 436, 444 (1890))).

they might agree to abolish death row for fiscal reasons, because custody restrictions (particularly solitary confinement) impose high costs.³² Death row housing has been estimated to cost nearly \$100,000 more per prisoner per year.³³ Thus, legislatures might abolish death row for many reasons, financial as well as humanitarian.

The Article proceeds in three parts. Part II provides background on development of death row in America today and how it has been established primarily through administrative policy. Part III explores the nature of the death row decision and asks whether death row is necessary for incapacitation, rehabilitation, retribution, or deterrence.³⁴ The Article concludes that only retribution and deterrence are plausible reasons for retaining death row. Part IV contends that because only punishment purposes possibly can justify death row, legislatures have the sole legal and democratic authority to establish or retain it. This Part further explains why legislatures ought not to delegate the power to establish death row to prison administrators, even if such delegation were permitted under law, because of the risk that prison administrators would retain death row for illegitimate reasons. Finally, this Part explains how courts can help ensure proper allocation of power over death row and prevent prison administrators and legislatures from exceeding their respective authorities.

The Article answers the substantive question of whether the death penalty requires death row, and the procedural question of who should decide. It reveals that death row is unnecessary for administrative reasons and can be justified only for punishment purposes. Accordingly, it concludes, death row should be abolished unless it is required by express statutory command.

II. DEATH ROW IN AMERICA

This Part offers a descriptive account of death row in the United States today. The first Section describes three important features of death row: first, the dramatic increase in the duration of death row confinement over the last

³² See ACLU, *PAYING THE PRICE FOR SOLITARY CONFINEMENT* (2015), <https://www.prisonlegalnews.org/news/publications/paying-price-solitary-confinement-aclu-factsheet-2015/> [<https://perma.cc/U55Q-AHWS>]; BOHM, *supra* note 10, at 183–84 (recounting studies of high costs of death row confinement); Lyon & Cunningham, *supra* note 16, at 26–27 (summarizing fiscal costs of death row in several states).

³³ See Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. (SPECIAL ISSUE) S41, S104 (2011).

³⁴ See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 2.03 (2d ed. 1995); see also Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1156 (1990) (“Retribution, deterrence (general and specific), rehabilitation, and incapacitation represent overlapping and antithetical perspectives on why, when, and to what degree criminals should undergo pain and suffering through punishment.”). The Article focuses on general deterrence, because of the limited relevance of specific deterrence in the death row context, see *infra* notes 115, 183.

two centuries; second, the ways in which death row entails different and worse treatment of death-sentenced inmates; and third, the ways in which state statutes and administrative policies determine the conditions of death row confinement.

A. *The Prolongation of Pre-Execution Confinement*

Prisoners condemned to death in colonial days would spend days or weeks waiting for their executions.³⁵ State statutes in the late 1800s usually required executions to be scheduled within weeks or months after sentencing.³⁶ Until fairly recently, executions followed sentencing in relatively short order. Garland writes 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.”³⁷ In 1960, the average time from sentencing to execution was two years.³⁸ Today, many prisoners spend decades on death row. The average time between sentencing and execution is fifteen-and-a-half years.³⁹

Pre-execution delays dramatically increase the relevance of death row for capital punishment. Some scholars and judges doubt that execution delays can be eliminated in light of prisoners’ expanding rights to constitutional review of their death sentences.⁴⁰ History supports that claim; both federal and state efforts to reduce pre-execution delays have failed. Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)⁴¹ to speed up the execution process and limit federal court review of state death sentences.⁴² In the year before AEDPA, the average time between sentencing and execution was just over eleven years.⁴³ Two decades later, it is more than four

³⁵ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 17 (2002); BOHM, *supra* note 10, at 2.

³⁶ See, e.g., *McElvaine v. Brush*, 142 U.S. 155, 157–58 (1891) (requiring an execution date within four to eight weeks); *Holden v. Minnesota*, 137 U.S. 483, 487 (1890) (discussing a Minnesota statute prescribing confinement “for a period of not less than one month nor more than six months”); *In re Medley*, 134 U.S. 160, 163–64 (1890) (discussing a Colorado statute requiring an execution date within two to four weeks).

³⁷ GARLAND, *supra* note 11, at 46.

³⁸ *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting) (citing *Aarons*, *supra* note 8, at 181).

³⁹ SNELL, *supra* note 9, at 14 tbl.10.

⁴⁰ *Knight v. Florida*, 528 U.S. 990, 992 (1999) (Thomas, J., concurring) (“Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence.”).

⁴¹ In relevant part, AEDPA has been codified at 28 U.S.C. §§ 2244(d) & 2254 (2012).

⁴² See *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (noting “AEDPA’s purpose to further the principles of comity, finality, and federalism” (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000))).

⁴³ TRACY L. SNELL, U.S. DEP’T OF JUSTICE, *CAPITAL PUNISHMENT* 1995, at 11 tbl.11 (Dec. 1996), <http://www.bjs.gov/content/pub/pdf/cp95.pdf> [<https://perma.cc/T2FQ-XS47>].

years longer.⁴⁴ State attempts to limit execution delays have been similarly unavailing. Florida, for example, codified the following provision shortly after Congress enacted AEDPA: “It is the intent of the Legislature to reduce delays in capital cases and to ensure that all appeals and postconviction actions in capital cases are resolved within 5 years after the date a sentence of death is imposed in the circuit court.”⁴⁵ Yet the ten persons Florida executed in the last two years had spent an average of over twenty years on death row;⁴⁶ none of them had spent less than fifteen years between sentencing and execution.⁴⁷ Even if the time from sentencing to execution decreases in the future, most prisoners sentenced to death likely will continue to spend many years on death row.

B. Current Death Row Conditions

Death row involves the segregation of death-sentenced inmates and their placement in “a separate enclosure” away from other inmates.⁴⁸ Today, almost all of the thirty-one capital punishment states⁴⁹ (as well as the federal government and the military⁵⁰) segregate their death-sentenced inmates.⁵¹ In

⁴⁴ SNELL, *supra* note 9, at 14 tbl.10.

⁴⁵ FLA. STAT. ANN. § 924.055 (West Supp. 2016).

⁴⁶ *Execution List: 1976–present*, FLA. DEP’T CORR., <http://www.dc.state.fl.us/oth/deathrow/execlist.html> [<https://perma.cc/22Q3-6Y8W>] [hereinafter FLA. *Execution List*]. Florida states that since 1979, the average age at time of offense has been 29.78 years, and the average age at time of execution has been 46.56 years, making the average time on death row since 1979 approximately 16.5 years. *Institutions: Death Row*, FLA. DEP’T OF CORR., <http://www.dc.state.fl.us/oth/deathrow/> [<https://perma.cc/R5EC-Z5KF>] [hereinafter FLA. *Death Row*].

⁴⁷ FLA. *Execution List*, *supra* note 46 (listing dates of sentencing and executions, the shortest time between which was for Juan Carlos Chavez, who was sentenced on November 23, 1998, and executed on February 12, 2014).

⁴⁸ GARLAND, *supra* note 11, at 46.

⁴⁹ Thirty-one states have crimes punishable by death. Nebraska was the thirty-second until recently. See L.B. 268, 104th Leg., 1st Sess. (Neb. 2015) (repealing the death penalty over the Governor’s veto on May 27, 2015). One additional state (New Mexico) repealed its death penalty but only prospectively, leaving inmates on death row. See *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#state> [<https://perma.cc/TN62-8K8N>]. Connecticut also abolished its death penalty only prospectively, but its partial retention of the penalty recently was found unconstitutional. See *State v. Santiago*, 122 A.3d 1, 11 (Conn. 2015).

⁵⁰ The federal government houses sixty-two prisoners on death row at the U.S. Penitentiary in Terre Haute, Indiana, which was created in 1995 as the first national death row facility in American history. See BOHM, *supra* note 10, at 105 (describing facility); *Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/federal-death-row-prisoners> [<https://perma.cc/JY7R-G6AU>] (last updated June 26, 2015). The military has six prisoners on death row, which is a “secluded corridor” in the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas (the Department of Defense’s only maximum security facility). See ARMY NEWS SERV., *Doing Time at Leavenworth*,

those jurisdictions, death-sentenced inmates are housed in a unit or tier away from noncapital prisoners, though in some states they may be housed with temporarily segregated noncapital inmates also removed from the general prison population.⁵²

Death row involves more than segregation, however. Most states impose restrictions on death-sentenced inmates that isolate them from human interactions. These restrictions come in different forms, such as isolation in a single-person cell, confinement in cells sealed with solid walls and doors to prevent communication, isolation during meals (taken alone in the cell), isolation during exercise (in a single-person pen), denial of work opportunities and group programs, denial of group religious services, and visitation restrictions including the prohibition of contact visits with family and friends. A recent investigation revealed that “[m]ost death row prisoners . . . are locked alone in small cells for 22 to 24 hours a day with little human contact or interaction; reduced or no natural light; and severe constraints on visitation, including the inability to ever touch friends or loved ones.”⁵³

Isolation and denial of privileges have been common features of death row for many years.⁵⁴ Indeed, several Supreme Court cases show that states started

ABOUT.COM (Dec. 16, 2014), <http://usmilitary.about.com/od/justicelawlegislation/a/leavenworth.htm> [<https://perma.cc/469Q-V3ZR>] (stating that six inmates are “currently on death row”); Russell Goldman, *Fort Hood Shooter Could Join 5 Others on Death Row*, ABC NEWS (Nov. 13, 2009), <http://abcnews.go.com/WN/militarys-death-row/story?id=9075282> [<https://perma.cc/ZM7B-TMXL>].

The remainder of this Article will focus on death row practices in the several *states*, because virtually all of the scholarship and empirical studies regarding death row with which this Article engages focus on the states.

⁵¹ See ASCA HOUSING POLICY SURVEY, *supra* note 14 (providing information on the segregation of inmates).

⁵² In Idaho, prison policies categorize death-sentenced inmates differently from other offenders; death-sentenced inmates are evaluated and placed in one of two kinds of restrictive housing: either administrative segregation or “close-restricted custody general population.” DIV. OF PRISONS, IDAHO DEP’T OF CORR., DIRECTIVE NO. 319.02.01.002 v3.0: OFFENDERS UNDER SENTENCE OF DEATH 07.00.00 (2016), <https://www.idoc.idaho.gov/content/policy/904> [<https://perma.cc/R8EJ-7MTK>]. In Kansas, death-sentenced inmates are separated from the general prison population and housed in administrative segregation with other segregated inmates. See Cheryl Cadue, *Capital Punishment Information*, KAN. DEP’T OF CORR., <http://www.doc.ks.gov/newsroom/capital/data> [<https://perma.cc/ZZAT-S435>] (last modified Jan. 21, 2016). Colorado and South Dakota at times may hold death-sentenced prisoners in segregation along with other prisoners who have been removed temporarily from the general population. In Colorado and South Dakota, death-sentenced inmates may be held with other inmates in administrative segregation. See ASCA HOUSING POLICY SURVEY, *supra* note 14, at 2, 6.

⁵³ ACLU, *supra* note 6, at 2; see also ASCA-LIMAN SURVEY, *supra* note 13, at 43–47; Sandra Babcock, *Death Row Conditions: State by State Comparison*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row> [<https://perma.cc/6MDS-KAW4>] (follow “Death Row Conditions” hyperlink to download spreadsheet).

⁵⁴ Although death row segregation and isolation thus are common features of capital punishment in America, changing penal perspectives are leading to some reductions in the

imposing solitary confinement on death-sentenced inmates in the late 1800s.⁵⁵ By the late 1900s, isolation of death-sentenced prisoners had become the norm. Scholars reported in 1997 that “while there is some variability in policy from state to state, death row conditions nationally are characterized by ‘rigid security, isolation, limited movement, and austere conditions.’”⁵⁶ They noted that “in 35 jurisdictions death row inmates [we]re housed in individual cells. In 18 jurisdictions these death row inmates average[d] less than an hour daily of activity outside of their cells, and in five other jurisdictions out-of-cell time [wa]s less than three hours daily. Social visitation [wa]s non-contact in 21 of 37 jurisdictions.”⁵⁷

Criminologist Robert Johnson has written that because death rows are “maintained in the same way that they were when the stay on death row prior to execution was minimal, . . . [w]hat formerly was a brief but debilitating experience has . . . become a seemingly endless and agonizing one.”⁵⁸

C. *The Allocation of Decisional Power over Death Row*

Death row has become an entrenched aspect of capital punishment that greatly augments the punishment for capital crimes. Yet in most states, death row is not mentioned in capital punishment statutes. Most legislatures have remained silent about the practice. Instead, death row has been created by prison authorities as a matter of prison policy. In his book on capital

use of solitary confinement, including for death-sentenced inmates. Prison administrators in some states have decided no longer to impose automatic solitary confinement, but instead to grant death-sentenced inmates certain privileges and incentives for good behavior. See Brief of Amici Curiae Correctional Experts in Support of Appellee at 26–27, *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015) (No. 13-8021). These changes have taken place on the prison policy level, in states where statutes do not mandate stricter treatment of the condemned. *Id.* (citing California’s two-tier classification system for death row inmates, which was adopted pursuant to a 1990 consent order; decisions by North Carolina and Colorado prison officials not to impose automatic solitary confinement on death-sentenced inmates; and a Pennsylvania prison policy allowing prisoners to have daily time for out-of-cell activities). Interestingly, even in those states that have lifted the harsh rule of solitary confinement, death-sentenced inmates usually continue to be segregated from other prisoners. See ASCA HOUSING POLICY SURVEY, *supra* note 14. This segregation preserves the existence of death row.

⁵⁵ *McElvaine v. Brush*, 142 U.S. 155 (1891); *Holden v. Minnesota*, 137 U.S. 483 (1890); *In re Medley*, 134 U.S. 160 (1890).

⁵⁶ Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 204 (2002) (quoting George Lombardi, Richard D. Sluder & Donald Wallace, *Mainstreaming Death-Sentenced Inmates: The Missouri Experience and Its Legal Significance*, 61 FED. PROB. 3, 3 (1997)).

⁵⁷ *Id.*

⁵⁸ Johnson & Carroll, *supra* note 16, at 8-3.

punishment, Garland writes that death row is “an administrative arrangement with no specific legal authority.”⁵⁹

Only a small number of states have statutes that require death row. Research for this Article has revealed four states—South Dakota,⁶⁰ Texas,⁶¹ Washington,⁶² and California⁶³—that prescribe by statute the segregation of death-sentenced inmates and thus require the creation of death row.

Some other states have legislated restrictions for death-sentenced inmates, but have not required the creation of death row. Louisiana, for example, mandates that death-sentenced inmates be held “in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution.”⁶⁴ Indiana and Mississippi statutes require death-sentenced inmates to be housed in maximum security facilities.⁶⁵ Wyoming requires death-sentenced inmates to be held in solitary

⁵⁹ GARLAND, *supra* note 11, at 46.

⁶⁰ S.D. CODIFIED LAWS § 23A-27A-31.1 (Supp. 2015) (“From the time of delivery to the penitentiary until the infliction of the punishment of death upon the defendant, unless lawfully discharged from such imprisonment, the defendant shall be segregated from other inmates at the penitentiary. No other person may be allowed access to the defendant without an order of the trial court except penitentiary staff, Department of Corrections staff, the defendant’s counsel, members of the clergy if requested by the defendant, and members of the defendant’s family. Members of the clergy and members of the defendant’s family are subject to approval by the warden before being allowed access to the defendant.”).

⁶¹ TEX. GOV’T CODE § 501.113(b) (West 2012) (requiring single occupancy cells for “inmates confined in death row segregation,” as well as other inmates, including those confined in administrative segregation). This provision was enacted as part of a bill “relating to the manner in which maximum [prison] capacity is established or increased.” H.B. 124, 72d Leg., Reg. Sess. (Tex. 1991). Accordingly, Texas death row prisoners are housed “separately in single-person cells, with each cell having a window. Death row offenders are also recreated individually. . . . Offenders on death row do not have regular TDCJ-ID numbers, but have special death row numbers.” *Death Row Facts*, TEX. DEP’T OF CRIM. JUST., http://tdci.state.tx.us/death_row/dr_facts.html [<https://perma.cc/7FE8-2VRA>].

⁶² WASH. REV. CODE ANN. § 10.95.170 (West 2012) (requiring an inmate sentenced to death to “be confined in the segregation unit, where the defendant may be confined with other prisoners not under sentence of death, but prisoners under sentence of death shall be assigned to single-person cells”).

⁶³ CAL. PENAL CODE § 3600(d) (West 2011) (establishing a separate classification system for death-sentenced inmates and referring to “condemned row [at] San Quentin State Prison”).

⁶⁴ *See, e.g.,* Compa, Kappel & Montagnes, *supra* note 14, at 313–14 (quoting LA. REV. STAT. § 15:568 (2013)) (describing how Louisiana prison officials have created a segregated death row with restrictions as severe as the conditions for inmates who are in disciplinary detention with extended lockdown).

⁶⁵ *See* IND. CODE ANN. § 35-38-6-4(a) (West 2012); MISS. CODE ANN. § 99-19-55(1) (West 2006); *see also* *Death Penalty*, IND. DEP’T CORR., <http://www.in.gov/idoc/3349.htm> [<https://perma.cc/ZK7A-HP7W>] (last updated Jan. 16, 2014) (“All offenders on Death Row are classified as maximum security and housed in single cells.”).

confinement.⁶⁶ And Delaware limits visitors to inmates in maximum security, including death-sentenced inmates.⁶⁷ Statutes in these states do not require death row, but they also do not forbid prison administrators from establishing it. And prison administrators in Wyoming, Louisiana, Indiana, Mississippi, and Delaware all have chosen, then, to create death row.⁶⁸

Similarly, in the remaining states (for which research has revealed no statute imposing special restrictions for death-sentenced prisoners⁶⁹) death row has been established by prison administrators. These states include Virginia, in which all death-sentenced inmates are held in segregation and solitary confinement under prison operating procedures.⁷⁰ (The Fourth Circuit recently

⁶⁶ WYO. STAT. ANN. § 7-13-907(a) (2015) (“The administrator of the state penal institution shall keep a person sentenced to death in solitary confinement until execution of the death penalty, except the following persons shall be allowed reasonable access to the prisoner: (i) The prisoner’s physician and lawyers; (ii) Relatives and spiritual advisers of the prisoner; and (iii) Persons involved in examining a prisoner believed to be pregnant or mentally unfit to proceed with the execution of the sentence.”).

⁶⁷ *Death Row*, DEL. DEP’T CORR., <http://www.doc.delaware.gov/deathrow/factsheet.shtml> [<https://perma.cc/K9GM-74PC>] (“Inmates in maximum security including those sentenced to the death penalty are reviewed individually for their privilege levels [with up to two visits per month].”).

⁶⁸ ASCA HOUSING POLICY SURVEY, *supra* note 14, at 2–4, 8. Death row inmates are segregated on different tiers so that they never come in physical contact with noncapital inmates and engage in no activities with one another except mental health group sessions. *Id.* at 12.

This Article refers to any separate location—whether a unit, tier, or other subsection of a prison designed to house more than one inmate—as a form of segregation from other inmates if death-sentenced inmates are housed there in a way that prevents them from intermingling with other prisoners. Thus, a prison may have an administrative segregation unit housing both death-sentenced inmates as well as noncapital inmates, but the death-sentenced inmates are “segregated” if they live in a different area of the unit from noncapital prisoners. This is a practice in some states. *See id.*

⁶⁹ This Article does not address the special measures that are used for a limited, final time to prepare prisoners and prison authorities for the execution procedure after a warrant for execution has issued. *See supra* note 14.

