ENDING DEATH BY DANGEROUSNESS
A PATH TO THE DE FACTO ABOLITION OF THE DEATH PENALTY

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The use of the death penalty—both in number of new death sentences and actual executions—has been steadily decreasing during the past decade. Two phenomena largely explain this decrease: (1) the continued discovery of individuals on death row who are actually innocent of the crimes they allegedly committed, and (2) the increasing use of life without parole as a sentencing alternative to the death penalty. Abolitionists have successfully seized upon the first of these in raising continuing doubts about the use of the death penalty. This Article proposes a deeper exploration of the second—the availability of life without parole—to suggest a second line of attack on capital punishment in an effort to further de facto abolition.

While the Supreme Court and the academic literature continue to debate whether the purposes of retribution and deterrence justify the use of the death penalty, the practical reality is that the strongest determinant of whether an individual receives the death penalty is his perceived future dangerousness to society. Given the overwhelming influence of future dangerousness in death penalty determinations, this Article argues that a wholesale removal from capital cases of the concept of future dangerousness, a concept largely irrelevant in light of the availability of life without parole (and solitary confinement), would approach de facto abolition of the death penalty.

Part I of the Article describes the dominant role that future dangerousness plays in capital cases. Part II explains why dangerousness ought to be excluded from capital cases as a commonsensical, empirical, and jurisprudential matter. Finally, Part III outlines the inroads achieved by the widespread implementation of life without parole, and suggests a series of possible attacks on the use of dangerousness in capital cases to continue the move toward de facto abolition.

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INTRODUCTION

The use of the death penalty—both in number of new death sentences and actual executions—has been steadily decreasing during the past decade.[1] Two phenomena largely explain this decline: (1) the continued discovery of individuals on death row that are actually innocent of the crimes of which they were convicted,[2] and (2) the increasing use of life without parole as a sentencing alternative to the death penalty.[3]

Abolitionists have successfully seized upon the first of these phenomena to raise new questions about the use of the death penalty.[4] Indeed, beginning in the late 1990s, a series of events led to these increasing doubts about the use of the

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1. *See* DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (Oct. 28, 2010), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (providing facts concerning the number of executions on an annual basis). *See generally* Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1 (2002); Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH. L. REV. 199, 207–10 (2008) (noting that the gradual trend moving away from the death penalty is particularly visible over the past thirty years); Aaron Scherzer, Note, *The Abolition of the Death Penalty in New Jersey and its Impact on Our Nation's "Evolving Standards of Decency,"* 15 MICH. J. RACE & L. 223 (2009).

2. *See* David Grann, *Trial by Fire*, NEW YORKER, Sept. 7, 2009, at 42 (discussing the case of Cameron Todd Willingham who, after his execution, was strongly believed to be factually innocent); George Ryan, Governor, Address at Northwestern University School of Law: I Must Act (Jan. 11, 2003), *reprinted in* AUSTIN SARAT, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION 163 (2003). Indeed, the system is rife with error. *See generally* Jay D. Aronson & Simon A. Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate Over Capital Punishment in the United States*, 34 LAW & SOC. INQUIRY 603 (2009); Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004).

3. *See generally* Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006). The United States has had a decrease in the number of people sentenced to death. *Id.* at 1845. For example, in 1996, 317 people were sentenced to death while the number dropped to 125 in 2004. *Id.* at 1845–46. Also, the number of people executed annually has decreased by 40% since 1999. *Id*. at 1846.

4. *See* Elizabeth R. Jungman, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1066–67 (2003) (showing that research indicates that approximately seven out of every ten people sentenced to death in the twenty-three years after *Furman v. Georgia*, 408 U.S. 238 (1972), were convicted in trials found to be flawed, that many of these were found to be innocent, and that 5% of defendants sentenced to death are exonerated later). Indeed, the Innocence Project reports that 258 individuals in the United States—seventeen of whom spent time on death row—have been exonerated based on DNA evidence. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/351.php (last visited Sept. 26, 2010). For two contrasting views on the ability of findings of innocence to end capital punishment, compare Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004), with Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005).

death penalty, particularly the risk of executing an innocent individual.[5] In 1991 and 1994, respectively, Supreme Court Justices Lewis Powell and Harry Blackmun renounced the death penalty based in part on their perceptions of error.[6] In 2000, Illinois Governor George Ryan imposed a moratorium on the death penalty after a study discovered that eighteen residents of that state's death row were actually innocent.[7] Columbia law professor James Liebman's 2001 study revealed an error rate of 68% in capital cases.[8] New Jersey and New Mexico abolished capital punishment, with a number of other state legislatures having discussions about abolition.[9] A series of lawsuits challenging the constitutionality of lethal injection

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5. These events also parallel those in Europe that accompanied the E.U.'s abolition of the death penalty. ROGER G. HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE 23–27 (4th ed. 2008). For a discussion of the likelihood of the United States following the same trajectory that the U.K. and the E.U. took toward abolition, see generally David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y 347 (2005), and Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131 (2002). For other perspectives on the persistence of capital punishment in the United States, see generally JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003), and FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003). *See also* William W. Berry III, *American Procedural Exceptionalism*: *A Deterrent or a Catalyst for Death Penalty Abolition*, 17 CORNELL J. L. & PUB. POL'Y 481, 511–13 (2008) (arguing that the role of procedural rules in driving capital punishment analysis may inhibit the abolition of the death penalty in the United States); Susan A. Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty*, *in* CRIMINAL LAW CONVERSATIONS (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

6. *See* William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY (forthcoming 2011) (describing how both Blackmun and Powell renounced the death penalty and investigating the basis for these reversals); Ryan, *supra* note 2, at 178–79; *see also* Austin Sarat, *Recapturing the Spirit of* Furman: *The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5, 9–13 (1998).

7. Ryan, *supra* note 2; Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, http://www.nytimes.com/2000/02/01/us/illinois-citing-faulty-verdicts-bars-executions.html. Maryland Governor Parris Glendening also declared a moratorium on executions in his state on May 9, 2002. *See* Henry Weinstein, *Md. Governor Calls Halt to Executions*, L.A. TIMES, May 10, 2002, http://articles.latimes.com/2002/may/10/nation/na-death10.

8. *See* Gelman, *supra* note 2, at 216–17. The American Bar Association has also conducted a number of studies of the death penalty in individual states that reach similar conclusions. *See ABA Death Penalty Moratorium Implementation Project*, AM. BAR ASS'N, http://www.abanet.org/moratorium/ (last visited Oct. 13, 2010) (describing the ABA's moratorium project and providing links to its studies of various states).

9. *See* Bill Mears, *New Jersey Lawmakers Vote to Abolish Death Penalty*, CNN (Dec. 13, 2007), http://articles.cnn.com/2007-12-13/politics/nj.death.penalty_1_capital-punishment-death-penalty-richard-dieter?_s=PM:POLITICS (reporting that New Jersey abolished the death penalty, the first state to do so in over forty years); *New Mexico Abolishes Death Penalty*, CBS NEWS (Mar. 18, 2009), http://www.cbsnews.com/stories/2009/03/18/national/main4874296.shtml (reporting that New Mexico abolished the death penalty). These discussions are continuing, particularly in light of the growing costs of capital punishment during an era of economic recession. *See, e.g.*, Ian Urbina, *Citing Costs, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 25, 2009, at A1, *available at*

as a method for execution led to a temporary moratorium on capital punishment while the Supreme Court considered the issue.[10] And the use of the death penalty, both in terms of new sentences and actual executions, decreased to levels not seen since *Furman v. Georgia*.[11]

This Article proposes a deeper exploration of the second of these two phenomena—the availability of life without parole—to suggest a new line of attack on capital punishment in an effort to further de facto abolition.[12] While the Court's decisions in *Atkins*[13] and *Roper*[14] have renewed the possibility that the Supreme Court will reinstate its holding in *Furman*[15] that the death penalty is unconstitutional as a "cruel and unusual" punishment forbidden by the Eighth Amendment,[16] this seems an unlikely development with four solid votes in favor of capital punishment and the most conservative Supreme Court in over fifty years.[17] And while some state legislatures have recently either abolished[18] or considered abolishing the death penalty,[19] the odds of states such as Texas or

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http://www.nytimes.com/2009/02/25/us/25death.html (reporting that legislators in Colorado, Kansas, Nebraska, New Hampshire, Maryland, and Montana have introduced bills to abolish capital punishment in light of growing costs).

10. The Supreme Court upheld the constitutionality of lethal injection in *Baze v. Rees*, 553 U.S. 35, 47 (2008), but the method of execution still remains a contentious issue in many states. *See, e.g.*, Douglas A. Berman, *Details on the Botched Ohio Execution Attempt, Issue Spotting, and Seeking Predictions*, SENT'G L. & POL'Y BLOG (Sept. 16, 2009, 12:40 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/09/details-on-the-botched-ohio-executions-issues-spotting-and-seeking-predictions.html (describing Ohio's struggles with lethal injection in various cases); Paul Elias, *Calif Calls Off Execution After Court Setbacks*, ASSOCIATED PRESS, Sept. 30, 2010, *available at* http://news.yahoo.com/s/ap/20100930/ap_on_re_us/us_california_executions (describing ongoing litigation over lethal injection in California).