⁷⁰ *See* VA. DEP’T OF CORR., OPERATING PROCEDURE 830.2(IV)(D)(7) (2015) [hereinafter VA. OPERATING PROCEDURE], <http://vadoc.virginia.gov/About/procedures/documents/800/830-2.pdf> [<https://perma.cc/T86T-HSJZ>] (“Any offender sentenced to Death will be assigned directly to Death Row . . .”). Prison administrators cite two statutes for assigning prisoners directly to death row. Neither of these statutes mentions death sentences or whether death-sentenced prisoners should be treated differently from other prisoners. *See* VA. CODE ANN. § 53.1-10 (2013) (granting authority to the Director of Corrections); *id.* § 53.1-32.1(A) (requiring that the Director maintain a system of classification that “(i) evaluates all prisoners according to background, aptitude, education, and risk and (ii) based on an assessment of needs, determines appropriate program assignments including career and technical education, work activities and employment, academic activities . . . , counseling, alcohol and substance abuse treatment, and such related activities as may be necessary to assist prisoners in the successful transition to free society and gainful employment”). Interestingly, because Virginia prison administrators have drawn from the statutory focus on rehabilitation of prisoners for “transition to free

upheld Virginia's death row policy, stating that "Virginia law mandates that all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row."⁷¹ The court's statement here, however, may mislead the reader. In Virginia, as in most states, there is no *statutory* mandate to hold prisoners on death row. Death row in Virginia, as in many other states, is a matter of administrative policy.⁷²

Of the thirty-one states with capital punishment and the additional state with death-sentenced inmates,⁷³ only one—Missouri—has chosen to abolish death row and fully integrate death-sentenced prisoners with noncapital inmates in a general prison population.⁷⁴ Missouri's prison administrators did so without any statutory mandate for or against death row, after a federal court issued a consent decree requiring them to ameliorate death row conditions and

society," *id.* § 53.1-32.1(A), the negative implication is that prisoners who are destined for execution do not warrant such educational, work, and other programs. *Prieto v. Clarke*, No. 1:12-CV-1199, 2013 WL 6019215, at *8 (E.D. Va. Nov. 12, 2013) ("The VDOC's policy toward death row inmates largely rests on two fundamental assumptions: first, that these inmates inherently present a greater risk to prison safety because they 'have nothing to lose,' and second, that they are less deserving of limited prison resources because they will never reenter society."), *rev'd on other grounds*, 780 F.3d 245 (4th Cir. 2015).

⁷¹ *Prieto v. Clarke*, 780 F.3d 245, 254 (4th Cir. 2015) (emphasis added). The court may have perpetuated the confusion in a subsequent decision, in which it addressed the liberty interests of prisoners who are "*sentenced to confinement in the general prison population*," *Incumaa v. Stirling*, 791 F.3d 517, 527 (4th Cir. 2015) (emphasis added), for prison administrators, not *sentencing* authorities, determine the placement of prisoners. *See* VA. CODE ANN. § 53.1-10 (granting authority to the Director of Corrections); *id.* § 53.1-32.1(A) (making the Director responsible for establishing a system of prisoner classification).

⁷² In the absence of statutory requirements, the segregation and isolation of death-sentenced prisoners result from administrative choices. Some states publish their policies. *See supra* note 70; *see also, e.g.*, OR. ADMIN. R. 291-093-0005(3) (2013), http://arcweb.sos.state.or.us/pages/rules/oars_200/oar_291/291_093.html [<https://perma.cc/7XVX-U3L2>] ("Policy: It is the policy of the Department of Corrections to assign inmates with a sentence of death to the Death Row Housing Unit or to a Death Row status cell."). In California, the legislature has specified only that death-sentenced inmates be sent to the prison where executions will take place—California State Prison at San Quentin. *See* CAL. PENAL CODE §§ 3600(a), 3602, 3603 (West 2011). Death-sentenced men go there directly; death-sentenced women live in the Central California Women's Facility until the end of their appeals. *See id.* §§ 3601, 3602. In contrast, in Virginia, at least one of the prison regulations governing death row confinement is not available on the Department of Corrections website and was filed under seal when challenged recently in litigation. *See* E-mail from Michael Bern, Assoc., Latham & Watkins LLP (and counsel to Alfred Prieto), to Marah Stith McLeod, Assoc. in Law, Columbia Law Sch. (July 1, 2015, 21:31 EST) (on file with author).

⁷³ New Mexico has abolished the death penalty only prospectively, and therefore still holds prisoners under a sentence of death. *See Death Row Inmates by State, supra* note 49.

⁷⁴ *See infra* note 100 and accompanying text. Note that Maryland also mainstreamed its few remaining death-sentenced inmates after abolition of the death penalty, but those inmates received commutations of their death sentences, and therefore Maryland no longer has any death-sentenced inmate in its custody.

to establish different custody levels for death-sentenced inmates.⁷⁵ In all other capital punishment states, death-sentenced prisoners remain segregated as they await execution.

Thus, death row accompanies the death penalty in nearly every capital punishment state. Though a few state statutes require death row, in most states prison administrators simply have retained it under their operating regulations. It is remarkable that, in these states, prison administrators on their own have established what scholars and courts increasingly recognize to be an “added punishment”⁷⁶ and even “*the punishment*”⁷⁷ for prisoners sentenced to death.

The next Part of this Article will show that despite its widespread use, death row is not an inevitable part of the death penalty. Instead, death row requires a choice—a normative choice about what punishment is just. Understanding the normative nature of the decision to establish death row points to the final claim of this Article, made in Part IV: that legislatures, not prison administrators, should decide whether to retain death row.

III. ARGUMENTS FOR AND AGAINST DEATH ROW

This Article has offered a brief account of the origins, prevalence, and legal authority for death row. This Part will ask whether death row is necessary, highlighting arguments for and against death row based on the four traditional purposes of punishment. Whether to retain death row turns out to be a primarily normative question, one that requires balancing the purposes and harms of criminal punishment.

A. *Is Death Row Necessary to Incapacitate the Condemned?*

Death row scholars have attributed death row conditions to “assumptions that the nature of capital offenses renders death-sentenced inmates more likely to assault and injure correctional personnel and other inmates in prison, and

⁷⁵ See George Lombardi, Richard D. Sluder & Donald Wallace, *The Management of Death-Sentenced Inmates: Issues, Realities, and Innovative Strategies* 7–8 (Mar. 1996) (unpublished manuscript), <https://doc.mo.gov/Documents/DeathSentencedInmates.pdf> [<https://perma.cc/9JK7-KAB2>] (a paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences, Las Vegas, Nevada). A thirty-five-year veteran of Missouri’s Department of Corrections, George Lombardi has served as Director since 2008. Lombardi has written about the harsh conditions of death row prior to abolition. See *id.* at 8 (“[Previously] condemned prisoners in Missouri were housed on ‘death row’ . . . [in] a below-ground unit . . . completely segregated from the general inmate population. With restrictions on movement and limited access to programs, conditions of confinement for death row inmates mirrored those found in other states. Death row inmates did not leave their housing unit. All services, including medical, recreation, food and legal materials, were brought to condemned prisoners. Inmates were permitted one hour of outside exercise each day in a small, fenced area by the unit.”).

⁷⁶ *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

⁷⁷ GARLAND, *supra* note 11, at 46 (emphasis added).

that this risk is amplified by their having ‘nothing to lose.’”⁷⁸ In her work on prison conditions, Mona Lynch has described how these assumptions have led some states to place death-sentenced inmates into the harsh and extremely isolating conditions of “supermax” confinement. She writes that “[p]enal administrators justify the use of Supermax as necessary to maintain internal security [for those] inmates who are defined as ‘the worst of the worst.’”⁷⁹

Some death-sentenced inmates have been found to pose a risk of future dangerousness by the sentencing jury. Two states, Texas and Oregon, allow the penalty of death only if the jury has made a finding of future dangerousness. There, the state must prove to the jury beyond a reasonable doubt that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”⁸⁰ In another state, Virginia, the jury must make either a dangerousness finding, or alternatively find beyond a reasonable doubt that the crime committed was “outrageously or wantonly vile, horrible or inhuman.”⁸¹ Numerous other states

⁷⁸ Lyon & Cunningham, *supra* note 16, at 2 (quoting James Flateau, spokesman for the New York State Department of Correctional Services) (citing William Glaberson, *On a Reinvented Death Row, the Prisoners Can Only Wait*, N.Y. TIMES (June 4, 2002), <http://www.nytimes.com/2002/06/04/nyregion/on-a-reinvented-death-row-the-prisoners-can-only-wait.html?pagewanted=all> [<https://perma.cc/UQ4Y-QFZH>]); *see also* Joint Appendix at 639, *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015) (No. 13–8021) (deposition of Virginia Director of Corrections Harold Clarke) (stating that death row prisoners are segregated because “we see those individuals as potentially the most desperate of all the offenders. Again, they have been sentenced to die. They have nothing to lose. They don’t even look forward to a life in prison in which they can improve themselves, change their ways, help other individuals for the rest of their life until they die of natural causes. They have been sentenced to die and as soon as the appeal process is completed, a date is set, that sentence will carry out.”).

⁷⁹ Lynch, *supra* note 6, at 68.

⁸⁰ OR. REV. STAT. § 163.150(B) (2007); TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2006).

⁸¹ Virginia law sets forth the requirements as follows:

Conditions for imposition of death sentence.

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

VA. CODE ANN. § 19.2-264.2 (2015). Other states also authorize death sentences to be based on findings of dangerousness and research suggests that dangerousness considerations drive many capital determinations. *See, e.g.*, Jonathan R. Sorensen & Rocky

allow dangerousness findings to be used as an aggravating factor in capital sentencing.⁸²

Assessments of future dangerousness to society in death sentencing have been attacked as inaccurate, unjust, and perhaps not even relevant where the alternative to a death sentence is life without parole (dangerousness to society having begun to be considered at a time when the alternative to a death sentence was a parole-eligible term).⁸³ Despite their claimed inaccuracy, unfairness, and possible irrelevance, however, such future dangerousness findings continue to be cited not only to support death sentences but to support death row conditions. Indeed, prison officials in Virginia recently argued that death-sentenced inmates categorically warrant stricter conditions of confinement because their sentences are based on findings that they either would commit violent crimes again or that their crimes were particularly vile.⁸⁴

Several notable escapes from death row have contributed to the belief that death-sentenced inmates are particularly dangerous and hard to control. In his historical study of capital punishment in the United States, Robert Bohm recounts several well-publicized escapes of death row inmates over the last fifty years:⁸⁵ A woman, Marie Arrington, escaped from Florida's death row in 1969; six inmates escaped from Oklahoma's death row in 1972; four inmates escaped from Georgia's death row in 1980; six inmates escaped from Virginia's death row in 1984; six inmates attempted (and one succeeded in) an escape from Texas's Huntsville prison in 1998; and another death row inmate escaped from a county jail in Houston in 2005 after attending a resentencing.⁸⁶

L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1252–53 (2000).

⁸² See Aletha M. Claussen-Schulz, Marc W. Pearce & Robert F. Schopp, *Dangerousness, Risk Assessment, and Capital Sentencing*, 10 PSYCHOL. PUB. POL'Y & L. 471, 479 (2004). These states include Missouri. See *State v. Deck*, 303 S.W.3d 527, 543–44 (Mo. 2010) (allowing prosecutors to argue future dangerousness as a non-statutory aggravating factor).

⁸³ See, e.g., John F. Edens, Jacqueline K. Buffington-Vollum, Andrea Keilen, Phillip Roskamp, & Christine Anthony, *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?"*, 29 L. & HUM. BEHAV. 55, 58 (2005); see also Mark D. Cunningham & Thomas J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 BEHAV. SCI. & L. 71, 71–72 (1998). Future dangerousness not only is difficult to predict, but predictions may be based on unrealistic consideration of whether a guilty defendant would kill if released rather than whether he would kill if kept in prison. On that topic, a recent article exposed how Virginia does not allow the jury to hear evidence regarding the effect of prison conditions on future dangerousness. See Andrew Lindsey, *Death by Irrelevance: The Unconstitutionality of Virginia's Continued Exclusion of Prison Conditions Evidence to Assess the Future Dangerousness of Capital Defendants*, 22 WM. & MARY BILL RTS. J. 1257 (2014).

⁸⁴ Opening Brief of Defendants-Appellants at 54–56, *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015) (No. 13-8021); see *supra* note 81 and accompanying text (citing statute).

⁸⁵ BOHM, *supra* note 10, at 177–78.

⁸⁶ *Id.*

These escapes caused great alarm, fueled by disturbing media reports.⁸⁷ In Virginia, the Mecklenberg prison became renowned for the death row escape debacle.⁸⁸ The escape led to a bevy of investigations, which resulted in recommendations for better prison organization and morale through measures that included “increased job, recreational and educational opportunities for inmates.”⁸⁹ Ultimately, however, Virginia prison officials chose to eliminate opportunities for death-sentenced inmates, rather than to enhance them to encourage good behavior: Death row was transferred to Sussex I State Prison, where death-sentenced prisoners now live in solitary confinement.⁹⁰ Virginia correctional officials have cited the 1984 escape incident to explain why the current death row strictures are necessary.⁹¹

Despite the alarm generated by these escapes, however, the risk of escape offers only a weak reason for condemning death-sentenced prisoners categorically to harsher confinement. Though escapes by death-sentenced prisoners may generate publicity,⁹² research for this Article has found no study or claim asserting that death-sentenced prisoners attempt to escape at higher rates than other murderers sentenced to lesser penalties, or that death-sentenced prisoners are more likely than such other murderers to commit violence during an escape.⁹³ Indeed, the escapes of death-sentenced prisoners

⁸⁷ See *id.* at 204 (citing news coverage).

⁸⁸ When authorities decided to close the prison many years later, news articles focused on this aspect of its history. See, e.g., *McDonnell Orders Mecklenburg Correctional Center Closed*, RICHMOND TIMES-DISPATCH (Dec. 13, 2011), http://www.richmond.com/archive/article_7d15ef34-b4b3-5b72-87a0-3d4a6767b563.html [<https://perma.cc/U3TT-NWS4>] (“About 300 people work at the Southside Virginia prison, which in 1984 was the site of the nation’s largest death row escape . . .”).

⁸⁹ DARYL CUMBER DANCE, *LONG GONE: THE MECKLENBURG SIX AND THE THEME OF ESCAPE IN BLACK FOLKLORE* 98 (1987).

⁹⁰ See *Prieto v. Clarke*, 780 F.3d 245, 247 (4th Cir. 2015) (noting that all death-sentenced inmates in Virginia are “housed in the same portion of Sussex I, known widely as Virginia’s ‘death row.’”); *id.* at 253–54 (rejecting death row inmate’s due process claim for a right to housing in non-solitary confinement). Recent reports suggest that prison administrators have ameliorated death row conditions in Virginia, apparently in order to stave off further litigation. See Alanna Durkin, *Virginia Quietly Grants Death Row Inmates New Privileges*, ASSOCIATED PRESS (Oct. 16, 2015), <http://bigstory.ap.org/article/24129250f1b74fefb1c4d4921f3aa199/virginia-quietly-grants-death-row-inmates-new-privileges> [<https://perma.cc/3QJD-CQRF>].

⁹¹ Opening Brief of Defendants-Appellants, *supra* note 84, at 15–16 (“Director Clarke explained his concern that permitting death-row offenders to congregate with other prisoners would pose an unacceptable safety risk. He described an incident in the 1980s in which death-row inmates who *had* been permitted to congregate at the maximum security prison in Mecklenberg ‘staged a mass escape,’ an incident that ‘could have been catastrophic’ had they not been apprehended.” (quoting Joint Appendix at 643)).

⁹² See BOHM, *supra* note 10, at 177–78 (recounting the history of death row escapes).

⁹³ Bohm does not offer comparative evidence, unfortunately, between rates of escape by death-sentenced inmates and noncapital inmates (such as LWOP or life inmates). See *id.*

Studies have found that, generally speaking, only a small fraction of prison escapes lead to injuries to staff. See, e.g., Richard F. Culp, *Frequency and Characteristics of Prison*

over the years have not resulted in the death of any third party.⁹⁴ All were recaptured, except for two who died before being found.⁹⁵ With regard to the risk of death row escapes, an event that occurred in 2004 in Arkansas is telling. For three minutes, all the death row cell doors were accidentally unlocked.⁹⁶ Though apparently aware, no death row inmate left his cell.⁹⁷ Quoted in a news report after the incident, the spokeswoman for the Arkansas prison system recounted: “[The prisoners] sat there. They didn’t move. . . . [T]he death row inmates are the best behaved inmates in prison.”⁹⁸ In other words, the data we have suggests, at the very least, that not every prisoner sentenced to death is a prisoner likely to escape or commit violence in the future.⁹⁹ The claimed risk of escape by capital inmates is simply insufficient to warrant subjecting every death-sentenced inmate automatically to the harshness of permanent isolation.

More importantly, recent and ongoing evidence further undercuts the general assumption that death-sentenced inmates will always be exceptionally dangerous. The best evidence comes from the Missouri prison system, which

Escapes in the United States: An Analysis of National Data, 85 PRISON J. 270, 285, 287 (2005) (describing a study of news reports regarding escapes over a two-year period in which “[e]scapes used violence against prison staff in only . . . 8.3% of the escapes,” “none of the incidents resulted in life-threatening injuries,” and “all of the escaped prisoners involved . . . were subsequently captured, most within a few days of the escape”). Unfortunately, studies offer little means to compare rates of escape by prisoners sentenced to terms of years and death-sentenced prisoners. Indeed, some studies code death sentences as terms of years. *See, e.g.*, Bryce E. Peterson, *Inmate-, Incident-, and Facility-Level Factors Associated with Escapes from Custody and Violent Outcomes* 105 n.24 (Feb. 1, 2015) (unpublished Ph.D. dissertation, City University of New York), http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1605&context=gc_etds [<https://perma.cc/GVP2-FQ83>].

⁹⁴ BOHM, *supra* note 10, at 178.

⁹⁵ *Id.* (describing the recapture of all escapees but two who were found dead). The bodies of the two who died were found within a week of their escapes; one was found beaten to death and the other had apparently drowned (in a separate incident). *Id.*

⁹⁶ *Death-Row Cells Are Unlocked by Accident*, L.A. TIMES (Jan. 30, 2004), <http://articles.latimes.com/2004/jan/30/nation/na-briefs30.1> [<https://perma.cc/3T7R-D4J4>].

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting Dina Tyler, spokeswoman for the Arkansas prison system).

⁹⁹ There may be reasons why death-sentenced inmates might not be more likely to escape or more likely to commit violence, as a category, than murderers sentenced to lesser terms. As an initial matter, though death row prisoners often are treated as a unique category, their crimes do not necessarily set them apart from all other prisoners. Other inmates may have committed capital crimes, but had prosecutors who did not pursue the death penalty, avoided the death penalty through plea bargains, or faced juries that exercised mercy. Death-sentenced prisoners, moreover, may be older on average. In 2013, death-sentenced prisoners had a mean age of forty-seven and a median age of forty-six. *See* SNELL, *supra* note 9, at 10 tbl.5. In contrast, that same year less than thirty percent of all state and federal prisoners, including noncapital prisoners, were over forty-four years old. *See* E. ANN CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013, at 8 tbl.7 (Sept. 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/Q8F7-7D9A>].

abolished death row and integrated its death-sentenced inmates with noncapital inmates at its maximum security Potosi Correctional Center over twenty years ago.¹⁰⁰ Rather than automatically sending every death-sentenced prisoner into high-security segregation on death row, Missouri prison officials began to evaluate each prisoner individually for risk of institutional violence and to determine a custody level accordingly.¹⁰¹ For the first time, evidence of likely institutional behavior (including a variety of factors such as psychological traits and past prison behavior), rather than the mere fact of a death sentence, mattered for placement in segregation.¹⁰²

As a result of the integration, within just over a decade eighty-four percent of the death-sentenced inmates in the Missouri prison system (then sixty-two prisoners) had been placed in some form of general population housing, including twenty-one percent who were placed in the “honor dorm” reserved for exceptionally well-behaved inmates.¹⁰³ Prisoners in the honor dorm remained out of their cells at all times except during roll call.¹⁰⁴ Only five percent of the death-sentenced prisoners had required segregated confinement due to the risks they posed to others or for disciplinary reasons.¹⁰⁵ The abolition of death row greatly improved life for death-sentenced prisoners, and—according to the current Director of the Missouri Department of Corrections, George Lombardi—also improved the “general climate and environment of the institution.”¹⁰⁶

When studying reports from the Missouri Department of Corrections eleven years after mainstreaming, forensic psychologists Mark Cunningham and Thomas Reidy, assisted by criminal justice professor Jon Sorensen, made several surprising discoveries.¹⁰⁷ They found that the mainstreamed death-sentenced inmates were significantly less likely to commit violent misconduct than prisoners sentenced to a term of years in the same facility.¹⁰⁸ Indeed, the rate of violent misconduct for death-sentenced inmates (and also for prisoners sentenced to life without parole (LWOP)) was only *one-fifth* of the rate of violent misconduct among parole-eligible inmates at the same facility.¹⁰⁹

Even after accounting for predictor variables such as age and education, the findings were remarkable: “Controlling for all of these predictor

¹⁰⁰ For the history of Missouri’s abolition of death row, see generally Lombardi, Sluder & Wallace, *supra* note 56.

¹⁰¹ See Cunningham, Reidy & Sorensen, *supra* note 22, at 311.

¹⁰² See *id.* at 310–11.

¹⁰³ *Id.* at 316 (recounting this information based on a personal communication with Don Roper, then the superintendent of Potosi Correctional Center).

¹⁰⁴ *Id.* at 311.

¹⁰⁵ *Id.* at 312.

¹⁰⁶ Lombardi, Sluder & Wallace, *supra* note 56, at 7.

¹⁰⁷ Cunningham, Reidy & Sorensen, *supra* note 22. Mark Cunningham has advised this author in a personal telephone conversation on March 3, 2015, that he is conducting a follow-up study that will update the results of his study of the Missouri experience.

¹⁰⁸ *Id.* at 315.

¹⁰⁹ *Id.* at 316.

variables . . . death-sentenced and LWOP inmates were half as likely to engage in violent misconduct as term-sentenced inmates housed under similar conditions of confinement at [Potosi Correctional Center].”¹¹⁰ Furthermore, none of the death-sentenced inmates attempted to escape during the study period, and Cunningham has heard of no subsequent escape attempt by a death-sentenced inmate in Missouri.¹¹¹

The fact that both LWOP and death-sentenced inmates “were significantly less likely than parole eligible inmates to be involved in violent misconduct”¹¹² bears attention. For LWOP inmates, like death-sentenced inmates, have little hope of release.¹¹³ The evidence from Missouri thus unsettles the claim that such prisoners categorically pose higher risks and therefore must be confined more strictly.

At least two factors may explain why mainstreamed death-sentenced inmates would commit relatively low rates of misconduct. The first reason is that these inmates acquire something to lose when they are given more privileges.¹¹⁴ When death-sentenced inmates are not automatically and categorically segregated and isolated on death row, the threat of segregation and isolation may be used to deter them from misconduct, just as this threat deters noncapital prisoners from prison misconduct. This would explain why Missouri’s mainstreamed inmates committed relatively low levels of violent misconduct. It might also explain why they did not attempt to escape, for if recaptured they faced return to solitary confinement as a consequence.¹¹⁵

A second reason may help explain why death-sentenced inmates in the Missouri study committed *less* violent misconduct than inmates with lower sentences: Death-sentenced inmates may view prison differently because they expect to be there for the rest of their lives. They may see the importance of establishing a good reputation and good rapport with prison officials more

¹¹⁰ *Id.*

¹¹¹ *Id.* Cunningham stated to this author in February 2015 that to date, his research has revealed no attempts to escape by the death-sentenced inmates who were mainstreamed in Missouri.

¹¹² *See id.* at 313.

¹¹³ *See* BOHM, *supra* note 10, at 181 (describing how LWOP and death-sentenced inmates may be seen to have little to lose because both have no hope of release).

¹¹⁴ Lombardi, Sluder & Wallace, *supra* note 56, at 7.

¹¹⁵ The mainstreamed prisoners’ temporary experience of life in isolation on death row may have had a specific deterrent effect, for it gave them a personal understanding of the hardship of isolated confinement—to which they might be returned based on misconduct. *See infra* note 183. (discussing whether temporary placement on death row might serve specific deterrence purposes). An updated study of the conduct of Missouri death-sentenced inmates would lend insight into whether prisoners’ former placement on death row has had a specific deterrent effect on them. Mark Cunningham has indicated to the author that he plans to conduct such a study. No reports to date suggest that violence among death-sentenced prisoners in Missouri has increased. And the Director of Corrections continues to post prominently on his state website his article lauding the positive effects of abolishing death row in Missouri. *See Office of the Director, MO. DEP’T CORR.*, <https://doc.mo.gov/OD/> [<https://perma.cc/T7G9-AEGH>].

than inmates who expect to spend a shorter time in prison.¹¹⁶ They may recognize that the loss of even small privileges, such as contact visits with family and increased time for recreation, may affect dramatically their quality of life over the long term. This long-term view could explain why death-sentenced and LWOP inmates would commit less violent misconduct than parole-eligible inmates, and why LWOP inmates would commit the least violence of all.¹¹⁷

The mainstreaming experience in Missouri offers strong empirical support for the claim that not all death-sentenced inmates pose a higher risk of prison violence.¹¹⁸ Earlier studies bolster that account, though they did not study prisoner conduct after abolition of death row. Some studies revealed relatively low rates of violence for inmates who were still on death row.¹¹⁹ Other studies found relatively low rates of violence of former death row inmates who, after their death sentences were vacated, were incarcerated in the general population.¹²⁰ The Missouri study also accords with broader studies of recidivism, which show that a crime of conviction is a poor predictor of

¹¹⁶ Timothy Flanagan's extensive studies have documented this explanation for the behavior of long-term inmates. See Timothy J. Flanagan, *Long-Term Incarceration: Issues of Science, Policy and Correctional Practice*, in LONG-TERM IMPRISONMENT: POLICY, SCIENCE, AND CORRECTIONAL PRACTICE 3, 5 (Timothy J. Flanagan ed., 1995).

¹¹⁷ Cunningham, Reidy & Sorensen, *supra* note 22, at 313. Furthermore, the possibility of enhancing the likelihood of post-conviction relief might also motivate death-sentenced inmates toward good behavior. A federal court recently noted, in rejecting the claim that death-sentenced inmates have "nothing to lose": "Death row inmates have obvious incentives to behave well and take rehabilitation seriously, including the possibility that new forensic evidence might undercut a conviction, a habeas petition might be granted, or that good behavior might improve the prospects of a commuted sentence." *Prieto v. Clarke*, No. 1:12-CV-1199, 2013 WL 6019215, at *8 (E.D. Va. Nov. 12, 2013), *rev'd on other grounds*, 780 F.3d 245 (4th Cir. 2015).

¹¹⁸ No evidence suggests that Missouri's corrections facility or death-sentenced prisoners are so different as to make this evidence inapplicable elsewhere. Nor does the Cunningham study of the Missouri experience suggest that good behavior was simply the immediate result of the transition and due to the inmate's recent experience with the suffering of death row (segregation to which they would not want to be returned for committing acts of prison violence). See Cunningham, Reidy & Sorensen, *supra* note 22.

¹¹⁹ See, e.g., 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). Such studies offered important information, but could not exclude the possibility that violence had been suppressed by death row confinement measures.

¹²⁰ See, e.g., Thomas J. Reidy, Mark D. Cunningham & Jon R. Sorensen, *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62, 70 (2001); see also Sorensen & Wrinkle, *supra* note 119, at 542. These studies avoided the problem of security effects, and provided important insights indicating that most capital offenders did not pose special risks of violence. But they could not foreclose the possibility that death row prisoners became less dangerous because they no longer faced execution or remembered and wanted to avoid being placed in segregated confinement again.

violence in prison. Specifically, 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.”¹²¹ 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.”¹²² Furthermore, studies have shown that the risk of violence by prisoners decreases significantly as they age.¹²³ Many death row prisoners are quite old; a recent government report counted over 350 death row inmates aged sixty or older.¹²⁴ In the last decades, hundreds have died awaiting execution.¹²⁵ As death-sentenced prisoners age in the many years leading up to execution, their permanent isolation on death row becomes less and less justified for security reasons. An accumulating body of evidence thus supports the claim that death-sentenced inmates do not pose exceptional security threats as a categorical matter.

This growing evidence has undercut the dangerousness rationale for death row. 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.¹²⁶

¹²¹ Jon Sorensen & Mark D. Cunningham, *Conviction Offense and Prison Violence: A Comparative Study of Murderers and Other Offenders*, 56 CRIME & DELINQ. 103, 123 (2010). Perhaps, one might argue, death-sentenced inmates commit *even less* violence if they are kept in isolation on segregated death rows. Some researchers suggest otherwise—arguing that the isolation can catalyze violence. The United Kingdom’s Chief Inspector of Prisons found that the use of solitary confinement was causing inmates to become more violent. See Alan Travis, *Solitary ‘Makes Dangerous Inmates Worse,’* GUARDIAN (Mar. 21, 2000), <http://www.theguardian.com/uk/2000/mar/22/alantravis> [<https://perma.cc/X57N-L9RQ>]. In any case, the argument for *less* misconduct would justify stricter security measures for other, noncapital prisoners as well. The question remains: why create death row?

¹²² Sorensen & Pilgrim, *supra* note 81, at 1254. The recidivism question seems important. Jonathan Sorensen has argued that “both correctional administrators and inmates agree that murderers are generally among the most docile and trustworthy inmates in the institution.” *Id.* at 1256. With regard to death-sentenced inmates, he notes that death row inmates whose penalties were commuted after *Furman* had a low rate of recidivism. See *id.* at 1255.

¹²³ See, e.g., CARLYNE L. KUJATH, DAN PACHOLKE, DAVE DANIELS & BRUCE STEGNER, WASH. STATE DEP’T OF CORR., PRISON VIOLENCE: PRELIMINARY STUDY 2 (Oct. 2009) (“Analyses indicated a negative relationship between age and violent behavior (e.g., as age increased, the number of violent infractions decreased). This suggests that older offenders are less likely than younger offenders, to be violent.”), <http://www.doc.wa.gov/aboutdoc/measuresstatistics/docs/PrisonViolence2009.pdf> [<https://perma.cc/9QEZ-M6M5>].

¹²⁴ See SNELL, *supra* note 9, at 21 app. tbl.1.

¹²⁵ See *supra* note 11.

¹²⁶ The district court in the Virginia death row case mentioned above reached this conclusion, finding that the Virginia prison administrators’ concerns for security could be adequately addressed through individual assessments of death-sentenced inmates for dangerousness. See *Prieto v. Clarke*, No. 1:12-CV-1199, 2013 WL 6019215, at *11 (E.D. Va. Nov. 12, 2013) (“[D]efendants could provide plaintiff with an individualized

But it is not yet clear that death row serves no legitimate penological purpose. For *other* traditional punishment purposes—rehabilitation, retribution, and deterrence—still might be served by death row.¹²⁷ Without considering these other purposes of punishment, one cannot conclude that death row has no legitimate place in capital punishment. The Article now will turn to whether death row may serve the aim of rehabilitation.

B. *Is Death Row Necessary to Rehabilitate the Condemned?*

Historically, states hoped that pre-execution confinement would facilitate rehabilitation of the offender. In colonial days, executions were delayed intentionally for up to a few weeks to enable death-sentenced inmates to meditate on their crimes and potential damnation, and with the help of visits from clergy, to express remorse and repent.¹²⁸ Pre-execution confinement thus

classification determination using procedures that are the same or substantially similar to the procedures used for all non-capital offenders, as plaintiff requests.”), *rev’d on other grounds*, 780 F.3d 245 (4th Cir. 2015). While the decision of the district court recently was reversed, that aspect of the decision was not rejected. *See Prieto v. Clarke*, 780 F.3d 245, 251 (4th Cir. 2015) (holding that the prisoner did not have a liberty interest triggering a right to procedural review before confinement on death row).

As a group of corrections experts recently argued in the *Prieto* case, moreover, individual assessments rather than automatic and permanent isolation are a sufficient and effective method to preserve prison security. *See* Brief of Amici Curiae Correctional Experts in Support of Appellee, *supra* note 54, at 3 (“*Amici* have first-hand experience in safely managing death-sentenced and other maximum-security populations. . . . It is *amici’s* view that the Virginia Department of Corrections policy of automatically and permanently placing death-sentenced prisoners in solitary confinement is a violation of prisoners’ due process rights and serves no correctional purpose.”). The amicus brief cited evidence from Missouri as well as other studies on the comparative non-dangerousness of capital inmates. *See id.* at 23–28. The state had opposed vigorously the consideration of this amicus brief. *See* Commonwealth’s Opposition to Correctional Experts’ Motion to File Amicus Brief, *Prieto*, 780 F.3d 245 (No. 13-8021). But, in testimony, even the Virginia prison director conceded that some death-sentenced inmates do not pose a higher risk than noncapital inmates. *See* Opening Brief for Plaintiff-Appellee at 54–55, *Prieto*, 780 F.3d 245 (No. 13-8021) (“In fact, however, Director Clarke himself expressly agreed that there are ‘individuals within death row who are less of a security risk than particular individuals in the general population.’” (quoting Joint Appendix at 657)). Based on such evidence, the district court concluded that prison administrators’ policy of automatically placing all death-sentenced inmates in solitary confinement on death row was based on unsupported “assumptions” about the dangerousness of death-sentenced inmates and “further[ed] few, if any, legitimate penological goals.” *Prieto*, 2013 WL 6019215, at *8.

¹²⁷In his history of the death penalty, Banner notes that capital punishment enjoyed widespread support in the seventeenth and eighteenth centuries for three main purposes: deterrence, retribution, and penitence. *See* BANNER, *supra* note 35, at 23.

¹²⁸BOHM, *supra* note 10, at 2. Banner also recounts that in the seventeenth and eighteenth centuries, “[t]he condemned person was normally allowed at least a week or two, and often several weeks, to get ready to die.” BANNER, *supra* note 35, at 17. Though execution delay “attenuat[ed] the link between the crime and the punishment” and created a risk of escape, “governments continued to allow sufficient time for repentance” and

was designed to rehabilitate the soul of the offender. This purpose of pre-execution confinement can be seen in the words of Massachusetts Chief Justice Lemuel Shaw in 1839, when he warned a defendant he was sentencing to death to use his remaining time in preparation for “the great change that awaits you.”¹²⁹

Some remnants of the historical aim of rehabilitation appear in current death row policy, despite the fact that secular aims largely have displaced religious purposes in American penal policy.¹³⁰ Some statutes still expressly provide for visitation by clergy to death row inmates.¹³¹ And some prison administrators have sought to make death row an environment that draws inmates’ thoughts toward God.¹³² Literature and books have depicted famous religious conversions on death row.¹³³

provided for a “steady stream of ministers” to visit the inmates and encourage their conversation and penitence. *See id.* at 17–19.

¹²⁹ LEMUEL SHAW, REMARKS OF CHIEF JUSTICE SHAW WHEN PASSING SENTENCE OF DEATH UPON NATHAN SMITH, FOR THE CRIME OF MURDER, JUNE 7, 1839, at 6 (1839). Note that one might also see retributive goals to be served by penitence; Michael Simons has written that “repentance exacts a punishment from the defendant.” Michael A. Simons, *Born Again on Death Row: Retribution, Remorse, and Religion*, 43 CATH. LAW. 311, 331 (2004).

¹³⁰ *Cf.* BOHM, *supra* note 10, at 3 (“Penitence is no longer an ostensible goal of capital punishment. . . . In addition, with the current separation of church and state, religion no longer has the influence in secular affairs as it did during colonial times.”).

¹³¹ *See, e.g.*, S.D. CODIFIED LAWS § 23A-27A-31.1 (Supp. 2015) (barring access to the prisoner by anyone except correctional staff, “the defendant’s counsel, members of the clergy if requested by the defendant, and members of the defendant’s family”); TEX. CODE CRIM. PROC. ANN. art. 43.17 (West 2006) (barring all persons outside the prison from access to a death-sentenced inmate “except his or her physician, lawyer, and clergyperson, . . . and the relatives and friends of the condemned person”); WYO. STAT. ANN. § 7-13-907(a) (2015) (requiring death-sentenced inmates to be held in solitary confinement but allowing certain visitation including by “spiritual advisers of the prisoner”).

¹³² *See* Michael J. Osofsky, Albert Bandura & Philip G. Zimbardo, *The Role of Moral Disengagement in the Execution Process*, 29 L. & HUM. BEHAV. 371, 377 (2005) (describing one of the penitentiaries studied as focused strongly on directing death row inmates toward religious development through means including religious counseling and religious art).

¹³³ *See, e.g.*, HELEN PREJEAN, DEAD MAN WALKING: THE EYEWITNESS ACCOUNT OF THE DEATH PENALTY THAT SPARKED A NATIONAL DEBATE 244 (1994); DEAD MAN WALKING (PolyGram Films 1995).

Some scholars have argued that newfound faith on death row may be a reason to conclude that a death-sentenced inmate should not be executed after all, either because he is no longer deserving of death or because he is no longer too dangerous to keep alive. *See, e.g.*, Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1633 (1998) (“In short, if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death.”); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, in THE PASSIONS OF LAW 168, 171 (Susan A. Bandes ed., 1999) (citing *Dead Man Walking* to show how remorse impacts

The historical rehabilitative purpose of pre-execution confinement, however, now offers little reason for death row. Pre-execution confinement lasts far too long to provide the temporal pressure that historically was seen to foster repentance. In 1839, New York minister John McLeod explained the importance of a *short* period of pre-execution confinement:

May we not fairly reason from what we know of the nature of the mind, and the deceitfulness of sin, that the criminal will be more likely to give all the energies of his mind to the work of preparation for meeting his God, when he knows that his days are numbered, than when they appear to him to be lengthened out indefinitely?¹³⁴

Today, prisoners who are executed spend an average of a decade and a half on death row—and most prisoners sentenced to death are not executed at all.¹³⁵ The religiously oriented purpose of pre-execution confinement would seem at most to justify special prison conditions designed to focus the prisoner on his eternal fate for the limited period immediately preceding his execution.¹³⁶

One scholar has suggested an alternative, secular rehabilitative purpose for the segregated confinement of death-sentenced prisoners. Criminologist Robert Johnson has argued for a “humane death row,” where death-sentenced inmates receive *more* caring treatment than other inmates. He contends that prisons should provide a special type of confinement for death-sentenced inmates that would mitigate the psychological and physical harms of pre-execution delay and prepare them for a dignified death. He argues that death-sentenced inmates are “persons in the process of dying at the hands of the state, a class of individuals analogous to and as deserving of humane care as

social judgments of character and desert); Simons, *supra* note 129, at 322 (noting that a jury faced with evidence of a capital defendant’s religious transformation “may have considered it relevant to [the defendant’s] desert (i.e., not simply relevant to his future dangerousness)”).

¹³⁴ BANNER, *supra* note 35, at 123 (quoting New York minister John McLeod).

¹³⁵ See *supra* note 11 and accompanying text.

¹³⁶ It seems hard to imagine that death-sentenced inmates would spend so many years “giv[ing] all the energies of [their] mind[s] to the work of preparation for meeting [their] God,” BANNER, *supra* note 35, at 123 (quoting New York minister John McLeod), particularly when they (or their lawyers) know that they will not be executed until the end of appellate and post-conviction review. The idea that prisoners on death row today constantly fear imminent execution seems implausible, though it has been made in prominent scholarship. See, e.g., Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 462 (2005) (“During the time an offender is on death row, he constantly fears that today is the day death comes knocking, making it hard for him to actually lend much thought to the values animating retributive justice.”); Sun, *supra* note 2, at 1613 (describing life on death row as “life in perpetual fear of state-implemented death, whose timing is impossible to predict”).

terminally ill patients.”¹³⁷ He envisions death row as a kind of hospice.¹³⁸ Johnson’s vision of death row would require states to treat death-sentenced inmates *better* than noncapital inmates; it seems to justify the creation of death row, but one very different from the harsh death row we see today.