11. 408 U.S. 238 (1972); *see also* DEATH PENALTY INFO. CTR., *supra* note 1. As discussed in Part II.C.1, *Furman v. Georgia* held that the death penalty was unconstitutional because, as applied, it was a "cruel and unusual punishment" under the Eighth Amendment. 408 U.S. at 239.

12. A de facto standard is one, though not formally adopted, that has achieved dominance by tradition, market standard, or custom. By contrast a de jure standard is one that has been formally adopted by law. Thus, de jure abolition would be making the death penalty illegal; de facto abolition would be a system where, although available, the death penalty is seldom, if ever, used. Many states use the death penalty so infrequently that they are said to have de facto abolished it. *See generally* HOOD & HOYLE, *supra* note 5.

13. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that execution of the mentally retarded is cruel and unusual, and therefore barred by the Eighth Amendment).

14. Roper v. Simmons, 543 U.S. 551, 571 (2005) (holding that execution of those who were minors at the time of their crime is cruel and unusual, and therefore barred by the Eighth Amendment).

15. 408 U.S. at 239–40.

16. *Id.*

17. *See generally* Steiker & Steiker, *supra* note 4.

18. New Jersey and New Mexico have recently abolished the death penalty. *See supra* note 9.

19. Other states considering abolition include Colorado, Kansas, Nebraska, New Hampshire, Maryland, and Montana. *See supra* note 9.

Virginia ever doing so seem remote.[20] Thus, with the possibility of de jure abolition not so imminent, abolitionists need a new line of attack on the use of the death penalty in order to move capital punishment closer to de facto abolition.[21] This Article argues that the dominant and inappropriate influence of future dangerousness on the use of capital punishment in the United States may provide such an opportunity.

While the Supreme Court and the academic literature continue to debate whether the penological purposes of retribution[22] and deterrence[23] justify the use of the death penalty, the practical reality is that the strongest determinant of whether an individual receives the death penalty is his perceived future dangerousness to society. As explained below, future dangerousness determines the outcome of capital sentencing determinations because (1) it is a required inquiry for the jury under some state statutes; (2) it is explicitly or implicitly part of the determination of the presence of certain aggravating factors; and (3) it is often one of the factors, perhaps the most important, considered by jurors in making their capital sentencing decisions.

Given the overwhelming influence of future dangerousness in death penalty determinations, this Article argues that a wholesale removal from capital cases of the concept of dangerousness, a concept largely irrelevant to capital sentencing decisions in light of the availability of life without parole and solitary confinement, would approach de facto abolition of the death penalty.

Part I of the Article describes the dominant role that future dangerousness plays in capital cases. Part II explains why dangerousness ought to be excluded as a factor in capital cases as a commonsensical, empirical, and jurisprudential matter. Finally, Part III outlines the inroads achieved by the widespread implementation of life without parole and suggests a series of possible attacks on the use of dangerousness in capital cases to enable the move toward de facto abolition.

I. THE DOMINANT INFLUENCE OF DANGEROUSNESS IN CAPITAL CASES

While the rationales of retribution and general deterrence tend to permeate the public's understanding of the justification for the state's use of the death penalty against its citizens, a closer examination of the various capital schemes employed by death penalty jurisdictions quickly reveals that dangerousness is in fact the primary determinant in the sentencing process.

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20. Indeed, Texas and Virginia are together responsible for more than 50% of the executions in the United States since *Furman* was decided in 1972. *See* DEATH PENALTY INFO. CTR., *supra* note 1.

21. *See supra* note 12.

22. *See infra* note 130.

23. *Compare* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005), *with* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005).

The concept of future dangerousness, also known as incapacitation, is a justification for punishment based on the threat an offender will be likely to pose *in the future*.[24] The rationale for punishing someone based on their dangerousness is that the state needs to protect its citizens from the threat that the offender poses to society.[25] In other words, the state chooses to incapacitate an offender in order to ensure that the offender does not commit another criminal act.[26]

From the beginning of the post-*Furman* era, most states have included and relied on an evaluation of an individual's dangerousness to contribute to the determination whether a criminal offender should be put to death.[27] The most obvious examples of the reliance on future dangerousness occur in the six states that list future dangerousness as a primary statutory criterion.[28] As explained below, two states—Texas and Oregon—*require* such a determination.[29]

A. Future Dangerousness as a Statutory Element

1. Future Dangerousness as a Prerequisite to Capital Punishment: Texas and Oregon

a. Texas

As explained in detail below, the Eighth Amendment, as applied in *Furman*, requires that each state's statutory scheme narrow the class of death-penalty-eligible murderers such that only some murderers, presumably the worst of the worst, actually receive the death penalty.[30] Under the Texas statute, the dangerousness determination is the means by which a jury "narrows" the class of murders and selects which murderers will receive the death penalty.[31] In other words, among all of the possible murderers that could receive the death penalty, Texas chooses those that its juries deem most likely to be *dangerous in the future* to receive the death penalty, and gives those perceived not to be as dangerous a lesser sentence.[32]

Under the Texas statutory scheme, once a defendant has been found guilty of capital murder, the sentencing phase of the trial then determines whether

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24. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 71 (2005); *see also* JAMES Q. WILSON, THINKING ABOUT CRIME 164 (rev. ed. 1983).

25. Frase, *supra* note 24, at 71.

26. *Id.*

27. Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decisionmaking*, 29 LAW & PSYCHOL. REV. 63, 66 (2005).

28. These six states—Texas, Oregon, Virginia, Idaho, Oklahoma, and Wyoming—account for over 50% of the executions since *Furman*. *Id.*; *see also* DEATH PENALTY INFO. CTR., *supra* note 1.

29. Both Texas and Oregon require that a capital jury affirmatively decide that a criminal defendant poses a "continuing danger to society" before he can be sentenced to death. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)–(c) (West 2009); OR. REV. STAT. § 163.150(1)(b)(A)–(D) (2007).

30. 408 U.S. 238 (1972).

31. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1).

32. *Id.*

the defendant will receive the death penalty or life without the possibility of parole.[33] During the sentencing phase, the jury considers three statutory issues that must be determined affirmatively or negatively by special verdict.[34] The first issue is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[35] While not using the words "future dangerousness," that is exactly the determination this first inquiry requires the jury to make. In other words, a determination that an individual will be a "continuing threat," or a future danger, to society is a prerequisite to receiving the death penalty in Texas.[36]

The second issue is "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."[37] Lastly, if the first two issues are decided affirmatively, the jury must decide:

> whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[38]

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33. The Texas statute was amended in 1991 and again in 2005. Prior to 1991, the only sentencing options were death or life in prison with the possibility of parole, a sentence that had no mandatory duration before a prisoner could become parole eligible. The 1991 amendment changed life with the possibility of parole to a mandatory forty-year imprisonment after which time the prisoner was eligible for parole. In 2005, the life in prison sentencing option was changed to life without the possibility of parole. As such, crimes committed before September 1, 1991 are subject to the pre-1991 amendment sentencing options; crimes committed before September 1, 2005, but after September 1, 1991, are subject to the pre-2005 amendment sentencing options; and crimes committed after September 1, 2005, are subject to the current statutory scheme. For a discussion of how "future dangerousness" became a part of the statute, see Eric F. Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL'Y REV. 143, 162–74 (2006).

34. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(c).

35. *Id.* § 2(b)(1). The following factors may be considered by the jury in making a determination of future dangerousness according to the Texas Court of Criminal Appeals:

> 1. the circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties; 2. the calculated nature of the defendant's acts; 3. the forethought and deliberateness exhibited by the crime's execution; 4. the existence of a prior criminal record, and the severity of the prior crimes; 5. the defendant's age and personal circumstances at the time of the offense; 6. whether the defendant was acting under duress or the domination of another at the time of the offense; 7. psychiatric evidence; and 8. character evidence.

Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987).

36. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1), (g).

37. *Id.* § 2(b)(2).

38. *Id.* § 2(e)(1).

If the jury answers "yes" to the first and second issues and "no" to the third, then the court shall sentence the defendant to death.[39] If the jury answers "no" to either of the first two issues, or "yes" to the third—or if they are unable to answer any one of the three issues—then the court shall sentence the defendant to life in prison without the possibility of parole.[40]

b. Oregon

Like Texas, Oregon's statutory scheme requires the jury to decide special sentencing issues, each of which must be answered affirmatively for the defendant to be death penalty eligible. The issues presented to the jury in Oregon are: (1) "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result," (2) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," (3) "if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased," and (4) "whether the defendant should receive a death sentence."[41] The future dangerousness issue in Oregon uses the exact same language—"continuing threat to society"—employed under the Texas scheme.

If the jury decides all four issues affirmatively, the court sentences the defendant to death.[42] If the jury answers one of the four issues negatively, the court sentences the defendant to life without the possibility of parole.[43] Thus, like Texas, every Oregon capital defendant must be deemed to be a future danger to society in order to receive the death penalty.