Many scholars have argued that death row as it exists today degrades rather than rehabilitates. Mona Lynch describes the harsh conditions of death row as part of a “post-rehabilitative, ‘waste management’ new penological regime.”¹³⁹ Lynch writes that death row conditions are “literally transforming those waiting to die from sociologically and psychologically rich human beings into a kind of untouchable toxic waste that need only be securely contained until its final disposal.”¹⁴⁰

To prison administrators who decide death row policy, rehabilitation may seem pointless. In the litigation over Virginia death row conditions in the *Prieto* case mentioned above, state prison officials defended the categorical denial of work and educational privileges to death-sentenced inmates on the ground “that they are less deserving of limited prison resources because they will never reenter society.”¹⁴¹ This utilitarian argument ascribes little or no

¹³⁷ ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 213 (2d ed. 1998). Johnson states that a humane death row “would be staffed by mature, service-oriented correctional officers able to relate to condemned prisoners as persons in the process of dying at the hands of the state, a class of individuals analogous to and as deserving of humane care as terminally ill patients.” *Id.* He writes that:

Visits would be encouraged, as would recreational activities and “programs of work or study that can take place in cells or in small groups.” Also encouraged would be “self-help programs, preferably developed by and for the prisoners,” which would be promoted as “collective adaptations to the stresses of death row confinement” and impending execution.

Id. at 214 (quoting Robert Johnson, *Life Under Sentence of Death, in THE PAINS OF IMPRISONMENT* 142–44 (Robert Johnson & Hans Toch eds., 1988)).

¹³⁸ *Id.* at 213–14.

¹³⁹ Lynch, *supra* note 6, at 79. Echoing Michel Foucault but without directly citing him, Sharon Dolovich has made similar claims about the American “carceral state” as a whole. See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *BERKELEY J. CRIM. L.* 259, 318 (2011). Both of these approaches treat conditions of confinement as efforts at subjugation and exclusion of certain offenders, not as the punishment calibrated to a particular crime. In this sense, their vision does not offer an explanation of death row as necessary to capital punishment but instead as a reflection of broader, excessively harsh carceral norms.

¹⁴⁰ Lynch, *supra* note 6, at 79.

¹⁴¹ *Prieto v. Clarke*, No. 1:12-CV-1199, 2013 WL 6019215, at *8 (E.D. Va. Nov. 12, 2013), *rev’d on other grounds*, 780 F.3d 245 (4th Cir. 2015). Perhaps the officials meant to say that death-sentenced prisoners “are less deserving of limited prison resources because they will never enter *prison* society.” If the view were premised instead on the idea that death-row inmates will not be released, the same rationale would justify subjecting LWOP inmates to harsh treatment as well. See *id.* (“[The rationale for limiting resources spent on inmates who will not reenter society is] also inconsistent with [prison] practices. Compare the treatment of inmates sentenced to death and those sentenced to life imprisonment

value to the human development of prisoners who are marked for execution, treating such inmates, in Lynch's words, as human "waste."¹⁴²

But the argument that rehabilitation is wasted on death row inmates because they will never reenter ordinary society, or even prison society, presumes that death-sentenced inmates will be executed. That is not true. Many death-sentenced inmates will not be executed. Recent records from the Bureau of Justice Statistics indicate that over forty percent of the persons sentenced to death between 1976 and 2013 were removed from death row due to court decisions or commutations.¹⁴³ An earlier and more detailed study conducted by James Liebman, Jeffrey Fagan, and Valerie West had found that over half of capital sentences from 1973 to 1995 were reversed based on prejudicial error.¹⁴⁴ Some death row inmates will end up with sentences of life in prison. A much smaller number will be exonerated.¹⁴⁵ Thus some of these inmates initially placed on death row will reenter society—at least the larger prison community. The claim that rehabilitation is wasted on death-sentenced inmates because they will never reenter society is not only morally questionable but often factually incorrect.¹⁴⁶ Any death row that is retained should prepare its inmates for the possibility of eventual reentry into human community, because many of its inmates will do so.¹⁴⁷ Thus, rehabilitation

without the possibility of parole. Although the VDOC's stated reasons for separating death row inmates and denying them programming apply with equal force to both classes, inmates serving life sentences are presumptively assigned to the general population units at SISP, where they may avail themselves of limited programming.").

¹⁴² See Lynch, *supra* note 6, at 79.

¹⁴³ See SNELL, *supra* note 9, at 19 tbl.16; see also Gross, O'Brien, Hu & Kennedy, *supra* note 11, at 7230–31.

¹⁴⁴ JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at i (June 2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf [<https://perma.cc/2MZC-5JWQ>].

¹⁴⁵ Since 1973, 156 persons sentenced to death have been found innocent, according to the Death Penalty Information Center. See *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> [<https://perma.cc/EE4J-HD5C>] (including in the list of innocent persons those who were sentenced to death but later were acquitted of all charges related to the alleged capital crime, had all charges relating to the alleged capital crime dismissed by the prosecution, or were pardoned based on evidence of innocence). Some scholars have attempted to calculate the percent of inmates who are innocent, but not necessarily exonerated. See Gross, O'Brien, Hu & Kennedy, *supra* note 11, at 7230 ("The high rate of exoneration among death-sentenced defendants appears to be driven by the threat of execution, but most death-sentenced defendants are removed from death row and resentenced to life imprisonment, after which the likelihood of exoneration drops sharply.").

¹⁴⁶ The resource conservation claim might support treating death-sentenced inmates harshly *after* all court review is completed (though under the Supreme Court's recent jurisprudence they may always present a claim of actual innocence). But it offers little justification for the immediate and permanent denial of human interaction and privileges to all death-sentenced inmates.

¹⁴⁷ See LIEBMAN, FAGAN & WEST, *supra* note 144, at ii (recounting the high rates of sentencing error).

provides no justification for the debilitating conditions of death row that prevail today.

C. *Is Death Row Necessary for Retributive Justice?*

Advocates of retributive punishment might view the idea of a rehabilitative death row—particularly the “humane death row” that Johnson proposes¹⁴⁸—as profoundly unjust. One self-professed advocate of retributive punishment is Robert Blecker, who contends that justice *requires* harsh death row conditions.¹⁴⁹ According to Blecker, prevailing death row conditions are far too lenient.¹⁵⁰ In his 2013 book, *The Death of Punishment*, Blecker recounts life on death row. His book focuses in particular on the lives and executions of inmates he interviewed in Florida and Tennessee.¹⁵¹ Blecker describes seeing death row inmates playing games and watching television.¹⁵² He contrasts the way that the death row inmates lived with the way in which they made their victims suffer. In gruesome detail, Blecker recounts how one death row inmate in Florida, Danny Rolling, mercilessly raped, murdered, and gutted a young university student and killed four other students in a killing spree.¹⁵³ He recounts how Florida death row prisoner David Keen raped an eight-year-old child, strangled her with a shoelace, and dumped her, still living, into a river.¹⁵⁴ And he describes how Daryl Holton, an inmate confined on death row in Tennessee, took his unsuspecting children into his garage, lined them up two at a time, and shot them to death.¹⁵⁵ To Blecker, death row is not nearly harsh enough in light of these prisoners’ crimes.

Retributive justice, Blecker contends, requires punishment that far better fits the crime. He proposes a “model” death penalty statute in which death-sentenced inmates live in “permanent punitive segregation”:

Those condemned to die . . . shall be permanently housed in a separate prison [wing], with their daily conditions no better than prisoners already subject to punitive or administrative segregation for the worst prison infractions. Specifically, within constitutional bounds, those condemned to death . . . shall have only the minimum constitutionally mandated exercise,

¹⁴⁸ JOHNSON, *supra* note 137, at 213–14.

¹⁴⁹ See BLECKER, *supra* note 26, at 205 (recounting his testimony to the Connecticut legislature that “[t]his legislature should specify that harsher punishment shall attach *on death row*”); *cf. id.* at 89 (“Witnessing the execution, I shuddered. It felt too much like a hospital or hospice where I watched my father-in-law die mercifully. *How we kill those we condemn should in no way resemble how we kill those we love.*”).

¹⁵⁰ *Id.*

¹⁵¹ See generally *id.*

¹⁵² See, e.g., *id.* at 130, 161.

¹⁵³ *Id.* at 76–77.

¹⁵⁴ *Id.* at 99.

¹⁵⁵ BLECKER, *supra* note 26, at 110–11.

recreation, phone calls, or physical contact. They shall not be permitted any communal form of play.

Their sole food shall be nutraloaf, nutritionally complete and tasteless. Photographs of their victims shall be posted in their cells, out of reach, in visibly conspicuous places.¹⁵⁶

Blecker criticizes prison officials for providing too many privileges to death-sentenced inmates out of a self-interested desire to make the inmates easier to handle and thus their own lives easier.¹⁵⁷ From his perspective, lenient treatment of death-sentenced criminals tends to be unjustly generous and leaves “[t]he nature of the crime . . . completely severed from the experience of the punishment.”¹⁵⁸

Blecker’s depiction of current death row conditions as lenient seems startling and inconsistent with the representations of death row conditions as extraordinarily harsh presented by so many scholars and studies.¹⁵⁹ But he does not appear to have focused on states where prisoners are held in solitary confinement or denied most human interactions. In his book, Blecker describes

¹⁵⁶ *Id.* at 282 (second alteration in original). Legislatures have sometimes embraced the idea of a limited diet as punishment. The Supreme Court’s decision in *Holden v. Minnesota* cites an 1868 statute requiring life-sentenced prisoners to be:

[P]unished by imprisonment at hard labor in the state prison . . . with solitary confinement upon bread and water diet for twelve days in each year during the term, to be apportioned in periods of not exceeding three days’ duration each, with an interval of not less than fourteen days intervening each two successive periods.

137 U.S. 483, 488 (1890). And a trial court not long ago required, as part of the sentence of a capital prisoner, that he have to face pictures of his victims in his cell every day. See Associated Press, *Man Who Threw Kids off Bridge Gets Death—Judge Also Orders That He Be Shown Photos of Children Every Day*, NBC NEWS (Apr. 30, 2009), http://www.nbcnews.com/id/30500905/ns/us_news-crime_and_courts/t/man-who-threw-kids-bridge-gets-death/ [<https://perma.cc/5KXT-2C83>]. Later, the Alabama Court of Criminal Appeals reversed the man’s conviction and ordered a new trial, but the Supreme Court of Alabama reversed again and remanded, and on remand the lower appellate court affirmed the death sentence. See *Luong v. State*, No. 1121097, 2014 WL 983288, at *19 (Ala. Mar. 14, 2014), *as modified on denial of reh’g* (May 23, 2014); *Luong v. State*, No. CR-08-1219, 2015 WL 1780094, at *50 (Ala. Crim. App. Apr. 17, 2015) (per curiam), *reh’g denied*, No. CR-08-1219, 2015 WL 4162926 (Ala. Crim. App. July 10, 2015), and *cert. denied*, 136 S. Ct. 1494 (2016).

¹⁵⁷ BLECKER, *supra* note 26, at 165 (citing the perspective of a warden’s assistant in Oklahoma: “We make it easy for them because it’s easy for us when it’s easy for them.”). Johnson, who demands more humane conditions on death row, seems to agree that appeasement is undesirable. He argues that some officers grant privileges out of fear of the prisoners. JOHNSON, *supra* note 137, at 111.

¹⁵⁸ BLECKER, *supra* note 26, at 166.

¹⁵⁹ See, e.g., ACLU, *supra* note 6, at 8; FIDH & CCR, *supra* note 2, at 4; Cunningham & Vigen, *supra* note 56, at 204; Johnson & Carroll, *supra* note 16, at 8-3; Lombardi, Sluder & Wallace, *supra* note 56, at 3.

his experiences in a handful of states that do offer some privileges to death row inmates,¹⁶⁰ including the opportunity to exercise with one another, which are not granted in many other capital punishment states.¹⁶¹ At least eleven other capital punishment states report that they do not permit death row inmates to engage in *any* congregate activities.¹⁶² Some states, including Arizona, hold their death-sentenced inmates in supermax confinement, as Lynch has described.¹⁶³ Blecker might be pleased to find out that, at least in some states, his arguments for retributive justice are defenses of much of the status quo.

Though Blecker's demands for harsh death row conditions may seem extreme, retributive justifications for harsh prison conditions are not new. In the late eighteenth century, some critics of the penal system advocated harsher prison conditions in *lieu* of capital punishment; they urged states to seal prisoners away in remote locations where prisoners would be forced to meditate on their offenses without any visitors.¹⁶⁴ Blecker simply wants some murderers to get both punishments—harsh conditions and death as well.¹⁶⁵

Blecker offers a particularly harsh vision of death row; other retributive justice advocates might desire death row to be harsh, but not quite so severe, perhaps seeking to combine the purposes of retributive justice with those of rehabilitation. Stephanos Bibas has advocated involving inmates in restorative justice, to repair some of the harm done by their crimes, but at the same time he has criticized other advocates of restorative justice who would “sweep away the traditional goals and processes of criminal justice” and who view “retribution for retribution's sake [as] pointless.”¹⁶⁶ He has written:

¹⁶⁰ See, e.g., ASCA HOUSING POLICY SURVEY, *supra* note 14, at 19, 23 (indicating that death-sentenced inmates may exercise with one another in Florida and Tennessee); BLECKER, *supra* note 26, at 78 (describing how death row inmates are permitted to play basketball with one another in Florida); *id.* at 162 (mentioning his experiences with death rows in Florida, Oklahoma, and Tennessee). Blecker describes seeing Oklahoma condemned prisoners playing basketball together. That seems inconsistent with prison officials' claims in the ASCA Housing Policy Survey. See ASCA HOUSING POLICY SURVEY, *supra* note 14, at 14, 22 (stating that Oklahoma inmates sentenced to death are not permitted to participate in congregate activities and are not allowed movement even within the death row unit unless in restraints). Perhaps Oklahoma's policy has changed, or perhaps it was not being enforced during Blecker's visit.

¹⁶¹ ASCA HOUSING POLICY SURVEY, *supra* note 14, at 9–32.

¹⁶² *Id.* at 9–16.

¹⁶³ See Lynch, *supra* note 6, at 66.

¹⁶⁴ BANNER, *supra* note 35, at 109.

¹⁶⁵ Blecker would eliminate some standard aggravators, including felony murder and premeditation, thus excluding a number of murderers eligible under current capital punishment statutes in the United States. See BLECKER, *supra* note 26, at 279.

¹⁶⁶ Stephanos Bibas, *Restoration, but Also More Justice*, in CRIMINAL LAW CONVERSATIONS 595, 596 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

[P]unishment is supposed to hurt. The bite of punishment sends an unequivocal message condemning the wrongdoer and vindicating the victim. It pays the criminal's debt to society. It teaches criminals and others not to hurt others, humbling proud wrongdoers. Restitution and fines can supplement prison and perhaps reduce the need for it. But because they lack the bite of condemnation and pain, they send too soft a message, overlooking the wrong and trying to hurry by it too fast. Criminals need to atone, to be humbled, to suffer. If they do not, the criminal does not learn a lesson and victims and the public never see justice done, leaving them dissatisfied.¹⁶⁷

If states viewed harsh death row conditions as just retribution, they nonetheless might limit the prisoners' isolation to encourage restoration and reconciliation. States might permit death row inmates, for example, to meet with the families of their victims to express remorse (something not contemplated under many current visitation policies). Or states might permit death row inmates to join in work programs only if they agreed to have their compensation sent to the families of their victims. In other words, a retributive vision of death row need not reflect the monolithic harshness of the permanent punitive segregation that Blecker proposes.

Retributive theory surfaces in other academic and judicial discourse about death row conditions.¹⁶⁸ Even when speaking of security rationales for death row conditions, courts sometimes advert to the moral desert of capital inmates. For example, Justice Clarence Thomas has written:

Justice [John Paul] Stevens criticizes the "dehumanizing effects" of the manner in which [the death row prisoner] has been confined, but he never pauses to consider whether there is a legitimate penological reason for keeping certain inmates in restrictive confinement. . . .

. . . .

. . . Justice Stevens altogether refuses to take into consideration the gruesome nature of the crimes that legitimately lead States to authorize the death penalty and juries to impose it. . . .

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., *Labat v. McKeithen*, 361 F.2d 757, 758 (5th Cir. 1966) (justifying death row conditions as acceptable by noting that "a death row inmate, is [not] entitled to the same privileges as the ordinary prisoner" (emphasis added)). Such acknowledgement of potential retributive purposes for death row may reflect that most people view capital punishment itself as justified on retributive principles. See BOHM, *supra* note 10, at 303 (recounting a 2008 public opinion survey in which 54.6% of respondents chose retribution as the main reason for supporting capital punishment).

... It is the crime—and not the punishment imposed by the jury or the delay in petitioner’s execution—that was “unacceptably cruel.”¹⁶⁹

Like Blecker, Justice Thomas invokes the death row inmate’s capital crime in his evaluation of the justice of harsh death row conditions. In a recent case, he responded to concerns that a death-sentenced prisoner had been held for decades in solitary confinement by noting that the prisoner’s “accommodations . . . are a far sight more spacious than those in which his victims . . . now rest.”¹⁷⁰ The idea that retributive justice supports harsh death row conditions has appeared in lower court decisions as well, such as an opinion regarding death row in Pennsylvania in which the Third Circuit stated: “[W]e cannot conclude that the totality of the conditions on Pennsylvania’s death rows constitute punishment ‘grossly disproportionate to the severity of the crime[s].’”¹⁷¹

But not all would agree that retribution justifies harsh confinement on death row. Russell Christopher contends that substantial death row incarceration may render the full experience of punishment retributively *excessive*.¹⁷² If one defends the death penalty on retribution grounds, he argues, one sees the death penalty as proportional to at least some capital crimes.¹⁷³ Death row incarceration then *adds* punishment and renders the death penalty disproportionately harsh under a retributive calculus.¹⁷⁴

¹⁶⁹ *Thompson v. McNeil*, 556 U.S. 1114, 1118–19 (2009) (Thomas, J., concurring) (citation omitted); *see also id.* at 1115 (Stevens, J., respecting the denial of certiorari) (“As he awaits execution, petitioner has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6- by 9-foot cell. Two death warrants have been signed against him and stayed only shortly before he was scheduled to be put to death. The dehumanizing effects of such treatment are undeniable.”).

¹⁷⁰ *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Thomas, J., concurring).

¹⁷¹ *Peterkin v. Jeffes*, 855 F.2d 1021, 1033 (3d Cir. 1988) (second alteration in original) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

¹⁷² Russell L. Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. 421, 483 (2014) (“[When c]onstruing substantial death row incarceration as additional punishment . . . the combination of it and death by execution is disproportional, undeserved and unjustified.”).

¹⁷³ *Id.* at 463.

¹⁷⁴ Christopher argues that if, in the alternative, death row is viewed as *mitigation* of the penalty of death (through continued life), then it is retributively too weak. *Id.* Again alternatively, if death row is viewed as “nothing”—neither punishment nor mitigation of punishment—then it leads to an “absurdity” because then persons who die of natural causes on death row receive “no punishment at all.” *Id.* at 469–71. Neither of these arguments seems persuasive. If death row mitigates punishment, this result may be accepted because justice requires greater concern for avoiding excessive punishment—through lengthy judicial review designed to determine whether prisoners have been sentenced in error—than with avoiding improper mitigation of punishment. And the fact that some prisoners will die of natural causes on death row does not illuminate an “absurd” result but merely shows that retributive justice is sometimes impossible. It is similarly impossible to achieve full justice when a prisoner sentenced to fifty years in prison dies in prison after two years

But Christopher's argument that death row incarceration is inconsistent with retributive justice appears to assume that execution is the maximum punishment a retributivist would consider appropriate for capital murder. That seems far from clear, at least for some of the most egregious capital murders such as the ones that Blecker describes.¹⁷⁵ If some capital crimes—and only some—are severe enough to justify harsh death row conditions as well as execution, such additional punishment could be limited to offenders who have committed very aggravated capital murders (based on jury findings of specific aggravation). Limiting harsh death row conditions in this manner might be a way to calibrate retributive punishment to fit a range of capital crimes.

Retributive justifications for harsh death row conditions would still raise a significant concern, however. The problem lies in the extraordinarily high rates of capital sentencing error. As mentioned above, yearly capital punishment statistics provided by the Bureau of Justice Statistics show that over forty percent of inmates sentenced to death have been removed from death row.¹⁷⁶ For inmates who are exonerated or resentenced to life or to a lesser term, the additional suffering caused by harsh death row conditions would be unjust.¹⁷⁷

The problem of unjust suffering by persons improperly sent to death row might be reduced by selective abolition of capital punishment for crimes that do not involve the highest degree of culpability (eliminating felony murder, for example, as even Blecker would do) or by allowing death sentences only if a jury has found *several* aggravating factors. One study of sentencing error revealed that for each additional aggravating factor found by a jury, the likelihood that the capital sentence would be reversed *decreased* by fifteen percent.¹⁷⁸ If this measure is correct, then sentencing error could be reduced if prosecutors proved to a capital jury a higher number of aggravating factors

or when a prisoner sentenced to prison escapes before he can be confined. These events simply do not call into question the retributive justice of the penalty imposed by law.

¹⁷⁵ See BLECKER, *supra* note 26, at 76–77, 99, 110–11. Moreover, there is a larger retributive problem in imposing the same capital penalty for a wide range of offenses, from felony murder (where even Blecker agrees it punishes too much) to premeditated first-degree murder. The Supreme Court held capital punishment for felony murder constitutional in *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

¹⁷⁶ See SNELL, *supra* note 9, at 19 tbl.16; *see also* Gross, O'Brien, Hu & Kennedy, *supra* note 11, at 7230.

¹⁷⁷ This problem of unjust suffering exists in other cases of sentencing error, but statistics suggest that capital sentencing error is particularly high. *See infra* note 193 and accompanying text.

The potential retributive problem with harsh death row conditions raised by capital sentencing error might not arise for prisoners removed from death row for reasons such as mercy-based commutations or lack of resources to retry defendants who receive appellate or habeas relief.

¹⁷⁸ JAMES S. LIEBMAN, JEFFREY FAGAN, ANDREW GELMAN, VALERIE WEST, GARTH DAVIES & ALEXANDER KISS, A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 333–34 (Feb. 2002), <http://www2.law.columbia.edu/brokensystem2/report.pdf> [<https://perma.cc/26AC-43AM>].

(and no longer pursued the death penalty if the jury found only a low number of aggravating factors).

Perhaps another way to reduce the potential injustice of harsh death row conditions would be to impose them only after a death sentence has been upheld on state appellate and collateral review. According to the study by Liebman, Fagan, and West, most sentencing error is discovered during state court review.¹⁷⁹ The risk of unjust punishment through harsh death row conditions thus could be mitigated by waiting until the end of state court review to send death-sentenced inmates to death row. But because the federal courts also find sentencing error,¹⁸⁰ further mitigation of the problem of unjustly harsh death row conditions would require states to wait until both state and federal courts complete their review. Then, though later investigation still might find evidence of actual innocence, the risk of unjust placement on death row would be low.

Unless some such solution can be found, however, the high incidence of capital sentencing error presents a profound challenge to the justice of harsh death row conditions imposed on retributive grounds. Retributive theory thus continues to provide arguments not only for and against the death penalty¹⁸¹ but also for and against death row.

D. *Is Death Row Necessary to Deter Others from Crime?*¹⁸²

Those who do not believe that retributive justice by itself requires harsh death row conditions nonetheless might find that general deterrence necessitates such conditions (within the bounds permitted by just

¹⁷⁹ LIEBMAN, FAGAN & WEST, *supra* note 144, at i.

¹⁸⁰ *See id.*; see also 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/YJ2A-Q544>].

¹⁸¹ Public opinion suggests strong support for the death penalty as such in terms of retributive justice. *See Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/Death-Penalty.aspx> [<https://perma.cc/A8KR-P59W>] [hereinafter GALLUP *Death Penalty*]. This view also reflects the state of the law, but not the opinion of this author.

¹⁸² Death row arguably also might serve a specific deterrence purpose, but not if death row confinement is permanent, as it is today. *See supra* note 115. Using death row for *specific* deterrence (to discourage the death row inmate from killing again) differs from using death row for purposes of incapacitation (to *prevent* the inmate from such violence, see *supra* Part III.A).

To be specifically deterred by the harshness of death row conditions, the prisoner would have to be removed from death row so as to fear being returned there. Perhaps specific deterrence could be achieved by placing all death-sentenced prisoners on death row for an initial period of time and subsequently only if they kill again. This arrangement would give them firsthand experience of the hardship of death row and a likely desire to avoid it.

retribution¹⁸³). Indeed, the Supreme Court has recognized that states may impose harsh death row conditions for a deterrent as well as retributive purpose. In 1890, the Supreme Court described a law requiring solitary confinement of death-sentenced inmates as imposing “an additional punishment of the most important and painful character” that was designed “to mark [the prisoners] as examples of the just punishment of the worst crimes of the human race.”¹⁸⁴

To be sure, deterrence may no longer motivate strongly most proponents of capital punishment and might not influence their approach to death row. The latest Gallup poll showed that only six percent of Americans stated that they supported the death penalty on deterrence grounds, when supporters were given a list of grounds from which to choose.¹⁸⁵ The poll also showed that roughly half as many people today believe the death penalty deters as people did in 1985.¹⁸⁶ Some research suggests that the death penalty in fact does not deter,¹⁸⁷ but these findings are controverted by other studies.¹⁸⁸

Such temporary harsh confinement would be very different from death row today, which is permanent. Its potential benefits seem limited. Much of the deterrence effect of temporary death row confinement might be achieved through the *threat* of disciplinary segregation, which prisoners routinely face. Moreover, temporary death row presents the same overbreadth problem as permanent death row, see *supra* Part III.A (citing evidence that not all death-sentenced prisoners require heightened security), though the unnecessary harm would be imposed for a shorter duration.

¹⁸³ See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 22 (1998) (“One widely shared understanding is that even if deterrence of crime is the general aim of a system of criminal prohibitions, ‘just desert’ (or retribution) should be a limit on the distribution of punishment.”).

¹⁸⁴ *In re Medley*, 134 U.S. 160, 169–71 (1890) (emphasis added); cf. *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring) (stating that “the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself”).

¹⁸⁵ See GALLUP *Death Penalty*, *supra* note 181. Most respondents apparently chose only one ground, although the choice of more than one was not forbidden. See *id.*

¹⁸⁶ *Id.*

¹⁸⁷ See, e.g., John J. Donahue, III & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 AM. L. & ECON. REV. 249, 249 (2009) (noting that “[t]here is little clarity about the knowledge potential murderers have concerning the risk of execution,” such as whether they tend to be aware of the passage or the existence of a death penalty statute). Robert Bohm offers an elegant summary of some of the assumptions and problems of the deterrence rationale for capital punishment. See BOHM, *supra* note 10, at 164–65. He also outlines studies that have suggested a *counter-deterrent*, or “brutalizing,” effect that if true would mean that capital punishment increases the likelihood of murders. See *id.* at 166–67.

¹⁸⁸ See *Glossip v. Gross*, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring) (opining that “[i]t seems very likely” that the death penalty has a significant deterrent effect, and citing “statistical studies that say so”). The interesting analysis of one empirical scholar suggests that in *some* states, executions deter, whereas in other states, executions may actually lead to higher rates of murder. See Joanna M. Shepherd, *Deterrence Versus*

Perhaps deterrence rationales no longer influence many death penalty supporters because so few persons who commit capital crimes are actually executed.¹⁸⁹ But even if execution is improbable,¹⁹⁰ the de facto punishment of death row is not.¹⁹¹ Making life on death row much worse than life in the general prison population might help deter others from capital crime. Predicting a deterrent effect is difficult, and depends on evidence about whether potential criminals know what crimes carry the death penalty and whether they will weigh rationally the costs and benefits.¹⁹² But it seems at least plausible to think that harsh prison conditions might have some marginal deterrent effect.

Whether achieving such marginal deterrence would justify imposing harsh death row conditions on all death-sentenced prisoners raises a different question and a potential problem. Reversal rates in capital cases are exceptionally high.¹⁹³ For those prisoners sentenced to death in error, death row incarceration augments their improperly imposed punishment. Deterrence objectives thus may bolster the argument for harsh death row conditions, but only if one accepts, as a normative matter, the risk of unjust additional harm to prisoners improperly sentenced to death.

* * *

The foregoing discussion of punishment purposes for death row reveals that retaining death row requires normative choices. The administrative rationale for death row, grounded in claims that death-sentenced inmates are

Brutalization: Capital Punishment's Differing Impacts Among States, 104 MICH. L. REV. 203, 205 (2005).

¹⁸⁹ See *supra* note 11 (recounting evidence that few inmates are executed).

¹⁹⁰ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014) (noting only a “remote possibility of death” for prisoners sentenced to death in California (emphasis omitted)), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

¹⁹¹ Liebman, Fagan, and West’s study showed that most death sentences are overturned, though not always quickly. Indeed, their study showed that after state courts had completed their layers of review, federal courts went on to find prejudicial error in over 40% of the remaining death sentences. See LIEBMAN, FAGAN & WEST, *supra* note 144, at i (noting that state courts found prejudicial error in 47% of death sentences, while later federal review found such error in 40% of the remaining sentences); see also *supra* note 144 and accompanying text.

¹⁹² See, e.g., BOHM, *supra* note 10, at 164–65; Donahue & Wolfers, *supra* note 187, at 262–64.

¹⁹³ The rates at which habeas corpus petitions are granted offers a useful comparison. See KING, CHEESMAN & OSTROM, *supra* note 180, at 10 (recounting that the rate at which petitions are granted in capital cases is thirty-five times higher than the rate in noncapital cases). The reasons for this error are unclear. Perhaps, when the crimes at issue are especially heinous and the death penalty is pursued, public outcry and the calls of the victims’ families may lead the jury and judge to push aside doubts to find someone to blame. Another reason might be that reviewing courts scrutinize more closely possible errors that might lead to the irreversible consequence of execution.

categorically more dangerous, has been undercut by empirical studies, particularly the study of Missouri's abolition of death row. Retaining death row is not a necessity for security reasons. The fact that some death-sentenced prisoners are exceptionally dangerous does not require that all death-sentenced prisoners endure the harshness of permanent isolation. Missouri's experience has shown that individual assessments can be used to determine the appropriate custody level for death-sentenced prisoners, as is done with other, noncapital prisoners.

Death row still might be seen to serve other punishment purposes, however. Retribution and deterrence aims offer potential reasons to retain harsh death row conditions,¹⁹⁴ and perhaps to make them more severe. Some advocates of harsh punishment might favor punitive death row conditions, as Robert Blecker does.¹⁹⁵ Others might believe that capital offenders deserve less harsh conditions than Blecker proposes, but still harsher conditions than noncapital prisoners experience. Still others might believe that juries should be authorized to decide whether certain particularly heinous murderers deserve the additional punishment of death row—serial killers, perhaps, but not felony murderers.

Ultimately, the decision whether to retain death row requires judgments about the purposes of punishment and how much potentially undeserved suffering society should inflict in the interest of punishment objectives. The next Part of this Article will contend that these normative judgments should be made by legislatures rather than prison administrators.

IV. RE-ALLOCATING DECISIONAL POWER OVER DEATH ROW

An increasing body of evidence has undercut the dangerousness rationale for death row and revealed that many if not most death-sentenced inmates do not require such strict confinement. A dangerousness rationale is no longer sufficient to justify augmenting punishment in such a categorical, severe, and permanent way. Thus retaining death row today requires an additional judgment that confining death-sentenced prisoners more harshly than other prisoners serves a valid retributive or deterrent purpose.

This Part will show that only *legislatures*, not prison administrators, are competent to make that judgment. For legislatures alone have the power to prescribe punishment for crimes in a way that has democratic legitimacy, adheres to the constitutional separation of powers, and satisfies the principle of legality. And legislatures ought not to delegate that power to prison administrators, even if a delegation were permitted, because prison administrators might retain death row for illegitimate psychological reasons.

¹⁹⁴ As described above, rehabilitation offers little or no basis for isolation of death-sentenced prisoners for years and decades, as is common practice today. *See supra* Part III.B.

¹⁹⁵ *See supra* notes 149–158 and accompanying text.

A. *The Legislative Responsibility for Just Punishment*

The preceding Part revealed why only punishment purposes of retribution or deterrence can justify death row. Both of these aims, this Part now will explain, may be chosen only by the legislature.

1. *Retributive and Deterrent Rationales*

If death row is to be retained for purposes of retribution—either for all capital offenders or for some—a legislative choice is needed to authorize that additional punishment. Retributive justifications for punishment are evaluated more properly by the legislature than by prison administrators, for they entail questions of proportionality and desert that do not admit of empirically correct or provable answers—choices about how wrong an action is and how much suffering a human being should be forced to endure. The decision whether to treat death-sentenced inmates categorically more harshly than other inmates is a moral choice more rightly made by the political body most tied to the people whose normative judgments are embodied in the criminal law.¹⁹⁶

Without a legislative decision, it would be inappropriate for sentencing authorities, as well as for prison administrators, to impose death row based on notions of desert. To prescribe death row for punitive reasons without prior statutory authorization would violate the principle of legality and its instantiations in the Due Process and Ex Post Facto Clauses.¹⁹⁷

A deterrence rationale for death row likewise requires legislative approval. In part, that is because punishment for deterrence reasons may be understood to require an initial determination that such punishment is deserved, or retributively just.¹⁹⁸ Legislatures must make that determination. Furthermore, with regard to the empirical question of which punishments effectively deter, legislatures remain the proper decision-makers, at least as compared to certain other institutional actors. The Supreme Court has stated that,

¹⁹⁶ Similar arguments have been made in favor of political answers to, *inter alia*, the immigration question. See Andrés Snaider, *The Politics and Tension in Delegating Plenary Power: The Need To Revive Nondelegation Principles in the Field of Immigration*, 6 GEO. IMMIGR. L.J. 107, 125–26 (1992).

¹⁹⁷ The principle of notice can be seen as an aspect of the broader “principle of legality” that grounds American and European criminal law. See *infra* notes 209–213 and accompanying text. Note that an administrative imposition of punishment might not violate the Ex Post Facto Clause if courts were to construe the administratively imposed sanction not to constitute a “law.” It would be troubling, however, for legislatures to be able to evade the constitutional prohibition on ex post facto laws through delegations of punishment authority to administrative actors. And legislatures should not be allowed to evade notice or legality principles through vaguely worded or merely implicit delegations of authority to administrators to impose punishments—such as those that now grant prison administrators decisional power over death row.

¹⁹⁸ See STITH & CABRANES, *supra* note 183, at 22.

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.¹⁹⁹

Though the Supreme Court then was comparing legislative competence with judicial competence regarding the deterrence question, its explanation bolsters the argument for legislative choice insofar as it points to multi-party legislative hearing and debate mechanisms as best suited to deal with a "complex factual issue."²⁰⁰

Various schools of thought support reliance on the legislature for such disputed normative decisions. Legal process theorists have defended the efficacy and propriety of legislative determinations. Henry Hart and Albert Sacks described the legislative process as the "forge and anvil of major public policy," noting that some problems "have to come [to the legislature] because they cut so deep into the vital concerns of people that no other official agency has the toughness and resiliency to hammer out solutions which will command acceptance."²⁰¹ Jeremy Waldron has presented an argument for legislative decision-making derived from Aristotelian theory and centered on the "doctrine of the wisdom of the multitude."²⁰² Waldron describes the doctrine in its weak form as follows: "The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any individual member of the body, however excellent, is capable of making on his own."²⁰³ He then states the claim in its strong form: "The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any subset of the people acting as a body and pooling the knowledge, experience, and insight of the members of the subset."²⁰⁴ These theories help explain why a legislative decision is so important and appropriate in the death row context, where the choice involves unsettled (and highly controversial) normative and empirical claims about the purposes and effects of punishment.

In some states, the law simply may not allow death row without express statutory authorization. Numerous state courts have ruled that "the power to create crimes and punishments . . . inheres solely in the democratic processes

¹⁹⁹ *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

²⁰⁰ *Id.*; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 700 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

²⁰¹ *Id.* Hart and Sacks also noted "the durability of public policies and principles of social action which have been developed by the process of full-fledged, hard-fought legislative and public debate." *Id.* at 701.

²⁰² JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 93 (1999).

²⁰³ *Id.* at 93-94.

²⁰⁴ *Id.* at 94.

of the legislative branch.”²⁰⁵ Some have explained that the “authority to define crimes and fix the punishment therefor is vested exclusively in the legislature, and it may not delegate that power either expressly or by implication.”²⁰⁶

The legislature’s monopoly on the power to prescribe punishment reflects a principle undergirding the legal system—“the principle *nulla poena sine lege*

²⁰⁵ *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991) (citing *Borges v. State*, 415 So. 2d 1265, 1267 (Fla. 1982)) (stating that “the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch”); *see also* *People v. Mikhail*, 13 Cal. App. 4th 846, 854 (1993) (“[T]he legislative branch bears the sole responsibility and power to define criminal charges and to prescribe punishment . . .”); *State v. Sequeira*, 995 P.2d 335, 337 (Haw. Ct. App. 2000) (“[A] court may only pronounce a sentence ‘which the law hath annexed to the crime[,]’ and ‘a sentence which does not conform to statutory sentencing provisions, either in the character or the extent of the punishment imposed, is void.’” (second alteration in original) (citation omitted) (first quoting *Territory v. Armstrong*, 22 Haw. 526, 535 (1915), which in turn quotes Blackstone; and then quoting 21A AMERICAN JURISPRUDENCE § 825, at 88 (2d ed. 1998))); *Howell v. State*, 300 So. 2d 774, 781 (Miss. 1974) (“We hold that the authority to define crimes and fix the punishment . . . is vested exclusively in the legislature . . .”); *Lincoln Dairy Co. v. Finigan*, 104 N.W.2d 227, 232 (Neb. 1960) (“The public . . . may properly assume that crimes and punishment are purely a legislative function and that the definition of all crimes and the punishment therefor will be found in the duly enacted statutes of this state.”); *State v. Krego*, 433 N.E.2d 1298, 1299 (Ohio Ct. Com. Pl. 1981) (“[T]he authority to define crimes and fix the punishment therefor is vested exclusively in the legislature . . .”).

Deborah Denno has written on impermissible delegation of punishment power in the capital punishment context, focusing on whether legislatures improperly delegate the choice of method of execution. *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 100 (2002) (“Of particular interest in this article are challenges concerning the extent to which a state can delegate to prison personnel the discretion and power to punish, a problem of greater relevance in lethal injection cases.”); *id.* at 66 (“Legislatures delegate death to prison personnel and executioners who are not qualified to devise a lethal injection protocol, much less carry one out. . . . In their all-consuming haste to perpetuate the death penalty, legislatures and courts promote an uncontrolled brutality that should have no place in society or the law.” (footnote omitted)).

²⁰⁶ *Krego*, 433 N.E.2d at 1299; *Howell*, 300 So. 2d at 781 (same); *Lincoln Dairy Co.*, 104 N.W.2d at 232 (“The Legislature may not avoid by delegation the performance of its exclusive function to define crimes and provide the punishment therefor.”). State court decisions differ, however, on the degree of separation required among the branches. Some have ruled, for example, that the legislature may leave certain decisions regarding the way punishment is imposed to the executive branch. *See, e.g., State ex rel. Reed v. Howard*, 69 N.E.2d 172, 172 (Ind. 1946) (“The place of punishment of convicts is within the control of the legislature designation of which it may delegate to other agencies.”); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978) (en banc) (allowing the legislature to delegate to the Director of the Department of Corrections the “power to determine details so as to carry out the legislative purpose which the Legislature cannot practically or efficiently perform itself”). These decisions do not suggest that the legislature may delegate power to increase punishment.

[no punishment without a prior *statutory* prohibition].”²⁰⁷ Herbert Packer described the principle of prior definition of crime and punishment as one that has been treated as “[t]he first principle” of American criminal law.²⁰⁸ Under this principle of legality, “the legislature is the principal lawmaker in a modern system of criminal law.”²⁰⁹

This principle of legality has led courts to prevent prosecution and punishment from extending beyond the clear reach of statutory authorizations through the void-for-vagueness doctrine and the doctrine requiring strict construction of penal statutes (the rule of lenity).²¹⁰ The prohibition against ex post facto lawmaking embodies the same idea.²¹¹ According to the Supreme Court, “[t]he fair warning requirement . . . reflects the deference due to the legislature, *which possesses the power to define crimes and their punishment.*”²¹² Furthermore, the Court has explained:

²⁰⁷ GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 48 (1998) (alteration in original).