2. Future Dangerousness as a Ground for Capital Punishment: Virginia

Under the Virginia statute, a defendant may only be put to death under one of two circumstances: if "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society," or if "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."[44] The jury must find that one of these two factors has been met and then must make a recommendation that the penalty of death be imposed despite the presence of any

39. *Id.* § 2(g).
40. *Id.*
41. OR. REV. STAT. § 163.150(1)(b)(A)–(D) (2007).
42. *Id.* § 163.150(1)(f).
43. *Id.* § 163.150(2)(a). Furthermore, if the jury answers one of the four issues negatively and finds that there is sufficient mitigating evidence, then the defendant shall be sentenced to life in prison for a mandatory thirty-year period after which he will become parole eligible. *Id.* § 163.150(2)(b) (referencing the thirty-year mandatory period prescribed by OR. REV. STAT. § 163.105 (1)(c)).
44. VA. CODE ANN. § 19.2-264.2(1) (2008).

mitigating evidence.[45] If the factors are not met or if the jury does not recommend the death penalty, then the defendant shall be sentenced to life without the possibility of parole.[46]

B. Future Dangerousness as an Aggravating Factor

Idaho, Oklahoma, and Wyoming allow a specific finding of future dangerousness to result directly in a death sentence. During sentencing, the jury must determine that the defendant has met certain aggravating factors before sentencing him to death. Each of these states includes future dangerousness as an aggravating factor, making the defendant eligible for the death penalty upon a showing of future dangerousness. Therefore, these three states allow execution of criminal offenders who commit homicides based on a finding that they pose a future danger to society.

1. Idaho

In Idaho, the jury must determine during sentencing that one of eleven statutory aggravating factors has been met[47] and that sentencing the defendant to death would be just despite the existence of any mitigating circumstances.[48] One of the aggravating factors asks whether "the defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."[49] If the jury finds that an aggravating factor exists, but believes (or cannot unanimously agree) that mitigating circumstances make the imposition of the death penalty unjust, then court shall sentence the defendant to life without the possibility of parole.[50] If the jury does not unanimously find the existence of an aggravating factor, then the court shall sentence the defendant to life in prison with a minimum mandatory term of ten years.[51]

2. Oklahoma

Oklahoma's scheme is identical to that of Idaho except that there are eight rather than eleven possible aggravating circumstances. The wording of Oklahoma's description of future dangerousness as an aggravating factor is virtually identical to that in the Texas and Oregon statutes. If the jury finds "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," then he may be

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45. *Id.* § 19.2-264.2(1)–(2); *see also id.* § 19.2-264.4(B) (providing for the consideration of mitigating evidence).
46. *Id.* § 19.2-264.4(A).
47. IDAHO CODE ANN. § 19-2515(9) (2007).
48. *Id.* § 19-2515(7)(a).
49. *Id.* § 19-2515(9)(i).
50. *Id.* § 19-2515(7)(b).
51. *Id.* § 19-2515(7)(c).

sentenced to death.[52] Oklahoma also provides that if a defendant is not sentenced to death, he may be sentenced to life with or without the possibility of parole.[53]

3. Wyoming

Wyoming is similar to Idaho and Oklahoma in that a defendant may be put to death upon the jury's determination that "[t]he defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence."[54]

Thus, prosecutors in these three states can establish death penalty eligibility simply by proving that the defendant will be a future danger to society.

C. Lack of Future Dangerousness as a Mitigating Factor

Colorado,[55] Maryland,[56] and Washington[57] statutes explicitly provide that a demonstration of the lack of future dangerousness can be a mitigating factor at trial. The implication of including this provision is that an inability to prove the absence of future dangerousness—in other words, the presence of a "dangerous" offender—means that the individual in question should receive the death penalty. While certainly not as significant as in the six states that provide for future dangerousness as a prerequisite to a capital sentence, these states nonetheless create the possibility that future dangerousness determinations can play an important role in the decision to impose a capital sentence.

D. States That Allow Future Dangerousness Arguments

Even where states do not provide for the use of future dangerousness in their statutes, many permit such arguments in capital sentencing hearings. States that have allowed "future dangerousness" arguments at sentencing include Alabama,[58] California,[59] Georgia,[60] Illinois,[61] Louisiana,[62] Missouri,[63] Montana,[64]

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52. OKLA. STAT. ANN. tit. 21, § 701.12(7) (2002).

53. *Id.* § 701.10(A).

54. WYO. STAT. ANN. § 6-2-102(h)(xi) (2007).

55. COLO. REV. STAT. § 18-1.3-1201(4) (2004) ("[M]itigating factors shall [include]: . . . (k) the defendant is not a continuing threat to society.").

56. MD. CODE ANN., CRIM. LAW § 2-303(h)(2) (West 2008) ("If the court or jury finds beyond a reasonable doubt that one or more of the aggravating circumstances . . . exist, it then shall consider whether any of the following mitigating circumstances exists based on a preponderance of the evidence: . . . (vii) it is unlikely that the defendant will engage in further criminal activity that would be a continuing threat to society.").

57. WASH. REV. CODE § 10.95.070 (2002) ("In deciding [whether there are not sufficient mitigating circumstances to merit leniency], the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to: . . . (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.").

58. *See, e.g.*, Arthur v. State, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990) (holding that the prosecutor's remark that the defendant will kill again if given the chance was proper because it concerned the valid capital sentencing factor of the defendant's future dangerousness).

59. *See, e.g.*, People v. Smithey, 978 P.2d 1171, 1217 (Cal. 1999) (noting that the prosecutor urged the jury to return a verdict of death in part because of the potential that

Nevada,[65] New Mexico,[66] North Carolina,[67] Ohio,[68] Pennsylvania,[69] South Carolina,[70] and Utah.[71] In addition, two other states, Arizona[72] and Florida,[73] allow

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the defendant would be dangerous in prison or to society if he escaped). California prohibits the use of expert testimony to establish future dangerousness. *See infra* note 212 and accompanying text.

60. *See, e.g.*, Walker v. State, 327 S.E.2d 475, 484 (Ga. 1985) (holding that the prosecutor's argument that the defendant might kill again if given a life sentence was neither irrelevant nor out of place, because whether the defendant's "probable future behavior indicates a need for the most effective means of incapacitation[,] i.e., the death penalty," is a matter which the jury may properly be invited to consider (quoting Ross v. State, 326 S.E.2d 194, 205 (Ga. 1985))).

61. *See, e.g.*, People v. Kidd, 675 N.E.2d 910, 934 (Ill. 1996) (holding that it was proper for the State to argue that the defendant would be a threat to others if he did not receive the death penalty because there was evidence of the defendant's prior misconduct while incarcerated).

62. *See, e.g.*, State v. Welcome, 458 So. 2d 1235, 1256 (La. 1984) (holding that the jury reasonably concluded that the offender presented such a continuing danger to society such that the most severe punishment—death—should be imposed).

63. *See, e.g.*, State v. Antwine, 743 S.W.2d 51, 71–72 (Mo. 1987) (holding that when the aggravating circumstance of murder committed by an inmate in a lawful place of confinement is present, a jury may properly consider whether an incarcerated criminal defendant is likely to place the lives of corrections personnel and other prisoners at risk if a sentence other than death is imposed).

64. *See, e.g.*, State v. Smith, 705 P.2d 1087, 1103–05 (Mont. 1985) (holding that once a statutory aggravating circumstance is found, the sentencing court is free to consider a wide range of evidence in determining whether death is the appropriate punishment, including a pre-sentence report containing a statement that the defendant is an extreme danger to society).

65. *See, e.g.*, Redmen v. State, 828 P.2d 395, 400 (Nev. 1992) (holding that a prosecutor may argue the future dangerousness of a defendant and the need to impose the death penalty in order to protect against future violence even when there is no evidence of violence independent of the murder in question).

66. *See, e.g.*, Clark v. Tansy, 882 P.2d 527, 533 (N.M. 1994) (holding that future dangerousness is appropriate for consideration by capital sentencing juries as long as the defendant is given an opportunity for rebuttal).

67. *See, e.g.*, State v. Steen, 536 S.E.2d 1, 31 (N.C. 2000) (holding that the prosecutor's argument relating to the defendant's potential for future dangerousness was proper, even though the defendant would never receive parole).

68. *See, e.g.*, State v. Beuke, 526 N.E.2d 274, 280 (Ohio 1988) (holding permissible a prosecutor's closing argument that the defendant would pose a future danger when coupled with a proper jury instruction explaining the statutory aggravating circumstances and mitigating factors).

69. *See, e.g.*, Commonwealth v. Trivigno, 750 A.2d 243, 254 (Pa. 2000) (holding that it is not per se error for a prosecutor to argue a defendant's future dangerousness because once the jury determines that a certain defendant is eligible for the death penalty, it is free to consider a myriad of factors to decide whether the imposition of the death penalty is an appropriate punishment).

70. *See, e.g.*, State v. Williams, 468 S.E.2d 626, 632 (S.C. 1996) (holding that when the State places the defendant's future dangerousness at issue, and the only available alternative sentence to the death penalty is life imprisonment without parole, due process entitles the defendant to inform the jury that he is parole ineligible).

future dangerousness on rebuttal, once the offender has "left the door open" by raising the lack of future dangerousness in mitigation.

Prosecutors are aware of the power of these arguments, and as indicated below, their assessments are correct.[74] As a result, arguments concerning future dangerousness, whether based on an explicit statutory consideration or the prosecutor's insistence that dangerousness be used as a criterion to determine whether an offender deserves death, are ubiquitous in capital sentencing proceedings.[75]

E. Jurors and Dangerousness

Even when jurors are not explicitly required to consider future dangerousness as a basis for imposing a death sentence, overwhelming evidence demonstrates that this is exactly what jurors consider.

The Capital Jury Project (CJP) was established in 1990 as a multistate research project designed to better understand the dynamics of juror decisionmaking in capital cases.[76] To date, CJP has interviewed 1198 jurors from 353 capital trials in fourteen states.[77] The findings CJP researchers draw upon come from statistical data as well as accounts from jurors in their own words.[78] The results of the CJP's research have indisputably demonstrated the significant impact that future dangerousness plays in the decisionmaking process of capital jurors.[79]

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71. *See, e.g.*, State v. Arguelles, 63 P.3d 731, 759 (Utah 2003) (holding that the probability of future violence by a defendant is a legitimate aggravating factor to consider in sentencing because (1) it applies only to a subclass of murderers, as not all murderers are considered a future threat to society if released, and (2) it is not unconstitutionally vague).

72. State v. Medina, 975 P.2d 94, 106 (Ariz. 1999) (noting that two doctors testified that the defendant posed a danger to society in response to the defendant's contention that he had the capacity to learn self-control, which he offered as a non-statutory mitigating circumstance).

73. Kessler v. State, 752 So. 2d 545, 547 n.4 (Fla. 1999) (noting that the trial court found, as a non-statutory mitigating circumstance, that "the defendant would not be a danger to society as a septuagenarian in prison").

74. *See, e.g.*, Note, *supra* note 3, at 1838 ("Prosecutors, in more and less subtle ways, often turn their closing appeals into descriptions of future dangerousness: 'Do you really want this man back out on the street?' Studies show that these prosecutorial tactics are not just rhetorical flourishes—they work."); *see also* William W. Hood III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1624–25 (1989).

75. Note, *supra* note 3, at 1838, 1845.

76. *What Is the Capital Jury Project?*, CAPITAL JURY PROJECT, http://www.albany.edu/scj/CJPwhat.htm (last visited Nov. 12, 2010); *see also* John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 402 (2001) (discussing the omnipresence of future dangerousness during jury deliberations in a capital trial).

77. *What Is the Capital Jury Project?*, *supra* note 76.

78. *Id.*

79. *See* Blume, Garvey & Johnson, *supra* note 76, at 404.

Unequivocally, future dangerousness is the predominant consideration of jurors during sentencing in capital cases.[80] Data from South Carolina indicates that topics related to the defendant's future dangerousness, should he ever return to society, are second only to the crime itself in the jury's sentencing deliberations.[81] These results are not unique to South Carolina; data from Virginia indicates that future dangerousness was the *most* discussed issue during capital sentencing.[82] Moreover, jurors consider future dangerousness even when the prosecution has not raised the issue.[83] In fact, between 21% and 32% of jurors stated that their deliberations focused on the issue of future dangerousness extensively even when the prosecution failed to raise the issue.[84]

Beyond the empirical data, capital jurors' own statements regarding future dangerousness reveal that the issue weighed heavily on their minds during the sentencing phase. Explaining the process by which the jury arrived at a death sentence, one South Carolina juror stated:

> What would the defendant do if set free? Would [the defendant] kill again? The law said the defendant must get death because he murdered—the Solicitor explained that this was required by law.[85]

Similarly, a California juror explained that future dangerousness helped persuade a holdout for life to agree with the majority:

> Kind of what it did was allow her to vote yes without, sort of it was the wording, it wasn't that we changed her mind, but somehow she was able to accept the argument, I think she finally had to admit that he would easily hurt someone else and that our instructions said in that case we were required to give him death.[86]

As previously discussed, the Texas statute requires jurors to answer whether a capital defendant will be a future danger. Unsurprisingly, capital jurors in Texas have said future dangerousness was their only concern during sentencing deliberations. Specifically, one juror recalled the jury instructions as follows:

> He said that if you found him guilty in committing a murder while in the act of burglary, therefore, it's a capital case and, as I remember it, the only question we had to answer is whether he was a threat to society and, was it danger, was it a danger to society and likely to do this again. We found him guilty of murder and the remaining question was whether he would do it again . . . .[87]

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80. *Id.*

81. *Id.*

82. Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2089–91 (2003) (analyzing Virginia capital jurors based on the research results from the CJP).

83. Blume, Garvey & Johnson, *supra* note 76, at 406–07.

84. *Id.*

85. Ursula Bentele & William J. Bowers, *How Jurors Decide Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1033 (2001) (quoting juror identified as SC-1240).

86. *Id.* at 1035 (quoting juror identified as CA-90).

87. *Id.* at 1038 (quoting juror identified as TX-1614).

The CJP's research shows that future dangerousness is a primary consideration of capital juries throughout the country. In addition to the empirical data, jurors' recollections are permeated with references to the possibility that the defendant may kill again. Clearly, future dangerousness influences the decisions of capital juries.

Giving even greater credence to such social science research is its logical nexus with the Baldus study cited in *McCleskey v. Kemp*, as well as other studies about the role of race in capital proceedings.[88] The Baldus study was conducted by Professors David C. Baldus and George Woodworth. The study collected data from records involving the disposition of 2000 murder cases between 1973 and 1979 in Georgia.[89] The study found that 22% of black defendants who murdered white victims were sentenced to death, while only 3% of white defendants who murdered black victims were sentenced to death.[90] Ultimately, "race proved no less significant in determining the likelihood of a death sentence than aggravating circumstances."[91] Despite presuming the validity of the Baldus Study, the Supreme Court nevertheless upheld the capital sentence of George McCleskey, an African American.[92]

More recently, Professors Baldus and Woodworth reviewed eighteen studies reported or published between 1990 and 2003.[93] Their research reinforced the two central discoveries of their original study. First, the *race of the defendant* does *not* have a consistent impact on capital punishment.[94] Second, the *race of the victim does* have a consistent and robust influence on capital punishment.[95] In other words, cases involving a white victim are far more likely to result in a capital sentence than cases involving a victim of a minority race.[96]

These results are consistent with, and perhaps even endorse, the CJP's evidence that jurors are constantly considering future dangerousness during capital sentencing. Where the victim is "like" the juror, as jurors are often predominately white, the juror has been demonstrated to be significantly more likely to vote for death.[97] This decision is presumably based, at least in part, on whether the juror

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88. McCleskey v. Kemp, 481 U.S. 279, 286–89 (1981) (holding that statistical disparities in a general study were insufficient to support a claim of discriminatory purpose in a specific case); David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); *see also, e.g.*, SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 66–69 (1989).

89. Brief for Petitioner at 11, *McCleskey*, 481 U.S. 279 (No. 84-6811).

90. *Id.* at 12.

91. *Id.* at 14.

92. *McCleskey*, 481 U.S. at 292.

93. David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 202–14 (2003).

94. *Id.* at 200–02.

95. *Id.* at 214.

96. *Id.* at 214–15.

97. *See, e.g.*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), *available at* http://eji.org/eji/files/Race

believes that the defendant poses a personal danger to the juror himself, his friends, and his family. Regardless of whether jurors are conscious of this analysis, the empirical evidence suggests that they are simultaneously considering the victim's likeness to themselves and whether the defendant thereby poses a future threat to them personally.

II. WHY DANGEROUSNESS SHOULD BE ELIMINATED FROM CAPITAL PROCEEDINGS

A. The Rise of Life Without Parole (The Common Sense Rationale)

A basic principle of the various rationales for punishment is that the punishment itself should not be more than what is required to achieve the stated purpose.[98] Indeed, this animating principle serves to guide the sentencing of all federal offenders in the United States. 18 U.S.C. § 3553(a) provides that in sentencing a federal offender, "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of punishment] set forth" in the statute.[99] This parsimony principle ensures that the government does not exceed the punishment needed to achieve its intended punitive goal or goals.[100]

In other words, the state should not punish a criminal offender more than is required to achieve its stated goal. If the purpose of punishment is "just deserts" retribution,[101] the state should punish the offender in a degree proportionate to his criminal act and accompanying culpability—no more and no less. Similarly, if general deterrence is the aim of the state, then the state ought to punish the offender no more than is necessary to achieve the desired deterrent effect on the rest of the population. If rehabilitation is the state's goal, the state should punish the offender no more than is required to enable the offender to be rehabilitated and become fit to rejoin society. Finally, if incapacitation is the goal, as is the case where future dangerousness determinations are concerned, the state should punish the offender no more than is required to keep society safe from that individual.

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and Jury Selection Report.pdf (providing data concerning the systematic exclusion of minority jurors in capital cases). *See generally* Miller-El v. Dretke, 545 U.S. 231 (2005) (describing the use of peremptory strikes by Texas prosecutors to exclude 91% of eligible African-American venire members from the jury and their use of different colloquies for potential white and African-American jurors to decrease the number of eligible African-American jurors).

98. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005).

99. 18 U.S.C. § 3553(a) (2006).

100. *Id.*

101. There are clearly several different competing versions of retribution, but for simplicity's sake, "just deserts" is adopted here. *See, e.g.*, Malcolm Thorburn & Allan Manson, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning*, 10 NEW CRIM. L. REV. 278 (2007) (analyzing ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005), where the authors focused on the justification of sentencing and receiving "just deserts" proportional to the crime involved).