²⁰⁸ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79–80 (1968) (“*The first principle [of the criminal law], we are repeatedly told, is that conduct may not be treated as criminal unless it has been so defined by an authority having the institutional competence to do so before it has taken place.*”); *see also* JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 92 (6th ed. 2012) (“The American legal system espouses the principle *nullum crimen sine lege, nulla poena sine lege*, or ‘no crime without law, no punishment without law.’ . . . There are three interrelated corollaries First, criminal statutes should be understandable Second, criminal statutes should be crafted so that they do not ‘delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.’ Third, judicial interpretation of ambiguous statutes should ‘be biased in favor of the accused,’ a concept that has come to be known as the lenity doctrine.” (fourth alteration in original) (citation omitted) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972))).

²⁰⁹ PACKER, *supra* note 208, at 91–92. Because this Article focuses on statutory authorization of death row and administrative imposition of death row, it does not address whether the principle of legality is offended by common law crimes and punishments. Some might argue that it does. George Fletcher, for example, contends that the Model Penal Code’s acceptance of punishment for omissions based on common law duties to act “raises serious problems under the principle [of legality].” FLETCHER, *supra* note 207, at 47–48. But whether the principle of legality has been modified in the United States to allow for punishment based on common law as well as statute is not relevant to the analysis here, where death row is established either by statute or administrative rule.

²¹⁰ PACKER, *supra* note 208, at 93. In some jurisdictions, the principle of legality is codified. *See, e.g.,* *Pueblo v. Lucret Quiñones*, 11 P.R. Offic. Trans. 904, 931 n.79 (P.R. 1981) (“The principle of legality provides that ‘. . . no punishments or security measures shall be imposed if not previously established [by law]’ [and] ‘[n]o crimes, penalties or security measures may be created by analogy.’” (last alteration in original) (quoting P.R. LAWS ANN. tit. 33, § 3031)).

²¹¹ PACKER, *supra* note 208, at 80.

²¹² *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997) (emphasis added) (first citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); then citing *United States v. Aguilar*, 515 U.S. 593, 600 (1995); then citing PACKER, *supra* note 208, at 79–96; and then citing John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985)).

The rule that penal laws are to be construed strictly, is . . . founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature . . . which is to define a crime, and ordain its punishment.²¹³

Allowing prison administrators to augment punishment outside the public lawmaking process could contravene the principle of legality, especially when the administrative rule-making process fails to give public notice of the punishment to be imposed. That is the case in those states in which prison policies need not be issued after public notice and comment or published publicly. In Virginia, for example, at least one of the prison regulations governing death row confinement is not available to the public on the Department of Corrections regulations website; when death row in Virginia was challenged in litigation, the relevant policy was filed under seal.²¹⁴ Punishment imposed by such hidden means does not satisfy the principle of legality and constitutional requirements of fair and public notice.

For these reasons, death row may not be retained for punishment reasons without an express determination by legislatures that such confinement is appropriate.

2. *Defending Legislative Action Against Objections*

Two core objections may be made to this call for legislative action. One lies in an institutional concern regarding the micromanagement of prisons, and the other lies in a consequentialist fear that legislatures will make death row even more cruel. But neither of these concerns provides a sufficient justification for ceding to prison administrators the choice of whether to establish death row.

a. *Prison Micromanagement*

The first objection to legislative intervention regarding death row likely will be that legislatures should not become enmeshed in matters of internal prison discipline.²¹⁵ As the Supreme Court has recognized, “a prison’s internal

²¹³ *Wiltberger*, 18 U.S. at 95.

²¹⁴ See E-mail from Michael Bern, *supra* note 72.

²¹⁵ The Supreme Court has required deference to prison officials regarding internal discipline:

“Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” . . . It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

security is peculiarly a matter normally left to the discretion of prison administrators.”²¹⁶ Prison administrators, not courts or legislators, have institutional expertise with regard to inmate discipline and institutional concerns. Yet if legislatures alone possess authority to establish death row because it is based only on the sentence imposed, it might appear that legislatures must review all other prison decisions that involve sentencing considerations. In some jurisdictions, for example, prison administrators assign initial custody levels based on expected years in prison, as well as other factors.²¹⁷ If death row is seen to augment punishment, arguably these decisions, too, would need to be reviewed. This objection would reflect a legitimate reluctance to intrude upon prison decisions that can be based on administrators’ experience and expertise.

However, legislatures already do make decisions regarding prison policy. The Virginia legislature, for example, has required prison administrators to give prisoners “appropriate program assignments including career and technical education, work activities and employment, academic activities . . . , counseling, alcohol and substance abuse treatment, and such related activities as may be necessary to assist prisoners in the successful transition to free society and gainful employment.”²¹⁸ The legislature has specified the average number of program hours each prisoner should receive, with the number increasing a specified amount over a period of several years.²¹⁹ A statute stating whether death row is appropriate would not require more interference.

Death row placement differs in important ways, moreover, from other decisions made by prison administrators. Three features typically set death row apart. First, death row is *categorical*. The entire class of death-sentenced prisoners is segregated and isolated. Other prisoners, in contrast, typically receive individual evaluations to determine their custody placement, either upon entry into prison or periodically thereafter.²²⁰ This purely sentenced-

Whitley v. Albers, 475 U.S. 312, 321–22 (1986) (first alteration in original) (citations omitted) (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

²¹⁶ *Id.* at 321 (quoting Rhodes v. Chapman, 337, 349 n.14 (1981)).

²¹⁷ See, e.g., FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT NO. P5100.08, at ch. 5, p. 5 (2006), https://www.bop.gov/policy/progstat/5100_008.pdf [<https://perma.cc/3NGT-8RP4>] (providing general rules for security designations based, *inter alia*, on remaining sentence length, but permitting deviations to lesser security based on other circumstances, such as “positive adjustment” to prison life); VA. DEP’T OF CORR., INSTITUTIONS BY SECURITY LEVELS, <http://vadoc.virginia.gov/facilities/security-levels.shtm> [<https://perma.cc/PGA6-DWQP>] (indicating that prisoners’ sentences affect their security and location assignments but that prisoners who do not engage in disruptive behavior may be eligible for transfers to less secure facilities).

²¹⁸ VA. CODE ANN. § 53.1-32.1(A) (2013).

²¹⁹ See *id.* § 53.1-32.1(C)(1)–(5).

²²⁰ Research for this Article has unearthed no exception to this rule. Even where prison policies take sentences into account in determining custody placements, placements may be overridden based on other considerations and are subject to reassessment in light of institutional behavior. See, e.g., TEX. DEP’T OF CRIM. JUST., OFFENDER ORIENTATION

based aspect of death row gives it its presumptively punitive character. Second, death row is *permanent*. Death-sentenced prisoners remain on death row until they die or are found to have been sentenced in error; other prisoners, in contrast, may request and receive custody transfers based on good behavior.²²¹ The permanence of death row indicates that prison administrators are not establishing death row based on expert decisions that reflect their unique view into prisoners' behavior and administrative needs. And third, death row is *severely harsh*. The severity of death row conditions makes them significant and of urgent concern.²²² In many states death row means solitary confinement, perhaps the harshest prison condition possible, and far worse than normal maximum security conditions.²²³ Solitary confinement otherwise

HANDBOOK 5 (2015), http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf [<https://perma.cc/9TSE-76WU>] (“An offender’s custody level depends on his current institutional behavior, his previous institutional behavior, and his current offense and sentence length. If the offender violates any rules, he may be placed in a more restrictive custody. If the offender complies with the rules, he may be assigned a less restrictive custody level.”); VA. DEP’T OF CORR., OPERATING PROCEDURE 830.5(III) (2014), <http://vadoc.virginia.gov/About/procedures/documents/800/830-5.pdf> [<https://perma.cc/G73G-SNU8>] (providing for an annual review of each offender’s classification based on “an offender’s needs and objectives” and permitting general population offenders—but not death row inmates—to request facility transfer).

Death row prisoners automatically face some of the strictest forms of incarceration, without the individualized procedural review other prisoners receive. Arkansas’s practice of confining death-sentenced prisoners in supermax provides an example. Noncapital prisoners may not be sent to Arkansas’s supermax unit unless they have escaped from a prior facility, assaulted another inmate or staff, been convicted of violent felony in prison, or for “[o]ther reasons, which the Warden believes may constitute a serious threat to the security and good order of the institution.” ARK. DEP’T OF CORR., INMATE HANDBOOK 34 (2012), <http://adc.arkansas.gov/resources/Documents/Inmate%20Handbook%202012%20-%20single%20page.pdf> [<https://perma.cc/MZV6-V9Q4>]. To be transferred, moreover, an Arkansas prisoner first must receive a hearing and opportunity to call witnesses and introduce evidence to challenge the grounds for transfer. *Id.* Death-sentenced prisoners, in contrast, receive no such protections. Since 2003, they have been placed directly in the supermax facility. See Associated Press, *Death Row on the Move*, KAIT8 (Aug. 26, 2003), <http://www.kait8.com/Global/story.asp?S=1417128> [<https://perma.cc/W2LN-FKYR>]. They must live in supermax confinement although, according to the prison system’s spokeswoman, “[t]he death row inmates are the best behaved inmates in prison.” *Death-Row Cells Are Unlocked by Accident*, *supra* note 96 (quoting Dina Tyler, spokeswoman for the Arkansas prison system).

²²¹ See *supra* note 220.

²²² Recently, a great deal of attention has been focused on the solitary confinement of prisoners, precisely because of the significant harms that follow from such treatment. See *supra* note 13 and accompanying text.

²²³ As an example, consider the contrast between Virginia’s solitary confinement of death row prisoners, see *supra* note 4, and the conditions of general population prisoners at the same maximum security facility (Sussex I State Prison). The district court explained in *Prieto v. Clarke*:

is reserved as a temporary measure to punish inmates who violate prison rules, are found individually to pose special risks, or sometimes as an extreme and unfortunate measure deemed necessary to protect prisoners at special risk.²²⁴ In combination, the categorical nature, permanence, and severity of death row conditions set them apart from all or nearly all other prison conditions. The need for legislative review of death row does not imply a need for legislatures to micromanage the many prison conditions that do not implicate these three crucial factors.

A final consideration also favors legislative action: Without legislative action, a real risk arises that *no one* will make a reasoned and deliberate decision about whether death row is necessary. Though prison administrators actually are choosing to establish death row, they—like so many courts and scholars—may assume that death row is an inevitable consequence of the decision of sentencing authorities to impose the death penalty. Meanwhile, sentencing authorities may assume that prison administrators are maintaining death row based on their institutional expertise and an empirical evaluation of prisoner risks. Legislatures, too, may make this assumption. But in reality, no one is making a reasoned or deliberate decision about the need for death row.

Justice Kennedy recently expressed a similar concern. He wrote in a concurring opinion in a recent capital case: “It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.”²²⁵ He urged close scrutiny over whether the solitary confinement of death-

Conditions for [general population prisoners and death row prisoners] differ in almost every meaningful respect. First, general population inmates spend substantial time every day out of the confines of their cells. For example, they are given approximately 80 minutes of outdoor recreation four or five days per week, and they have access to the open prison yard, complete with a jogging track and basketball courts. Second, general population inmates enjoy the near-constant company of others. . . . This is to say nothing of the benefits of two communal meals per day, regular contact visits from family and friends, and group religious and educational programming. In other words, the experience for general population inmates at SISP is hardly a solitary one.

No. 1:12-CV-1199, 2013 WL 6019215, at *6 (E.D. Va. Nov. 12, 2013) (citation omitted), *rev'd on other grounds*, 780 F.3d 245 (4th Cir. 2015).

²²⁴ See, e.g., VA. DEP'T OF CORR., OPERATING PROCEDURE 861.1(V)(A)(100) (2016), <http://vadoc.virginia.gov/About/procedures/documents/800/861-1.pdf> [<https://perma.cc/AKE2-K9SY>] (listing prison offenses, including killing another inmate, and providing a maximum penalty of loss of 30 days good conduct allowance and up to 30 days disciplinary segregation); VA. DEP'T OF CORR., OPERATING PROCEDURE 861.3(IX)(A)(1) (2015), <http://vadoc.virginia.gov/About/procedures/documents/800/861-3.pdf> [<https://perma.cc/H32T-FCK6>] (providing for segregation for personal protection or custodial management).

²²⁵ *Davis v. Ayala*, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring).

sentenced prisoners and other inmates was necessary, and seemed to invite a constitutional challenge to the long-term use of solitary confinement.²²⁶

Requiring legislative authorization of death row will ensure that it is not used illegitimately and unthinkingly to augment the punishment for capital crimes.²²⁷ As Justice Kennedy observed, “Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society’s simple unawareness or indifference.”²²⁸

b. *Legislative Harshness*

Another likely objection is that legislatures will mandate even harsher death row conditions than prison administrators already impose today. Critics who espouse this objection may care less about a democratically legitimate process than about a humane result. But the arguments in this Article are non-consequentialist in nature,²²⁹ and rooted in the idea that the division of authority among the branches best preserves and legitimates the exercise of power over a people that does not agree on the existence of some higher law and has agreed to rely instead on majority will. The arguments are also grounded in a conception of what state constitutional law requires as a matter of the separation of powers, and on the principle of legality that could be violated by the administrative creation of death row.

The consequentialist argument may also be answered on its terms, for the sake of broadening the discussion. A historical review of laws regarding methods of execution offers a useful example to show that legislatures—even in states that choose to retain capital punishment—are not inevitably harsh.²³⁰ Over the last decade and a half, state legislatures have pursued less painful methods of execution out of what the Supreme Court has called “an earnest

²²⁶ *Id.* (objecting to the use of permanent solitary confinement for death row and certain other prisoners).

²²⁷ See HART & SACKS, *supra* note 200, at 696 (describing “the ideals of an informed and deliberative [legislative] process”).

²²⁸ *Ayala*, 135 S. Ct. at 2209.

²²⁹ See *supra* notes 197–214 and accompanying text.

²³⁰ Over the last one hundred and fifty years, a dozen states abolished the death penalty in favor of lesser punishments; six states abolished it within the last *fifteen* years. *States With and Without the Death Penalty as of July 1, 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<https://perma.cc/8KBY-MVU6>].

More broadly speaking, Darryl Brown has shown that legislatures over the last hundred years often have limited dramatically—and sometimes entirely repealed—criminal laws, usually with strong public support for their decriminalization choices. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 233–45 (2007). Brown’s research calls explicitly into question the common claim that the politics of crime create a one-way ratchet in favor of greater criminalization. *Id.* at 223–25.

desire to provide for a progressively more humane manner of death.”²³¹ Indeed, states adopted electrocution as the method of execution in the late 1880s after a commission established by the New York legislature concluded that it was “the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.”²³² The Supreme Court observed that they had done so because of “a well-grounded belief that electrocution is less painful and more humane than hanging.”²³³ Lethal gas was adopted in numerous states after the Nevada legislature concluded that it was “the most humane manner known to modern science” at the time.²³⁴ Later, legislatures “once again sought a more humane way to carry out death sentences [and] eventually adopted lethal injection.”²³⁵ In other words, legislatures do not always enact harsher or crueler laws, even for the most hated criminals.

Furthermore, legislatures have fiscal reasons to eliminate or limit the use of death row. Death row segregation and isolation require additional facilities and resources.²³⁶ Studies have found that housing a prisoner on death row costs tens of thousands of dollars more per year than housing him in the general population. One estimate revealed that California pays \$90,000 more to house each condemned prisoner on death row.²³⁷ For budgetary reasons,

²³¹ *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion); see also TEX. CODE CRIM. PROC. ANN. art. 43.24 (West 2006) (“No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.”).

²³² *In re Kemmler*, 136 U.S. 436, 444 (1890); see also *Baze*, 553 U.S. at 42; *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915).

²³³ *Malloy*, 237 U.S. at 185.

²³⁴ *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (quoting *State v. Jon*, 211 P. 676, 682 (Nev. 1923)).

²³⁵ *Id.* More recently, at least one state legislature has tried to limit the duration of the time inmates spend on death row. See, e.g., FLA. STAT. ANN. § 924.055 (West Supp. 2016) (“It is the intent of the Legislature to reduce delays in capital cases and to ensure that all appeals and postconviction actions in capital cases are resolved within 5 years after the date a sentence of death is imposed in the circuit court.”). Perhaps the legislature’s concern was motivated by a desire to be more humane, or perhaps it sought to promote the efficiency and efficacy of the death penalty.

²³⁶ See *supra* note 32.

²³⁷ See Alarcón & Mitchell, *supra* note 33, at S102–06 (describing \$90,000 as best estimate available for additional costs of death row confinement); see also Ed Barnes, *Just or Not, Cost of Death Penalty Is a Killer for State Budgets*, FOX NEWS (Mar. 27, 2010), <http://www.foxnews.com/us/2010/03/27/just-cost-death-penalty-killer-state-budgets/> [<https://perma.cc/YB3Z-3Y98>] (citing \$90,000 estimate). Studies also have found that solitary confinement generally is extremely expensive, and so when death row involves such isolation, its costs will naturally be much higher. See, e.g., ACLU, *A SOLITARY FAILURE: THE WASTE, COST AND HARM OF SOLITARY CONFINEMENT IN TEXAS* 39 (Feb. 2015), https://www.aclutx.org/sites/default/files/field_documents/SolitaryReport_2015.pdf [<https://perma.cc/RCH4-6M8J>] (stating that in Texas solitary confinement “costs forty-five percent more than housing the same person in general population, or \$61.63 per person per day compared to \$42.46 per person per day”).

legislatures might abolish death row or ameliorate costly death row conditions such as solitary confinement.

Fiscal concerns might motivate a legislature at least to reduce the use of death row, such as by creating a penal review board—akin to a parole board—with authority to release a prisoner into the general prison population after a certain period of time or good behavior.²³⁸ Thus, legislatures might abolish or reduce death row for a variety of reasons and in a variety of ways.

Admittedly, some legislatures might be reluctant to eliminate death row, out of fear of the political blame they would face if any inmate were to escape or kill again.²³⁹ Legislatures might see the political risk as too high a price to pay for a less cruel or costly capital punishment process.²⁴⁰ But evidence could be useful to counteract such alarmism. Experts such as Mark Cunningham, who authored the study of Missouri's death row abolition experience, could testify that death-sentenced inmates are as a group no more dangerous than term-sentenced inmates.²⁴¹ And publicizing cost estimates of death row confinement could foster public support for death row abolition.

A legislature concerned about political backlash also could appoint a special commission to study death row confinement and to offer recommendations. This approach would make it harder for the legislatures to be accused of making a rash or unreasoned decision. Legislatures appointed similar commissions before adopting more humane methods of execution.²⁴² A commission could provide legislatures with analysis and recommendations regarding the ethical, punishment, and fiscal dimensions of death row. The

²³⁸ The author thanks Professor Robert Ferguson for this thoughtful suggestion.

Here one should note that parole decisions do not appear to implicate the problem of administrative imposition of punishment challenged in this Article. A parole system requires an express decision by the legislature to allow reductions in punishment based on subsequent behavior. *See, e.g., Rivenbark v. Commonwealth*, 501 A.2d 1110, 1113 (Pa. 1985) (“Parole is a method of rehabilitation enacted as the public policy of the Commonwealth pursuant to the General Assembly’s exclusive power to determine the penological system of the Commonwealth.”). Such a delegation of release power may be the only means by which legislatures can enact punishment calibrated to the goal of rehabilitation. Moreover, authorized decreases in punishment do not raise the legality and separation of powers concerns that flow from the imposition of additional, non-statutory punishments.

²³⁹ If prisoner escapes into the *public* are the chief concern, strictly monitoring *external* prison perimeters might address the problem even if prisoners are granted greater *internal* privileges and activities. The extent of external perimeter safeguards helps distinguish higher security prisons from lower ones. Perimeter security does not equate to close custody restrictions, though high-security prisons tend to have both. *See, e.g., About Our Facilities*, FED. BUREAU PRISONS, http://www.bop.gov/about/facilities/federal_prisons.jsp [<https://perma.cc/9EH8-9JZY>].

²⁴⁰ Prison administrators, too, may have such fear, suspecting that they will be blamed for change but not held responsible if they simply maintain the status quo.

²⁴¹ *See supra* Part IV.A.