The question then becomes whether death is required to incapacitate any criminal offenders. If death is the only way to incapacitate a particular offender, then future dangerousness can serve as a valid justification for capital punishment. If, on the other hand, there are other ways to keep society safe from a criminal offender, then death can no longer be justified by the offender's potential to commit future murders or other violent crimes.

Life without parole appears to provide the very alternative to death that eliminates dangerousness as a valid reason for execution. If an offender can be locked away forever in jail with no hope of parole or release, and is therefore *no longer dangerous to society*, it makes no sense to then decide that such an offender must be executed *because he is dangerous*. In other words, if the goal of incapacitation can be achieved *without death*, it logically cannot serve as *a* reason, much less *the* reason for death.

Three questions do arise when one considers whether life without parole can truly incapacitate an individual for life. First, does life without parole really mean life *without parole*? Second, even with life without parole, would the offender still pose a threat to fellow prisoners or prison guards? And third, what about the possibility of executive clemency or a prison escape? Each of these potential objections is addressed in turn.

First, life without parole now means life *without parole*. For many years, in both the federal and state systems, a life sentence was, in practice, something less than life—often around a fifteen year sentence.[102] Beginning with the abolition of parole in the federal system through the passage of the Sentencing Reform Act of 1984, many states adopted life without parole statutes, which provide for a life sentence with no possibility of ever leaving prison before death.[103] To date, forty-nine states and the District of Columbia have a life without parole statute.[104]

If there is anything that the United States does well in its criminal justice system, it is keeping criminal offenders incarcerated. Currently, the United States of America has "five percent of the world's population and twenty-five percent of the world's known prison population."[105] As of September 2008, 2.3 million

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102. In 1913, "life" in the federal system officially meant fifteen years. Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910–1972)*, 61 FED. PROBATION 23, 25 (1997). Most states had similar systems. *See* Andrew M. Hladio & Robert J. Taylor, *Parole, Probation and Due Process*, 70 PA. B. ASS'N Q. 168, 169–70 (1999) (outlining the origins of parole in the United States).

103. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

104. *See Life Without Parole*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/life-without-parole (last visited Oct. 1, 2010). The only state without life without parole is Alaska (a non-capital state). *Id.*

105. *See Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearings Before the J. Economic Comm.*, 110th Cong. (2008) (statement of Sen. Jim Webb, Member, Joint Econ. Comm.), *available at* http://jec.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=9d0729b4-eefe-2b3e-7931-fb353bebe2a8&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=cb5dcfe4-afee-419f-94ee-e51eb07de989&MonthDisplay=6&YearDisplay=2008 (providing a transcript of the committee hearing in which Senator Webb made his remarks about prison populations).

Americans were in prison, meaning that almost one out of every one hundred Americans are imprisoned.[106]

And capacity does not seem to be a problem. From 2000 to 2006, the average annual growth rate of incarceration was 2.6%.[107] This continues the trend of a more than fivefold (over 500%) increase in prison population in the United States between 1972 and 2003.[108]

Further, many death row inmates are kept in solitary confinement, drastically reducing their potential to threaten the health or safety of others. Under these conditions, inmates are given little to no contact with other inmates in order to ensure they do no harm to others.[109]

Senator Webb added, "Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system. And I choose to believe the latter." *Id.*; *see also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations,'* N.Y. TIMES, Apr. 23, 2008, http://www.nytimes.com/2008/04/23/us/23prison.html (reporting data about prisons and prison population).

106. Neal Peirce, *Real Commander Needed for the War on Drugs*, SEATTLE TIMES, Sept. 7, 2008, http://seattletimes.nwsource.com/html/opinion/2008163334_peirce07.html; Carol S. Steiker, *Passing the Buck on Mercy*, WASH. POST, Sept. 8, 2008, at B7, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/05/AR2008090502971.html. Amazingly, this criminal justice reality is not part of the political debate, even in an election year. *See generally* Douglas A. Berman, *Will Crime and Punishment Get Any Attention at the Democratic Convention?*, SENT'G L. & POL'Y BLOG, http://sentencing.typepad.com/sentencing_law_and_policy/2008/08/will-crime-and.html (Aug. 25, 2008, 5:17 PM) (displaying numerous posts that bemoan the failure of politicians to address and debate criminal justice issues, including the size of the prison population).

107. *Corrections*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=1 (last visited Sept. 26, 2010).

108. MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 10 (2006). Commentators have increasingly questioned the size of the prison population and the continued move toward mass incarceration, suggesting that such widespread imprisonment is counterproductive in the fight against crime. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomena*, 54 AM. U. L. REV. 703, 719–21, 725–29 (2005) (discussing lawmakers' incentives to add new offenses and enhance penalties and the unfortunate consequences that result); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (discussing criminal law's push toward more liability). This is particularly true given that almost half of the current state prison population committed non-violent crimes. *Corrections*, *supra* note 107.

109. Shireen A. Barday, *Prison Conditions and Inmate Competency to Waive Constitutional Rights*, 111 W. VA. L. REV. 831, 834 (2009) (noticing that solitary confinement is different from general imprisonment on three grounds: "First, whereas most prison environments provide inmates with abundant opportunities for social interaction, the solitary confinement experience is specifically designed to severely limit human contact. The physical conditions . . . amplify the sense of isolation. . . . Second, solitary confinement is used as a punitive measure above and beyond general incarceration. . . . Third, assignment to solitary confinement is unrelated to an inmate's original offense. Rather, it is a punitive measure 'reserved for prisoners who commit serious disciplinary violations once in prison or who are deemed to endanger the safety of others or the security of the prison system.'").

Thus, the prisoners who commit murder while incarcerated are generally not those on death row or those in a maximum security prison. Further, the availability of solitary confinement minimizes the concern that an increase in life without parole sentences will increase the number of attacks on prison guards and other inmates. For those whom we deem truly "dangerous," then, it is not difficult to minimize, if not eliminate, any risk of dangerousness by simply using the penitential structure already in place, solitary confinement in particular.

Particularly in light of the foregoing, the possibility of escape is remote. In the United States, a mere 1.4% of inmates escape annually, with over 90% recaptured.[110] In fact, these numbers are continually dropping.[111]

Finally, executive clemency is rare, particularly in non-capital cases. In a world where politicians and judges who are not "tough on crime" lose often, the political risk of pardoning convicted murderers makes the possibility of pardons extremely unlikely in most cases.[112] Indeed, such pardons have become exceedingly rare.[113]

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110. Howard Bromberg, *Pope John Paul II, Vatican II, and Capital Punishment*, 6 AVE MARIA L. REV. 109, 153 n.148 (2007) (citing Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 PRISON J. 270, 275–87 (2005)). This 1.4% rate takes into account escapees from all security levels, not just those from maximum security. *Id.* Indeed, the "vast majority of escapees are 'walk-aways' from community corrections facilities that have minimal supervision." Chris Suellentrop, *How Often Do Prisoners Escape?*, SLATE.COM (Feb. 1, 2001), http://www.slate.com/id/1007001/. Thus, the rate for maximum security inmates incarcerated for violent crimes—the inmates at issue here—is likely to be much lower than 1.4%.

While this data is the best currently available, it reflects statistics between eight and ten years old. There is no evidence suggesting that the low escape rate has increased or that the recapture rate has decreased since that time. Nevertheless, additional research on inmate escape rates—perhaps even research assessing the impact, if any, of prison privatization—would benefit scholars in this area.

111. Culp, *supra* note 110, at 275–87; *Factsheet: Corrections Safety*, ASS'N OF STATE CORR. ADM'RS, http://www.asca.net/documents/FACTSHEET.pdf (last visited Nov. 17, 2010) (noting a dramatic decline in number of prison escapes over the period from 1981 to 2001).

112. Some might argue that the potential for executive clemency might provide the opportunity for such an "escape," but clemency is rarely used overall, and much less so in cases where the defendant has not been sentenced to death. *See, e.g.*, Douglas A. Berman, *The Shameful State of Clemency in the Buckeye State (and in the United States)*, SENT'G L. & POL'Y BLOG (Nov. 15, 2009, 5:12 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/11/the-shameful-state-of-clemency-in-the-buckeye-state.html. In fact, by giving a sentence of life without parole, a jury actually diminishes the likelihood of clemency. For more discussion on the use of clemency in capital cases, see James R. Acker & Charles S. Lanier, *May God - or the Governor - Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 Crim. L. Bull. 200 (2000).

Note that even judicial elections can be affected by judges' death-penalty decisions. *See, e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions*, 72 N.Y.U. L. REV. 308 (1997); Richard Brooks & Stephen Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM.

None of these objections carries enough weight to serve as the basis for executing someone *because of* his dangerousness. So, the most obvious reason that future dangerousness has no legitimate place in capital sentencing proceedings is that common sense dictates otherwise. With the availability of a legitimate alternative, death by dangerousness not only is not required, it is also simply not sensible.

B. The Unpredictability of Dangerousness (The Empirical Rationale)

In addition to the commonsensical argument for prohibiting the use of future dangerousness in capital cases, the evidence concerning a jury's ability to determine whether or not an individual does in fact pose a future danger to society suggests another reason for banning such determinations from capital cases.

The incontrovertible scientific evidence demonstrates that future dangerousness determinations are, at best, wildly speculative. For over the past twenty years, the American Psychiatric Association has maintained that predictions of future threats are "wrong in at least two out of every three cases."[114] In addition, the American Psychiatric Association has explained that, "medical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy."[115] These assertions remain supported by more recent studies that continue to demonstrate the extreme inaccuracy in predicting future dangerousness.[116]

In 1999, Jonathan Sorensen and Rocky Pilgrim conducted a study on jurors' perceptions about the future dangerousness of capital defendants.[117] The findings indicated that eighty-five percent of capital jurors believed that the defendant would commit another violent crime if given a life sentence, and fifty percent of capital jurors believed the defendant would kill again.[118] Prison violence rates, however, prove that capital murderers are "among the most docile and

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L. & CRIMINOLOGY 609, 638 (2003); *see also* HOOD & HOYLE, *supra* note 5, at 356.

113. *See supra* note 112.

114. Brief of the American Psychiatric Ass'n as Amicus Curiae Supporting Petitioner at 3, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080), *available at* http://www.psych.org/MainMenu/EducationCareerDevelopment/Library/BernsteinReferenceCenter/AmicusCuriae_1.aspx ("The large body of research in this area indicates that, *even under the best conditions*, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases." (emphasis added)).

115. *Id.*

116. *Compare* JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 47–49 (1981) (listing the rate at which predictions turned out to be wrong at about 60% or 70%), *with* John Monahan et al., *An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders*, 56 PSYCHIATRIC SERVS. 810, 814 tbl.2 (2005) (noting a 49% false positive rate using modern risk assessment instruments).

117. Rocky L. Pilgrim & Jonathan R. Sorensen, Jury Deliberations on Future Dangerousness (1999) (unpublished study presented at the annual conference of the American Society of Criminology in Toronto, Nov. 15–19, 1999); *see also* Jonathan R. Sorensen et al., *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251 (2000) (study conducted by capital juror exit polls).

118. Sorensen et al., *supra* note 117, at 1269.

trustworthy inmates in the institution."[119] Sorensen and Pilgrim's study reflects the inevitable tendency toward over-prediction of future dangerousness in capital cases.[120] This tendency toward over-prediction was once again confirmed in a recent study of life-sentenced defendants.

In what may be the most recent study of life-sentenced defendants, the authors found the error rate of dangerousness assertions in federal capital cases is "sobering, both in its inability to discriminate who will and will not engage in violent misconduct in prison and in the minority who fulfill the prediction."[121] Less than one percent of federal inmates in the study perpetrated an assault causing moderate injuries,[122] and none of the prisoners caused a life threatening injury or assaulted a member of the prison staff.[123] More importantly, none of the prisoners whom the government claimed were dangerous committed another homicide while incarcerated.[124]

The results of these studies ought not to be surprising given that mental health professionals themselves are skeptical of their own ability to make accurate predictions. In a study of several hundred practicing physicians, clinical psychologists, and mental health lawyers, the mean self-reported estimate of percentage of accurate future dangerousness predictions fell between 40% and 46%. If psychiatrists are unable to make determinations of future dangerousness with any reliability, to what extent can such assessments be made with any degree of accuracy by lay jurors?[125]

C. A "Cruel and Unusual" Proxy (The Jurisprudential Rationale)

In addition to the commonsensical and empirical rationales, the Court's jurisprudence, if properly applied, provides a further rationale for barring the use of future dangerousness evidence in capital cases. Despite the Court's implicit acceptance of future dangerousness, it has never explicitly decided whether future dangerousness is a valid justification for the use of capital punishment under the Eighth Amendment. Indeed, a careful examination of the principles established in *Furman v. Georgia*,[126] *Gregg v. Georgia*,[127] and the Court's subsequent "evolving

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119. *Id.* at 1256 (noting low violence rates among capital inmates as well as agreement among inmates and administrators that capital murderers are among the most docile inmates).

120. Over-prediction is a noted effect in any dangerousness prediction. *See, e.g.*, John Monahan & Lesley Cummings, *Prediction of Dangerousness as a Function of Its Perceived Consequences*, 2 J. CRIM. JUST. 239 (1974).

121. Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 LAW & HUM. BEHAV. 46, 61 (2008).

122. "Moderate injuries" are those that require evacuation to an outside hospital, but are not life-threatening. *Id.* at 55.

123. *Id.* at 55–56.

124. *Id.*

125. *See generally* James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC'Y REV. 449 (1989).

126. 408 U.S. 238 (1972).

standards of decency" jurisprudence,[128] suggests that the Eighth Amendment prohibits consideration of future dangerousness in capital cases.

1. Evolving Standards of Decency Prohibit Future Dangerousness

In *Furman v. Georgia*, the Court held that capital punishment, as currently applied by the states, constituted "cruel and unusual" punishment in violation of the Eighth Amendment to the United States Constitution.[129] In *Furman*, each of the five justices in the majority wrote separately, with almost all considering whether retribution and/or deterrence were valid justifications for using the death penalty.[130] In other words, the absence of an adequate justification

127. 428 U.S. 153 (1976).

128. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (holding that revocation of citizenship is unconstitutional as punishment under society's "evolving standards of decency"); *see* discussion *infra* Part II.C.1.

129. 408 U.S. at 239–40. The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

130. Six out of the nine justices relied in part on their view of the validity of retribution and/or deterrence in making their respective decisions. *Furman*, 408 U.S. at 307–08 (Stewart, J., concurring) ("If we were reviewing death sentences imposed under these or similar laws . . . [w]e would need to decide whether a legislature—state or federal—could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterrence. . . . On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment."); *id.* at 304 (Brennan, J., concurring) ("There is, then, no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society. The only other purpose suggested, one that is independent of protection for society, is retribution . . . . As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals."); *id.* at 311–12 (White, J., concurring) ("But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked."); *id.* at 342–43 (Marshall, J., concurring) ("In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional."); *id.* at 394–95 (Burger, C.J., dissenting) ("Two of the several aims of punishment are generally associated with capital punishment—retribution and deterrence. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. . . . It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose."); *id.* at 452–53 (Powell, J., dissenting) ("I come now to consider, subject to the reservations above expressed, the two justifications most often cited for the retention of capital punishment. . . . Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view.").

for the use of capital punishment, at least as applied, provided the basis for the Court's finding that capital punishment was a "cruel and unusual" punishment in violation of the Eighth Amendment.[131]

And in *Gregg v. Georgia*, in which the Court reinstated the death penalty by finding that the new Georgia statute complied with the Eighth Amendment, the Court based its holding in part on its ability to find satisfactory justifications for the use of the death penalty.[132] In adopting the view that retribution was an acceptable justification for the use of the death penalty, the Court explained that:

> The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders . . . . Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[133]

Thus, central to the Court's decision that capital punishment was constitutional under the Eighth Amendment was its view that retribution and, to a lesser degree, deterrence, provided legitimate penological justifications for its use.

Beginning in *Coker v. Georgia*,[134] the Court articulated its "evolving standards of decency" jurisprudence, which has remained the applicable approach over the past thirty years.[135] As in *Furman* and *Gregg*, the Court assessed whether the application of the death penalty at issue could be justified by a legitimate penological purpose.[136]

In its application of the Eighth Amendment, the Court begins with the understanding that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," thus requiring the Court to determine whether a particular sentence is excessive.[137] The "evolving standards of decency" inquiry then begins with the premise that the meaning of "cruel and unusual" punishment is not static.[138] As a result, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[139]

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131. *Furman*, 408 U.S. 238.

132. 428 U.S. at 176–88.

133. *Id.* at 183–84.

134. 433 U.S. 584 (1977).

135. For a critique of this line of cases, see William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-Is-Different" Jurisprudence*, 28 PACE L. REV. 15 (2007).

136. *See Coker*, 433 U.S. 584.

137. Trop v. Dulles, 356 U.S. 86, 100–01 (1958); *see also* Weems v. United States, 217 U.S. 349 (1910).

138. *Weems*, 217 U.S. at 350 ("Legislation, both statutory and constitutional, is enacted . . . from an experience of evils but its general language should not . . . be necessarily confined to the form that evil had theretofore taken. . . . Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.").

139. *Trop*, 356 U.S. at 101.

To determine what constitutes the current applicable standard of decency, the United States Supreme Court looks first to objective indicia, namely the practices of state legislatures, and then its own judgment is "brought to bear"[140] to determine whether there is any reason to contradict the objective evidence of the views of "the citizenry and its legislators."[141]

When applying its own judgment, the Court typically has asked whether the use of the death penalty at issue can be supported by the justifications adopted by the Court for the death penalty—retribution and deterrence.[142] Thus, the Court's assessment of a given imposition of the death penalty and whether it violates the evolving standards of decency is based on the degree to which it can be justified by an appropriate purpose of punishment.[143]

For instance, in *Atkins v. Virginia*, the Court held that the execution of mentally retarded individuals constituted "cruel and unusual" punishment.[144] Executing such individuals violated the evolving standards of decency based on the objective evidence of the actions of state legislatures and its conclusion that such executions did not satisfy the purposes of retribution or deterrence.[145]

And in *Roper v. Simmons*, the Court held that individuals who were minors at the time they committed the crime at issue could not be executed under the Eighth Amendment.[146] Again, the Court relied both on objective indicia and its subjective judgment that executing minors did not satisfy the purposes of retribution or deterrence.[147]

Finally, in *Kennedy v. Louisiana*, the Court held that the Eighth Amendment prohibited the execution of an individual for the crime of raping a juvenile.[148] The Court here again explained that the death penalty could not be justified on grounds of retribution or deterrence in that situation.[149]

If, then, the Eighth Amendment requires that the Supreme Court assess whether a particular use of the death penalty meets the evolving standards of decency, the Court should bar the use of future dangerousness in capital cases.