²⁴² *Glossip v. Gross*, 135 S. Ct. 2726, 2731–32 (2015).

legislature could rely on the commission's recommendations and estimates to support its own decision regarding death row.

Not only would these approaches limit the risk of unthinking legislative cruelty, and thus assuage the consequentialist objection to legislative decision-making, but they could foster a more reasoned and legitimate lawmaking process.

B. *Executive Officials and Executioner Bias*

The Article has explained why legislatures alone have competence to establish death row, and that this power may not be delegable. Now the Article will contend that even if legislatures legally could delegate this power to prison administrators, they should not do so. The reason is that prison administrators may not be suited to make fair and informed choices about whether death row is necessary, because their perspective may be affected by their dual role in the execution process—as both executioners and policymakers.²⁴³ The Article will describe this risk as one of possible “executioner bias.”²⁴⁴

Prison administrators, such as death row wardens and directors of departments of corrections, often serve two roles in the execution process.²⁴⁵ As part of their responsibilities under state law, they may be required to play direct roles in the execution process, by ordering and supervising executions. According to criminologist Robert Johnson, “The plain fact is that formal executioners, whether shrouded in secrecy or working more or less as public figures, do not orchestrate the execution process. The warden or his designate does.”²⁴⁶ At the same time, these officials are often involved in setting or

²⁴³ Other reasons may exist why prison administrators would retain death row, which this Article does not explore because they do not show why administrators would be *worse* decision-makers than legislatures. One of these other reasons is simple risk-aversion. If officials lessen the restraints imposed on death-sentenced prisoners, and one of the prisoners kills an inmate or guard, or tries to escape, the prison administrators will be blamed for not keeping the prisoners in harsher conditions. This agency problem will give administrators an incentive to maintain the status quo to avoid blame. Legislatures, however, would face the same incentive not to change.

²⁴⁴ This term is the author's own.

²⁴⁵ The prison administrators, who would be involved in the policy decisions regarding how death-sentenced inmates should be confined, must be distinguished from prison personnel who lack policy-making power and who may not be involved in the executions of the inmates they guard.

²⁴⁶ JOHNSON, *supra* note 137, at 126. Death row wardens are personally involved in the execution process. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-100(b) (West 2009) (“Besides the warden or deputy warden and such number of correctional staff as he thinks necessary, the following persons may be present at the execution: the Commissioner of Correction . . .”); CONN. DEP’T OF CORR., ADMINISTRATIVE DIRECTIVE 6.15(9)–(12) (2014), <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0615.pdf> [<https://perma.cc/W8CQ-M2WS>] (requiring the warden to supervise personally the execution process, including by escorting the executioner(s) and witnesses, inspecting the condemned prisoners’ physical

implementing confinement policies for death-sentenced prisoners.²⁴⁷ As Johnson explains,

[The execution] process starts on death row, the bleak and oppressive “prison within a prison” where the condemned are housed for years awaiting execution . . . and culminates in the deathwatch . . . supervised by a team of correctional officers . . . who typically report directly to the prison warden.²⁴⁸

Presuming that the death penalty requires death row may make it easier psychologically for prison administrators to fulfill their lethal roles in the execution process²⁴⁹ in at least three ways. First, the segregation and isolation of death-sentenced inmates helps foster an image of death-sentenced inmates as uniquely vicious and dangerous. This image makes executions easier to rationalize on retribution or incapacitation grounds. Second, death row conditions of segregation and isolation may help break down empathy for condemned inmates, making it easier to think that their deaths do not matter or even that they deserve to die. Third, imposing death row automatically and invariably for each death-sentenced inmate shifts responsibility for the judgment of the appropriateness of such pre-execution confinement to sentencing authorities, implying further that death row is part of the just retribution decided upon by those authorities. In these ways, the existence of

restraints, inspecting the IV connection in the prisoner, and ordering the lethal injection to be administered). Other states are similar. *See, e.g.*, MONT. CODE ANN. § 46-19-103(5) (2015) (“The warden shall . . . select the person to perform the execution, and the warden or the warden’s designee shall supervise the execution.”); VA. CODE ANN. § 53.1-234 (2013) (requiring that “[a]t the execution there shall be present the Director [of the Department of Corrections] or an assistant”). The process may take a toll on wardens, as some have attested. *See, e.g.*, Ron McAndrew, *Former Florida Warden Haunted by Botched Execution*, DEATH PENALTY FOCUS, <http://deathpenalty.org/article.php?id=293> [<https://perma.cc/UPU5-I6>] (“During my tenure as Warden at Florida State Prison it was my duty to oversee the executions of three men: John Earl Bush, John Mills Jr. and Pedro Medina. Remembering every gruesome detail of their deaths is haunting.”).

²⁴⁷ *See, e.g.*, ARK. DEP’T OF CORR., ADMINISTRATIVE REGULATION AR002(I) (1988), <http://adc.arkansas.gov/images/uploads/AR002.pdf> [<https://perma.cc/KWB9-UU2Y>] (“The Director shall delegate authority to the Unit Wardens/Center Supervisors/Administrators or appropriate administrative designees to act on all matters related to the unit/center operational areas, to manage all programs, activities, inmates, personnel and volunteers connected with the unit/center/operational areas.”); CONN. DEP’T OF CORR., ADMINISTRATIVE DIRECTIVE 1.3(15)(B) (2015), <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0103.pdf> [<https://perma.cc/8678-LH9T>] (providing for input by units that will be affected by policy changes).

²⁴⁸ JOHNSON, *supra* note 137, at 126.

²⁴⁹ *Cf.* 18 U.S.C. § 2 (2012) (“(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”).

death row may make it easier psychologically for prison administrators to direct executions.

1. *Inmates As Savages*

Segregation of inmates on death row reinforces an image of the death-sentenced inmates as dangerous savages. Justice Brennan viewed the denial of common humanity as an inevitable aspect of capital punishment. Concurring in *Furman v. Georgia*, he wrote that “[t]he calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity.”²⁵⁰ He argued that the death penalty marked the condemned as categorically different from other prisoners and no longer “member[s] of the human family.”²⁵¹

Indeed, researchers have found that persons who must assist executions tend to engage in psychological self-protection by “dehumaniz[ing]” capital murderers as “devoid of any human qualities.”²⁵² Dehumanization may be expressed by assertions that, “Murderers who receive the death penalty have forfeited the right to be considered full human beings.”²⁵³

Social and psychological studies have shown that participation in killing creates enormous psychological stress, even when fully legal.²⁵⁴ Executioners (and others who must kill, such as soldiers) develop psychological coping mechanisms that limit their inhibitions and the psychological impact or “moral injury” caused by their lethal roles.²⁵⁵

Researchers have studied the kinds of coping mechanisms employed by prison personnel involved in the execution process. In a study published in 2005, Stanford researchers visited three penitentiaries where executions were carried out,²⁵⁶ and studied the moral disengagement levels of execution team members, support team members who consoled the victims’ families and the

²⁵⁰ *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

²⁵¹ *Id.*

²⁵² Osofsky, Bandura & Zimbardo, *supra* note 132, at 380 (emphasis omitted).

²⁵³ *Id.* (emphasis omitted).

²⁵⁴ See, e.g., RACHEL M. MACNAIR, PERPETRATION-INDUCED TRAUMATIC STRESS: THE PSYCHOLOGICAL CONSEQUENCES OF KILLING 31–43 (2002).

²⁵⁵ Jonathan Shay, who studied the phenomenon of “moral injury,” writes in a book on American soldiers in Vietnam that the enemy soldiers were “called madmen and animals and were said to lack any emotions.” JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 106 (1994). Saira Mohamed has contributed important analysis of perpetrator trauma and the tendency of perpetrators of killings to rationalize their actions. See Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, 115 COLUM. L. REV. 1157, 1185–86 (2015).

²⁵⁶ Osofsky, Bandura & Zimbardo, *supra* note 132, at 377–78. The study focused on three types of personnel, including support team members and persons directly participating in the lethal actions. *Id.* at 371, 378. The study concluded that “[e]xecutioners made heaviest use of dehumanization, security and economic justifications and disavowal of personal responsibility, but somewhat lesser use of moral justification.” *Id.* at 382.

condemned inmates, and prison guards with no involvement in the execution process.²⁵⁷ The researchers found that “[t]o negate moral self-sanctions, executioners do not focus on the taking of life, but rather seek solace in the dignity of the process and in the view that condemned killers have a *bestial aspect* to their nature and executing them will protect the public.”²⁵⁸ All three groups—executioners, supporters, and guards—“dehumanized” the prisoners to some degree, and the executioners did so the most.²⁵⁹ Building upon earlier studies, the researchers concluded that “the offenders tend to be dehumanized by those who have to take a human life.”²⁶⁰

The Stanford study illuminated the psychological tendencies of executioners, and its findings could suggest that prison administrators who direct executioners also might treat death-sentenced prisoners in ways that dehumanize them. As Lyon and Cunningham have noted, segregation on death row labels the death row inmate as a vicious criminal who has committed a hideous crime for which he must live permanently apart from others, awaiting execution.²⁶¹ His segregation and isolation confirm the sense that he is dangerous, vicious, and unfit for human interaction.²⁶² The isolation, restriction of personal hygiene, and physical and mental stagnation increases the sense of death row defendants as bestial and different from human beings who retain the right to life. Indeed, such treatment may push inmates actually to become the enemy of humanity that they were first labeled to be.²⁶³

Some prisons may use additional visual markers as well as physical barriers to set death-sentenced inmates apart. In Florida, for example, death

²⁵⁷ *Id.* at 371.

²⁵⁸ *Id.* at 386–87 (emphasis added). The executioners, support group members, and prison guards sought to avoid moral injury in other ways as well, such as by citing the “moral, economic, and societal security justifications” for the death penalty. *Id.* at 371, 381, 387.

²⁵⁹ *Id.* at 383.

²⁶⁰ *Id.* at 387–88.

²⁶¹ See Lyon & Cunningham, *supra* note 16, at 29 (noting that after mainstreaming in Missouri, “efforts were made to separate from the self-perpetuating mythology of condemned inmates by modifying the terminology used to refer to these inmates: ‘death row inmates’ was replaced by ‘capital punishment inmates’”); cf. JOHNSON, *supra* note 137, at 218 (“Prisoners on death row are sometimes explicitly referred to as ‘dead men.’”).

²⁶² See, e.g., Michael J. Osofsky & Howard J. Osofsky, *The Psychological Experience of Security Officers Who Work with Executions*, 65 PSYCHIATRY 358, 365 (2002) (noting that some officers who worked with executions justified the death penalty by “[s]tressing the heinous nature of the inmates’ crimes [and] referenced some of the horrid acts of inmates on Death Row”); John L. Worrall & Robert G. Morris, *Inmate Custody Levels and Prison Rule Violations*, 91 PRISON J. 131, 148 (2011) (suggesting that imposition of a custody level “labels” an inmate and stating that the classification of the inmate leads to assumptions about him).

²⁶³ To the extent that death row conditions of segregation and isolation prevent these inmates from being in contact with other persons and lead to their psychological and physical dysfunction, they may become a self-fulfilling prophecy that the prisoners will be unfit to function in society, even the limited society that exists in a prison community.

row inmates are distinguished visibly from other inmates because they must wear orange t-shirts.²⁶⁴ These superficial distinctions serve as a reminder of the crimes these prisoners have committed, setting them apart from the rest of humanity and even the prison community.

By adopting death row policies that require the automatic isolation of prisoners without individual evaluations, prison officials avoid the need for personal contacts that might cast doubt on their view of these prisoners as savages, and might reveal their common humanity. By marking death-sentenced inmates as savages who must be segregated and isolated for the safety of others, prison administrators may find it easier to justify killing them on incapacitation grounds, or even for reasons of retribution or general deterrence. Moreover, to the extent the condemned inmates are segregated from others and unable to contribute to society (even prison society), their continued existence may seem a waste and their execution may be rationalized on economic grounds as well.

2. *The Destruction of Empathy*

Death row also may serve to break down empathy and to make executions easier to perform. Insofar as death row helps prison administrators and guards²⁶⁵ dehumanize prisoners as savages, it may limit the officials' empathy for the prisoners when they suffer. And death row conditions also create a psychological and apparent divide between prison officials and inmates. As Craig Haney has shown in his seminal work on the "empathic divide" that enables white juries to impose death sentences on black defendants,²⁶⁶ racial, cultural, and situational differences can break down empathy.²⁶⁷

²⁶⁴ FLA. *Death Row*, *supra* note 46 ("Death Row inmates can be distinguished from other inmates by their orange t-shirts.").

²⁶⁵ The Article uses the term "prison guards," in reference to prison employees who interact on a daily basis with prisoners, providing their meals, transportation, and the like. Though these employees might also be referred to as "correctional officers," the Article uses the term "prison guards" to avoid confusion between their work and that of "prison administrators," who have authority to establish overarching rules for the prison and who may but need not come in contact with prisoners on a daily basis.

²⁶⁶ See Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573 (extending Haney's prior work on the empathic divide).

²⁶⁷ Sharon Dolovich has argued that "[i]n today's carceral regime, . . . to be a prisoner is to occupy a morally degraded state, in which any harm you suffer counts for nothing." Dolovich, *supra* note 139, at 312. Given the disproportionate number of blacks who are convicted of crime, Dolovich has implied that racial animus may be a factor in the imposition of harsh penal conditions. *See id.* at 313 ("Certainly, the drivers of exclusion and control are complex, and not reducible to any one variable, be it race or otherwise. But it surely bears noting that, as segregation based exclusively on race has become constitutionally impermissible, the carceral system—which allows for both the physical removal and moral degradation of targeted individuals—has dramatically expanded and disproportionately targeted people of color."). If death row conditions are made

Segregation and isolation of death-sentenced inmates may hinder empathy for the condemned and the shared suffering it could generate. When death-sentenced inmates are prevented from engaging in communal activities, supervising officials (prison administrators and, more frequently, prison guards) do not have to see the inmates behaving toward others with generosity, humor, or friendship. They also avoid seeing the inmates fight with one another, or display fear of injury at the hands of other inmates—negative actions and emotions but nonetheless ones that manifest the humanity and personality of the condemned. Not seeing how death-sentenced inmates interact with others may make it less likely that prison officials will relate to them or empathize with them. Limitations on visits between death-sentenced inmates and their families also may shield officials from witnessing the prisoners' love for their families and the suffering the families feel as they anticipate the prisoners' executions. The avoidance of empathy may cultivate a team of prison officials less troubled by executions and more willing to participate in the execution process directed by prison administrators.

Some scholars, most notably Sharon Dolovich in recent years, have written about how our penal system excludes criminals from society and from the rights that society accords.²⁶⁸ Death row takes exclusion a step further and bars death-sentenced inmates even from the general prison community. Over time, the strictures of death row may deprive inmates of all personal relationships. For the prohibition on contact visits, and the restrictions on visitation generally, eventually may break down even those familial bonds.²⁶⁹ The loosening of the prisoner-family bonds may make the families less pained or angry as a result of the execution process. Prison administrators in turn may be more accepting of their lethal roles when the execution process does not appear to cause so much pain to innocent family members.

intentionally harsh as punishment, Dolovich's argument would seem to raise a serious concern. But the strongest evidence of the harshness of death row conditions—the argument that they force some inmates to “volunteer” for execution—undercuts a racial animus claim at least in the context of death row; white inmates “volunteer” at a rate ten times that of black inmates. See DPIC “*Volunteers*,” *supra* note 7. This disproportionate willingness of whites to speed their deaths may reflect many factors, including, perhaps, their greater incidence of guilt. It does, however, undercut any suggestion that death row conditions disproportionately burden black inmates.

²⁶⁸ See, e.g., Dolovich, *supra* note 139.

²⁶⁹ See *Block v. Rutherford*, 468 U.S. 576, 599 (1984) (Marshall, J., dissenting) (recounting expert testimony stating that contact visitation is crucial to retention of prisoners' familial bonds and that denial of contact visitation contributes to the break-up of prisoners' marriages); see also Opening Brief for Plaintiff-Appellee, *supra* note 126, at 11–12 (noting that the current prison warden for Virginia's death row has stated that he would allow a contact visit by an immediate family member only if a death row inmate were on his deathbed).

3. Deflection of Responsibility

By treating death row as tethered to death sentences, prison administrators can deny responsibility for the entire execution process, including the dehumanizing conditions of pre-execution confinement. Death row becomes an inevitable correlate of a death sentence, and the result of decisions by other authorities: the legislatures that authorized the capital penalty, the jury and judge who imposed the capital sentence, and the inmate who committed the capital offense. The “tether” between death sentences and death row²⁷⁰ provides cover for prison administrators to distance themselves from the prisoners they will have to execute. The Stanford study mentioned above found that all prison personnel involved in executions strongly denied responsibility for the execution decision.²⁷¹ They emphasized that they had no role in imposing the death sentences.²⁷² As the Stanford researchers observed with regard to executioners: “*Displacement of responsibility* absolves executioners from being judged personally for carrying out the orders of society, and shifts responsibility to the heinous nature of the crimes and to sentencing requirements”²⁷³

Arguments in the recent *Prieto* case illustrate how prison administrators may seek to shift responsibility to sentencing authorities. During oral argument in October 2014, the Virginia Director of Corrections argued that the segregation and solitary confinement of death row prisoners was warranted because they had been found by the jury or judge to pose a risk of future dangerousness or to have committed particularly “vile” crimes (and thus presumably to require either permanent incapacitation or harsh retribution).²⁷⁴ He made clear that death row placement resulted solely and entirely from the sentence.²⁷⁵ Indeed, he explained, even if the court required the prison to

²⁷⁰ According to the Fourth Circuit’s recent decision in *Prieto v. Clarke*, “tethered to the death sentence in Virginia is pre-execution confinement on death row.” 780 F.3d 245, 254 (4th Cir. 2015).

²⁷¹ Osofsky, Bandura & Zimbardo, *supra* note 132, at 371, 381, 386–87.

²⁷² *Id.*

²⁷³ *Id.* at 379.

²⁷⁴ Oral Argument at 13:40, *Prieto*, 780 F.3d 245 (No. 13-8021), <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments#audiocurrent> [<https://perma.cc/6C5E-E8UZ>] (arguing that death row placement is due to the sentence which is based on one of two determinations: risk of future dangerousness or that the crime was particularly “vile”). Note that the required finding is in *addition* to a finding that the defendant has committed an enumerated capital crime. See *supra* note 81; see also Oral Argument, *supra* (Motz, J.) (referring to the “death row sentence”); John Woestendiek, *Prison Official Backs Segregation of Death-Row Inmates*, PHILLY.COM (June 28, 1986), http://articles.philly.com/1986-06-28/news/26045740_1_death-row-inmates-state-prison-graterford [<https://perma.cc/9Z5K-VDUK>] (quoting official as stating that “our philosophy is that the sentence overrides the other factors because it’s the only sentence that leads to death”).

²⁷⁵ The director’s argument, and death row policies of segregation and isolation generally, thus contradict Robert Blecker’s claim that prison officials “consciously ignor[e]

assess death-sentenced inmates individually for security risk, the prison would give them an automatic maximum score based on their death sentences that would secure their placement on death row.²⁷⁶ In other words, the prison would assume that a capital sentence meant that death row was necessary. This approach enabled Virginia prison officials to place responsibility for the entire pre-execution process on the legislature, judge, and jury, for imposing a death sentence for a capital crime.²⁷⁷

In all the foregoing ways, death row segregation and isolation may help prison administrators reduce the psychological burden of their participation in executions. Contrary to presumptions that prison administrators will base their death row policies on institutional competence, prison administrators may be predisposed to impose conditions that will limit their own “moral injury” and psychological stress. They may not give up longstanding death row policies, even in the face of mounting evidence that the segregation of all death-sentenced prisoners is not necessary for security reasons.²⁷⁸ And instead of judging whether any retributive and deterrent purposes require death row,

prisoners’ criminal records” and thus “unwittingly help sever the essential retributive connection between the past crime committed and the present punishment experienced.” Blecker, *supra* note 34, at 1171.