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140. *Coker*, 433 U.S. at 597. As the Court has explained, objective criteria do not "wholly determine" the controversy, "for the Constitution contemplates that in the end . . . [its] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.*

141. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

142. *See, e.g.*, *id.* at 319 ("*Gregg v. Georgia* identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.'" (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) and Enmund v. Florida, 458 U.S. 782, 798 (1982))).

143. *Id.*

144. *Id.* at 321.

145. *Id.* at 319–21.

146. 543 U.S. 551, 570–71 (2005).

147. *Id.*

148. 128 S. Ct. 2641 (2008).

149. *Id.* at 2661.

Although, as discussed above, the use of future dangerousness dominates capital cases, it has not been required by a majority of jurisdictions. In fact, as described above, only two states explicitly require consideration of future dangerousness. The objective evidence, then, is that an overwhelming number of state legislatures, while not banning future dangerousness, do not require it.[150]

More importantly, the Court should use its own subjective judgment to determine that assessments of future dangerousness cannot be justified by the purposes of retribution or deterrence.[151] Assuming future dangerousness plays a significant role in the outcome (and the evidence above indicates that it is *the* determining factor in many cases), its use contravenes the goals of retribution and deterrence.

Retribution, as described by the Court, is "the interest in seeing that the offender gets his 'just deserts.'"[152] Thus, the goal of retribution is to determine whether an offender's past act, based on the culpability of the offender and the harm caused, justly deserves death.[153] If the penological goal is to determine the appropriate punishment based on the offender's past acts, then his potential for future bad acts is irrelevant.[154] Put another way, the goal of retribution is to punish *past* acts, not on the need to protect against *future* bad acts.[155] As a result, death determinations based on future dangerousness do not achieve the goal of retribution.[156]

Deterrence, explained by the Court as "the interest in preventing capital crimes by prospective offenders,"[157] focuses on the effect that sentencing one offender will have upon the conduct of potential future offenders.[158] As with retribution, deterrence cannot justify the use of dangerousness as a criterion for determining death. Executing individuals based on their perceived dangerousness does not have a clear effect on the ability to deter others from committing capital

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150. The majority of the states using capital punishment have not banned the use of future dangerousness, but the "objective indicia" inquiry by the Court has arguably been no more than a proxy for the Court's own subjective judgment. *See generally* Berry, *supra* note 135.

151. Indeed, I have written elsewhere concerning the conflicting nature of the various purposes of punishment. *See* William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to §3553 After* Booker *and Its Progeny*, 40 CONN. L. REV. 631 (2008).

152. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

153. VON HIRSCH & ASHWORTH, *supra* note 101, at 75–89.

154. *Id.*

155. Hollywood attempted to capture such a reality in its movie *Minority Report*, in which individuals who can see the future notify the police just before a crime is committed, and the individual is punished as if he had committed the foreseen crime.

156. It is, of course, possible that an individual who is sentenced to death *because of* his dangerousness could otherwise have his sentence justified on "just deserts" grounds, but retribution does not justify the consideration of dangerousness in the first place.

157. *Atkins*, 536 U.S. at 319–20.

158. Note that this form of deterrence, often called general deterrence, does not focus on the potential deterrent effect on the offender himself, which is referred to as specific deterrence. When the Court considers the issue of deterrence with respect to capital punishment, it focuses exclusively on general deterrence.

crimes. In other words, whether the offender is dangerous or not has no effect on whether executing them will have a deterrent effect. Thus, the use of dangerousness does nothing to further the goal of deterrence in capital cases.[159]

As the use of dangerousness cannot be justified by either retribution or deterrence, it constitutes "cruel and unusual" punishment under the Eighth Amendment, pursuant to the Court's evolving standards of decency jurisprudence.[160]

2. The Supreme Court's Eighth Amendment Jurisprudence Does Not Foreclose a Prohibition on Dangerousness

a. General Discussion of Future Dangerousness

While it seems clear that a current application of the Court's Eighth Amendment evolving standards of decency jurisprudence could be used to bar the use of dangerousness in capital cases, it is equally important to demonstrate that the Court's prior cases do not prohibit such a determination. Indeed, the Court has never explicitly addressed whether future dangerousness or incapacitation alone could be a valid basis for the death penalty. Rather, it has implicitly assumed the constitutionality of using future dangerousness in capital cases without ever squarely addressing the issue.

In *Furman* and *Gregg*, the Court debated the acceptability of retribution and deterrence as justifications for the death penalty.[161] Incapacitation, however, was barely mentioned. Justice Marshall dismissed incapacitation as a valid rationale in *Furman*:

> Much of what must be said about the death penalty as a device to prevent recidivism is obvious—if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens. Furthermore, most persons who commit capital crimes are not executed. . . . In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no

159. Again, to the degree that executing any capital offender may have a deterrent effect, the execution of a "dangerous" offender can deter capital crimes. But it is the execution of a capital offender, and not the dangerousness of the offender, that achieves that result. In other words, using dangerousness in sentencing does nothing to advance the purpose of deterrence.

160. Indeed, as Justice Stevens recounted in *Baze v. Rees*, "In *Gregg v. Georgia*, we explained that unless a criminal sanction serves a legitimate penological function, it constitutes 'gratuitous infliction of suffering' in violation of the Eighth Amendment." 553 U.S. 35, 78 (2008) (Stevens, J., concurring) (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

161. *See supra* note 130.

> general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.[162]

Justice White's concurrence likewise stated that:

> [while] executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. . . . [W]hen imposition of the penalty reaches a certain degree of infrequency . . . . it [could not] be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient . . . .[163]

Further, in *Gregg*, Justice Stewart's plurality opinion effectively dismissed incapacitation as a valid purpose for using the death penalty.[164] In footnote 28, he cited two cases, *People v. Anderson*[165] and *Commonwealth v. O'Neal*,[166] both of which explain why incapacitation does not justify the death penalty. In *People v. Anderson*, the California Supreme Court explained that:

> [a]dmittedly, isolation of the offender from society is a proper and often necessary goal of punishment and death does effectively serve that purpose. Society can be protected from convicted criminals, however, by far less onerous means than execution. In no sense can capital punishment be justified as "necessary" to isolate the offender from society.[167]

Similarly, in *Commonwealth v. O'Neal*, the Supreme Judicial Court of Massachusetts stated that:

> [w]hile isolating convicted murderers from society in order to prevent their commission of similar crimes in the future is a legitimate objective of punishment, it seems clear that this goal can be effectively served by means less restrictive than death. "The sufficient answer (to the claim that the infliction of death is necessary to stop those convicted of murder from committing further crimes) . . . is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined."[168]

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162. Furman v. Georgia, 408 U.S. 238, 355 (1972) (Marshall, J., concurring).
163. *Id.* at 311–12 (White, J., concurring).
164. *Gregg*, 428 U.S. at 183 n.28.
165. 493 P.2d 880, 896 (Cal. 1972).
166. 339 N.E.2d 676, 685–86 (Mass. 1975) (holding that the death penalty is unconstitutional as punishment for murder in the course of rape).
167. 493 P.2d at 896.
168. 339 N.E.2d at 685 (citation omitted).

b. *Jurek v. Texas*

In *Jurek*, the Supreme Court addressed the constitutionality of the newly adopted Texas capital statute.[169] As described above, the second required statutory question for a Texas jury to answer in making a capital determination is whether the offender poses a danger to society.[170] In upholding the statute, the Court focused on whether dangerousness could be predicted, and largely ignored the question of whether the Eighth Amendment allowed consideration of dangerousness in the first place.[171] Writing for a three justice plurality, Justice Stevens explained:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.[172]

Thus, in *Jurek*, the Court upheld Texas's statute on the grounds that (1) juries have the ability to make dangerousness determinations, and (2) such determinations do not foreclose defendant's ability to offer mitigating evidence.[173] But such a determination does not foreclose a challenge to the statute based on its decision to use dangerousness in the first place.

Even if *Jurek* squarely held that the use of dangerousness in capital cases does not violate the Eighth Amendment, other significant factors preclude *Jurek* from foreclosing additional inquiry into the matter. First, as described above, life without parole has now become a valid sentencing option in almost every jurisdiction.[174] In 1976, this was not the case.[175] Second, as described above, the standards of decency in capital cases have clearly evolved since 1976.[176] Third, the Court, beginning in *Gregg*, and as demonstrated later by *Atkins*[177] and *Roper*,[178] has demonstrated a willingness to reverse itself in capital cases.[179]

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169. Jurek v. Texas, 428 U.S. 262 (1976); *see also supra* note 33 and accompanying text.