²⁷⁶ The prison’s approach to noncapital inmates is very different. See VA. OPERATING PROCEDURE, *supra* note 70, at 830.2(III) (defining prisoner “suitability” for a particular custody level as “[a] reasoned, professional judgment regarding an offender’s ability to perform in a certain security level or facility environment; it calls for a discerning judgment relative to length of sentence, crime, prior record, as well as sociological, medical, and psychological considerations. Suitability differs with each individual offender depending upon the offender’s facility, parole eligibility, Mandatory Parole Release Date or Good Time Release Date.”); *id.* at 830.2(IV)(A)(1) (stating that offenders are to be “assigned to the least restrictive security level necessary and not subjected to excessive control and management”).

²⁷⁷ The Fourth Circuit’s decision in *Prieto* fosters this impression that the sentencing authorities are responsible for confinement conditions. See *Prieto*, 780 F.3d at 254 (stating that “tethered to the death sentence in Virginia is pre-execution confinement on death row”).

²⁷⁸ Corrections authorities have ready access to this information. See Lyon & Cunningham, *supra* note 16, at 8 n.44 (“Correction departments belong to common associations and accrediting organizations, disseminate statistical experience and research findings with each other, and are guided by common judicial determinations.” (quoting Mark D. Cunningham & Thomas J. Reidy, *Violence Risk Assessment at Federal Capital Sentencing: Individualization, Generalization, Relevance, and Scientific Standards*, 29 CRIM. JUST. & BEHAV. 512, 522 (2002))). Recently, the Association of State Corrections Administrators released a thorough study and critique of the widespread use of solitary confinement, including for death row prisoners. See ASCA-LIMAN SURVEY, *supra* note 13; Williams, *supra* note 13.

Notably, former corrections officials recently spoke out in an amicus brief against the use of solitary confinement for death-sentenced prisoners. See Brief of Amici Curiae Correctional Experts in Support of Appellee, *supra* note 54, at 1–3. But they did so only after ceasing to serve in lethal roles. *Id.* (describing past experience with death-sentenced prisoners).

prison administrators may hold onto death row in order to reassure themselves that these and other purposes require execution.

C. *The Role of the Courts*

This Article thus far has focused on the role of legislatures and prison administrators regarding death row. Challenging the existing reliance on administrative decision-making has been its central aim. Now the Article will turn to the role that courts may play in ensuring that the allocation of decisional authority remains within constitutional bounds.

Prior scholars and courts have explored important limits on the harshness of death row imposed by the Eighth Amendment,²⁷⁹ the Due Process Clause,²⁸⁰ and international law.²⁸¹ They have entirely overlooked, however,

²⁷⁹ Some of the most significant challenges to death row conditions have been raised under the Eighth Amendment. Andrea Lyon and Mark Cunningham have argued that automatic and permanent isolation on death row violates the Eighth Amendment because it is unnecessary and cruel. *See* Lyon & Cunningham, *supra* note 16, at 13 (“[T]he long-term segregation and deprivations of death row have been shown time and time again to have deleterious and even debilitating effects upon inmates, thereby rendering death row cruel. Because the stark conditions of isolation and deprivation of death row are not suffered by the vast majority of prison inmates, they are unusual as well.”). In an ongoing lawsuit, prisoners on Virginia’s death row claim that Virginia’s policy of sending all prisoners sentenced to death into solitary confinement on death row violates the Eighth Amendment. *See* Complaint at 1–2, Porter v. Clarke, No. 1:14-CV-01588 (E.D. Va. Nov. 20, 2014). Their case has come before District Judge Leonie Brinkema, the same judge who granted a fellow death row prisoner’s claim for due process relief in 2013 (only to be reversed recently by the Fourth Circuit). Though the claim will be difficult to win because such harsh treatment of death-row prisoners is not “unusual,” as the Eighth Amendment requires, Judge Brinkema has already expressed doubt in the 2013 case that Virginia prison administrators have a sufficient penological purpose to justify automatically and permanently sending all death-sentenced prisoners into solitary confinement on death row. *See* Prieto v. Clarke, No. 1:12-CV-1199, 2013 WL 6019215, at *8 (E.D. Va. Nov. 12, 2013) (stating that the death row policy “further[ed] few, if any, legitimate penological goals”), *rev’d on other grounds*, 780 F.3d 245 (4th Cir. 2015). Scholars and death penalty opponents also have cited the harsh conditions of death row to argue that the death penalty itself is unconstitutionally cruel, contending that protracted isolation on death row followed by execution exceeds the punishment permitted by the Constitution. *See, e.g.,* Sun, *supra* note 2.

To date, however, no court has held the Eighth Amendment to forbid the segregation or isolation of prisoners on death row. Several federal courts have issued consent decrees to remedy unusually extreme conditions of death row confinement caused by, for example, severe lack of sanitation or extreme temperatures, but these orders have not barred the isolation of death row prisoners or questioned the propriety of a separate death row. The use of such decrees, moreover, is controversial. *See, e.g.,* Lewis v. Casey, 518 U.S. 343, 365 (1996) (Thomas, J., concurring) (objecting that “the federal judiciary has for the last half century been exercising ‘equitable’ powers and issuing structural decrees entirely out of line with its constitutional mandate”).

²⁸⁰ Other challenges to death row have been presented under the Due Process Clause. A prisoner challenging confinement conditions under due process must show that he has a

whether prison administrators have institutional authority to establish death row in the first place. The Article now will address that question and will show that at least in some states, the separation of powers forbids administrative creation of death row. Additionally, the Ex Post Facto Clause may limit legislatures' ability to rubber-stamp current administrative death row policies. The role that courts may play enforcing these constitutional limits merits a central place in death row scholarship and litigation.

1. *Separation of Powers As a Limit on Death Row*

In most states, statutes do not require or even address the creation of death row.²⁸² Prison administrators have established death row based only on their general authority to create custody conditions. In Virginia, for example, prison administrators have cited two statutes to support their creation of death row. One statute grants general authority to the Director of Corrections,²⁸³ while the other requires the Director to maintain a system of classification for evaluating prisoners according to factors such as "background, aptitude, education, and risk."²⁸⁴ Neither of these statutes authorizes prison administrators to hold death-sentenced prisoners in worse conditions based only on the crimes that they committed.

In states like Virginia, where prison administrators have no express authority to establish stricter conditions for death-sentenced prisoners, courts should hold that the creation of death row by prison policy exceeds the legitimate bounds of administrative authority. Unless a statute expressly mandates death row, the law should not be read to allow prison administrators the power to establish it. For any such prescription of additional punishment ought to be express in order to satisfy the principle of legality and the rule of lenity that helps enforce it. Moreover, though courts normally might defer to

liberty interest in avoiding those conditions. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The courts have not recognized a state-created or constitutionally created liberty interest in avoiding death row. To the contrary, in the Virginia case mentioned above, the Fourth Circuit has held that death-sentenced prisoners have no liberty interest in avoiding solitary confinement on death row, where such death row confinement is prescribed by "state law" or prison policy. See *Prieto*, 780 F.3d at 254. This decision will not be overturned, because Virginia executed Alfred Prieto on October 1, 2015, rendering his request for the Supreme Court's intervention moot. See Cristian Farias, *Solitary Confinement Case Dies with Death-Row Inmate's Execution*, HUFFINGTON POST (Oct. 17, 2015), http://www.huffingtonpost.com/entry/alfredo-prieto-solitary-confinement_562227ece4b02f6a900c9010 [<https://perma.cc/U3HJ-QSB5>]; see also *Prieto v. Clarke*, 136 S. Ct. 319 (2015) (mem.) (dismissing petition for certiorari in *Prieto v. Clarke* as moot).

²⁸¹ Finally, some courts have concluded that death row conditions violate international law. See *supra* note 3 (citing decisions). Courts in the United States, however, have not barred death row on international law grounds.

²⁸² See *supra* Part III.C.

²⁸³ VA. CODE ANN. § 53.1-10 (2013).

²⁸⁴ *Id.* § 53.1-32.1(A).

an agency's interpretation of a statute governing its conduct,²⁸⁵ a claim by prison administrators that a statute silent regarding death row implicitly grants authority for it would be an unreasonable reading of such a statute and would not deserve deference. It would be unreasonable to claim that the legislature intended by silence to delegate a quintessentially legislative function.²⁸⁶

Moreover, if a state were to enact a statute authorizing prison administrators to impose death row for punitive reasons, some state constitutions would forbid such a delegation of power. The permissibility of such delegation depends on state law and state courts have divided over similar issues. For example, state courts have split over whether a legislature may delegate to an agency the power to specify what controlled substances come within the purview of a drug law. The Louisiana Supreme Court, among other courts, has held such a statute invalid as an unconstitutional delegation of legislative authority.²⁸⁷ The court has explained: "[W]here a statute vests arbitrary discretion in a board or an official without prescribing standards of guidance there is an unconstitutional delegation of legislative authority to the executive branch of the government."²⁸⁸ Other state courts have agreed.²⁸⁹ On the other hand, the Alabama Supreme Court has deemed such a statute permissible, concluding that "it is the legislative will, not the [administrative agency's], which states that, following a controlled classification, certain conduct related to that controlled substance constitutes a public offense."²⁹⁰ In the case of a delegation of authority to impose death row, it seems likely that,

²⁸⁵ At least in the federal system, prison administrators usually would receive deference for their interpretation of ambiguous statutes. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *Auth. to Advance Funds to Cuban Detainees to Purchase Commissary Items*, 12 Op. O.L.C. 64, 65 (1988) ("The deference that has been accorded the Bureau of Prisons in construing and applying the statute which it administers is consistent with the general administrative law principles reaffirmed by the Supreme Court." (citing *Chevron*, 467 U.S. at 842–45)).

²⁸⁶ Even without invocation of the rule of lenity, the choice of prison administrators to establish death row might be considered an unreasonable interpretation of their statutorily granted authority to maintain prison security and order. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. Even under this deferential standard, however, 'agencies must operate within the bounds of reasonable interpretation.'" (citation omitted) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014))).

²⁸⁷ *State v. Rodriguez*, 379 So. 2d 1084, 1087 (La. 1980); *see also id.* at 1085 ("Article II, § 1 of the 1974 Louisiana Constitution divides the powers of government into three separate branches: legislative, executive and judicial. Article II, § 2 provides that no one of these branches may exercise power belonging to either of the others.").

²⁸⁸ *Rodriguez*, 379 So. 2d at 1086.

²⁸⁹ *See Sundberg v. State*, 216 S.E.2d 332, 333 (Ga. 1975); *Howell v. State*, 300 So. 2d 774, 779 (Miss. 1974); *State v. Johnson*, 173 N.W.2d 894, 895 (S.D. 1970); *State v. Gallion*, 572 P.2d 683, 687 (Utah 1977).

²⁹⁰ *Ex parte McCurley*, 390 So. 2d 25, 29 (Ala. 1980).

at least in some states, such a delegation would be deemed constitutionally impermissible.

If prison administrators claim the power to establish death row not for punitive reasons, but based on security concerns, courts should reject and refuse to grant deference to that reasoning.²⁹¹ To be sure, federal courts usually defer to prison administrators' choices about how to manage prisons and presume that administrators' choices are reasoned judgments based on administrative expertise.²⁹² But prison administrators should not be presumed to act reasonably and based on their institutional expertise when they place an entire class of prisoners in solitary confinement based on their sentence alone.²⁹³ The automatic and permanent isolation of death-sentenced prisoners on its face does not involve the use of expert judgment upon which administrative deference is premised. Instead, it is a sentence-based and presumptively punitive measure.²⁹⁴ Courts should require concrete evidence

²⁹¹ State and federal courts differ in their approaches to agency determinations. As a general matter, several scholars have noted the need for more piercing review. Eric Berger, for example, has argued that courts ought to consider more closely institutional behavior before granting deference based on assumptions of institutional competence. See Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 470 (2013). Louis Virelli has argued for similarly stricter scrutiny in the exercise of arbitrary-and-capricious or "hard look" review of administrative decisions in the federal courts. See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 724–25 (2014) (arguing that the appropriate level of deference should be determined by "a collection of more particularized inquiries into specific components of agency decision making," such as "record building, reason giving, input scope and quality, and rationality").

²⁹² See, e.g., *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) (recognizing the "wide-ranging deference to be accorded the decisions of prison administrators").

²⁹³ The district court in the Virginia death row case mentioned earlier in this Article offers a model. In considering whether Virginia's death row policy imposed an atypical and significant hardship on death-sentenced inmates that would implicate procedural due process rights, the court asked whether the categorically harsh treatment of death-sentenced inmates bore "a rational relationship to legitimate penological interests." *Prieto v. Clarke*, No. 1:12-CV-1199, 2013 WL 6019215, at *6 (E.D. Va. Nov. 12, 2013), *rev'd on other grounds*, 780 F.3d 245 (4th Cir. 2015). Though the Fourth Circuit reversed on the ground that the district court should not have considered the hardship question because the prisoner had failed to show, as a predicate matter, that death row infringed on any liberty interest, the district court's analysis remains a useful guide should a liberty interest be found in another case or by another court.

²⁹⁴ Whether a restriction is punitive or regulatory is not always obvious. The Supreme Court has noted some features that can help draw the distinction:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the

that such categorical treatment is needed for security purposes, before accepting as an administrative necessity such a punitive provision.²⁹⁵ In these ways, courts may prevent prison administrators from illegitimately augmenting the punishment for capital crimes.

2. *Ex Post Facto Limitations on Death Row*

If state courts invalidate administrative policies creating death row, legislatures will be forced to enact legislation if they wish to preserve it. Importantly, the Ex Post Facto Clause may bar legislatures from simply rubber stamping under statutory law the death row practices that now occur based on administrative policy. Specifically, the Ex Post Facto Clause may forbid legislatures from requiring solitary confinement prior to execution for the category of prisoners who have already committed their capital crimes.²⁹⁶

The premise for this argument lies in an 1890 case in which the Supreme Court invalidated on Ex Post Facto grounds a Colorado statute mandating solitary confinement for all prisoners sentenced to death.²⁹⁷ A prisoner had challenged the statute on Ex Post Facto grounds, because he had committed his capital crime before the statute went into effect. To determine whether the Ex Post Facto Clause applied, the Court considered whether the law amplified punishment. Rejecting the state's argument that the imposition of solitary confinement was "a mere unimportant regulation as to the safe-keeping of the

alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (footnotes omitted).

²⁹⁵ Prisoners challenging death row would bear the initial burden of bringing evidence to the attention of the courts that calls death row into doubt. Experts also might weigh in as amici, as they did in the *Prieto* case. See *supra* note 126.

Unfortunately, the Fourth Circuit's decision reversing the district court, though not on this point, may have perpetuated the idea that prison officials should receive unthinking deference with regard to death row, even in the face of contrary evidence. See, e.g., Larry O'Dell, *Court OKs Automatic Solitary for Virginia Death-Row Inmates*, CNS NEWS (Mar. 10, 2015), <http://www.cnsnews.com/news/article/court-oks-automatic-solitary-virginia-death-row-inmates> [<https://perma.cc/6YEZ-AQ49>] ("[T]he appeals court agreed with state attorneys who argued that prison officials are better equipped than judges to assess security risks and adopt appropriate safeguards.").

²⁹⁶ See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . ."). The Ex Post Facto Clause prohibits retroactive application of penal statutes that disadvantage the offender affected by them. See *Calder v. Bull*, 3 U.S. (5 Dall.) 386, 390–92 (1798); see also *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). Separate from this limitation on the states, the Constitution protects against ex post facto laws by Congress. See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

²⁹⁷ *In re Medley*, 134 U.S. 160, 172–73 (1890). The statute also prohibited the warden from warning the prisoner of which day had been chosen for his execution. *Id.* at 163–64.

prisoner,” the Court held that mandatory isolation constituted “an additional punishment of the most important and painful character.”²⁹⁸ Furthermore, the Court found that the isolation was not ameliorated by the fact that the prisoner could have certain visitors, noting that administrative authorities could deny such visits in their discretion.²⁹⁹ The Court acknowledged a plausible retributive and deterrent purpose in the mandatory isolation—noting that it was designed “to mark [the condemned prisoners] as examples of the just punishment of the worst crimes of the human race”³⁰⁰—but held that such punishment could not be imposed retroactively.³⁰¹ The Court’s analysis thus forbade a legislature from mandating as punishment what prison wardens were already free to impose on individual prisoners.³⁰²

The Supreme Court has never overruled that 1890 decision and it appears to remain good law.³⁰³ Thus, if legislatures wished to retain death row after invalidation of an administrative death row policy by a court, it is not clear that they could simply revive the administrative policy of death row isolation. If courts were to combine this understanding of the Ex Post Facto Clause with a strict understanding of the separation of powers, many of the 3,000 prisoners now awaiting execution would have to be removed from death row,³⁰⁴ and the

²⁹⁸ *Id.* at 167, 171.

²⁹⁹ *Id.* at 167–69.

³⁰⁰ *Id.* at 169–70; *cf.* *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring) (stating that “the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself”).

³⁰¹ *In re Medley*, 134 U.S. at 174.

³⁰² In two later decisions, the Supreme Court upheld statutes imposing solitary confinement on death-sentenced inmates, making clear that the constitutional problem lay in retroactive application of such harsh restrictions and not in the restrictions themselves. *See* *McElvaine v. Brush*, 142 U.S. 155, 158–59 (1891); *Holden v. Minnesota*, 137 U.S. 483, 493–96 (1890).

³⁰³ Recently, a court cited *In re Medley* in a case involving the transfer of a death-sentenced prisoner into solitary confinement. *In re Gentry*, 245 P.3d 766, 768 (Wash. 2010) (citing *In re Medley*, 134 U.S. 160). The court in that case found no ex post facto violation because “solitary confinement was contemplated by state law at the time of [the prisoner’s] crime and sentence.” *Id.* at 767. The court stated that to prevail on his ex post facto claim, the inmate had to show that he had a liberty interest created by state law in avoiding the harsh conditions of death row confinement; for this proposition the court relied on its understanding of the *due process* principles set forth in *Sandin v. Conner*, 515 U.S. 472 (1995). *See In re Gentry*, 245 P.3d at 768 (citing *In re Dyer*, 143 Wash. 2d 384, 392–93 (2001) (citing *Conner*, 515 U.S. at 484)). Under this approach, the court concluded that the inmate could not prevail, because state law granted prison authorities “broad discretion over conditions of inmate housing” and the inmate had “no legitimate claim to future entitlement or liberty interest in [less severe housing] conditions.” *Id.* at 769. The court offered little justification for its layering of the limitations on due process claims and ex post facto protections. Nor did the court explain how the mere “contemplation” of solitary confinement under statutory law was sufficient to satisfy the principle of legality’s requirement of a clear and public prescription of punishment.

³⁰⁴ To be sure, not all courts may apply the Ex Post Facto Clause to limit legislatures that wish to mandate harsh death row conditions. Some courts might conclude that the

newly retained death row would have to remain empty until filled by the newly convicted.

V. CONCLUSION

Many scholars have argued that death row conditions are senselessly cruel. But most scholars and courts have accepted death row as an inevitable aspect of capital punishment. Few scholars have addressed whether death row is necessary and what purposes it might serve. As execution delays drag into years and decades, the need for a reasoned and democratically legitimate decision as to this significant *de facto* punishment becomes more pressing. Additional punishment of prisoners condemned to die should not be imposed unthinkingly. Justice Stevens has argued that the death penalty's continued existence in America reflects "habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits."³⁰⁵ Abolitionists and advocates of capital punishment alike should agree that the death penalty and its implementation—including the use of death row to augment punishment—should not occur without a deliberate and democratically legitimate process that gives voice to the relevant punitive, humanitarian, and fiscal concerns.

The question whether to retain death row does not need an empirical answer from prison administrators about what security requires—for that question has been answered by studies showing that categorically and permanently sending all death-sentenced prisoners into segregation and isolation is unnecessary. Instead, the question whether to retain death row requires a normative answer about whether death row serves legitimate punishment objectives or imposes too much undeserved suffering. That normative answer must be provided by legislatures, not prison administrators.

prohibition on retroactive punishment is not violated by a legislative mandate that simply confirms what has long been the existing administrative practice, despite *In re Medley*. But a simple expectation of cruelty should not translate that treatment into a legitimate state action; if that were the case, then legislators could decide to openly permit prison rape for child molesters, too, as an expected and therefore retroactively valid part of punishment.

³⁰⁵ *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring in judgment).