170. *Jurek*, 428 U.S. at 272.

171. *Id.*

172. *Id.* at 274–76.

173. *Id.* at 276.

174. *See supra* note 3.

175. *See Jurek*, 428 U.S. 262.

176. *See supra* Part II.C.1.

177. Atkins v. Virginia, 536 U.S. 304 (2002) (reversing Penry v. Lynaugh, 492 U.S. 302 (1989)).

Finally, to the extent that Justice Stevens expressed a view in *Jurek* that incapacitation is an acceptable justification for capital punishment, he has clearly rejected that view in recent cases. In *Harris v. Alabama*,[180] Justice Stevens explained in dissent that:

> [while in] ordinary, noncapital sentencing decisions, judges consider society's interests . . . in incapacitating [the defendant] from committing offenses in the future . . . . In capital sentencing decisions, however, . . . incapacitation is largely irrelevant, at least when the alternative of life imprisonment without possibility of parole is available.[181]

Likewise, in *Baze v. Rees*, Justice Stevens clearly stated that incapacitation is not a valid constitutional justification for the death penalty.[182] He explained that:

> [w]hile incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty. Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.[183]

c. *Spaziano* and *Simmons*

In *Spaziano v. Florida*, the Supreme Court addressed whether the Eighth Amendment required a judge to make capital sentencing decisions.[184] The petitioner argued that the difference between capital and non-capital sentences, and the applicable penological purposes of each, required a jury determination.[185] In rejecting this argument, the Court dismissed this distinction, explaining that "the distinctions between capital and noncapital sentences are not so clear as petitioner suggests."[186] As part of its explanation, the Court stated that, "[a]lthough incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding."[187]

This statement, however, only addressed the ability of a judge to decide the outcome of the case. Thus, it is not a binding determination of the legitimacy

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178. Roper v. Simmons, 543 U.S. 551 (2005) (reversing Stanford v. Kentucky, 492 U.S. 361 (1989)).
179. *See* Ryan, *supra* note 2, at 170.
180. 513 U.S. 504 (1995).
181. *Id.* at 517 (Stevens, J., dissenting).
182. 535 U.S. 35, 78–79 (2008) (Stevens, J., concurring).
183. *Id.*
184. 468 U.S. 447 (1984).
185. *Id.* at 457–58.
186. *Id.* at 461.
187. *Id.* at 461–62.

of consideration of future dangerousness. Further, this general statement was based on the Court's holding in *Jurek* described above.

Justice Stevens' partial concurrence likewise explained why incapacitation could not be a valid justification for the use of capital punishment:

> In general, punishment may rationally be imposed for four reasons: (1) to rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution. . . . The second would be served by execution, but in view of the availability of imprisonment as an alternative means of preventing the defendant from violating the law in the future, the death sentence would clearly be an excessive response to this concern.[188]

Justice Stevens added that

> [a]lthough incapacitation was identified as one rationale that had been advanced for the death penalty in *Gregg*, we placed no reliance upon this rationale in upholding the imposition of capital punishment under the Eighth Amendment, and this ground was not mentioned at all by four of the seven Justices who voted to uphold the death penalty in Gregg and its companion cases . . . . In any event, incapacitation alone could not justify the imposition of capital punishment, for if it did mandatory death penalty statutes would be constitutional, and, as we have held, they are not.[189]

In *Simmons v. South Carolina*,[190] as in *Spaziano*, the Supreme Court considered the application of future dangerousness in capital cases without addressing its general propriety. In *Simmons*, the Court considered whether the Due Process Clause of the Fourteenth Amendment required notifying the jury of a

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188. *Id.* at 477–78 (Stevens, J., concurring in part and dissenting in part). In *Ring v. Arizona*, Justice Breyer shared this same sentiment:

> I note the continued difficulty of justifying capital punishment in terms of its ability . . . to incapacitate offenders . . . . [F]ew offenders sentenced to life without parole (as an alternative to death) commit further crimes. *See, e.g.*, Sorensen & Pilgrim, An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants, 90 J.Crim. L. & C. 1251, 1256 (2000) (studies find average repeat murder rate of .002% among murderers whose death sentences were commuted); Marquart & Sorensen, A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loyola (LA) L. Rev. 5, 26 (1989) (98% did not kill again either in prison or in free society).

536 U.S. 584, 614–15 (2002) (Breyer, J., concurring).

189. *Spaziano*, 468 U.S. at 478 n.19 (Stevens, J., concurring in part and dissenting in part).

190. 512 U.S. 154 (1994).

defendant's ineligibility for parole where the prosecution put the defendant's future dangerousness at issue.[191]

Again relying on *Jurek*, the Court in *Simmons* reiterated its statement from *Spaziano* that "[t]his Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system."[192]

The Court, however, never explained why this is the case. In fact, nowhere in its jurisprudence has it assessed this idea, other than to simply say that dangerousness is not a sufficient justification for the death penalty.[193]

In holding that a jury instruction concerning the availability of life without parole is required by the Fourteenth Amendment in such cases, the *Simmons* court actually explained why the death penalty is an unnecessary solution to the issue of dangerousness:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future non-dangerousness to the public than the fact that he never will be released on parole.[194]

Despite the Court's language in *Jurek*, *Spaziano*, and *Simmons* to the contrary, the Court has never explicitly addressed the acceptability of future dangerousness as a consideration in the determination of whether to sentence an offender to death. Further, even if such language provides a basis for using future dangerousness, it certainly does not foreclose an Eighth Amendment challenge to the use of such irrelevant considerations to determine whether an offender should receive a death sentence.

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191. *Id.* at 156. For a discussion of the impact of *Simmons*, see Benjamin P. Cooper, *Truth in Sentencing: The Prospective and Retroactive Application of* Simmons v. South Carolina, 63 U. CHI. L. REV. 1573 (1996).

192. *Simmons*, 512 U.S. at 162. The Court cited the language from *Jurek v. Texas*: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." 428 U.S. 262, 275 (1976). It also cited *California v. Ramos* and its explanation that it is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society." 463 U.S. 992, 1003 n.17 (1983).

193. *See supra* text accompanying note 187.

194. *Simmons*, 512 U.S. at 163–64.

III. ENDING DEATH BY DANGEROUSNESS: A PATH TO DE FACTO ABOLITION?

A. The Promise of Life Without Parole

Since the widespread adoption of life without parole, as described above, death sentences have steadily decreased in almost every jurisdiction in recent years.[195] In fact, death sentences are as infrequent as they have been since *Furman v. Georgia*.[196] Thus, while other factors may also be at play, including concerns about innocence, there is undoubtedly a parallel between the decrease in capital sentences and the rise of life without parole.[197]

Given the strong correlation between the two, the implementation of life without parole suggests that an attack on future dangerousness may be one possible path to achieving de facto abolition. If this Article is indeed accurate in its assessment of the determinative role of dangerousness in capital sentencing, the elimination of such considerations will have a significant impact in reducing the number of death sentences and executions.

This is not to suggest, however, that widespread use of life without parole is a satisfactory outcome.[198] Indeed, life without parole is in many ways no different than being slowly buried alive.[199] In other words, the "promise of life without parole" is that by eliminating dangerousness as a valid consideration in capital cases, jurors will use a more relevant standard by which to assess whether an individual deserves death, and accordingly, may elect to use the death penalty less often.

B. Attacking Dangerousness

As with most unfair impositions of law, there are three possible avenues of attack—the executive, the legislative, and the judiciary—in order to change policy. These approaches are considered in turn.

1. Executive Branch

Governors of multiple states have grown increasingly hesitant about the use of capital punishment in recent years. Governors George Ryan of Illinois and

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195. *See* DEATH PENALTY INFO. CTR., *supra* note 1.

196. *Id.*

197. *See* Note, *supra* note 3, at 1844.

198. There has been an ongoing debate in the abolitionist camp concerning whether pursuit of life without parole as an alternative to capital punishment is an acceptable means to achieve the common goal of abolition. Indeed, I have written elsewhere about the need for heightened Eighth Amendment standards for life without parole after *Graham v. Florida*, 130 S. Ct. 2011 (2010). *See* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. (forthcoming 2010), *available at* http://ssrn.com/abstract=1615148.

199. Columbia Law Professor Jeffrey Fagan has likened giving a juvenile a life without parole sentence to "being buried alive." *When Kids Get Life: Interview with Jeffrey Fagan*, FRONTLINE (May 8, 2007), http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/interviews/fagan.html.

Parris Glendening of Maryland both instituted moratoriums in their states; other governors have requested that commissions investigate the use of the death penalty in their states.[200] Further, a number of governors stepped in to intervene when the doubts and problems concerning lethal injection arose, even before the Supreme Court granted certiorari in *Baze v. Rees*.[201] Given the willingness to respond to concerns about capital punishment in recent years, governors may be receptive to the idea that future dangerousness creates fundamental problems in the use of capital punishment, as explained above.

If so, governors have several ways to address the problem of dangerousness. First, governors can commute death sentences to life sentences in cases where the sentence was based primarily on future dangerousness.[202] This would make sense as a governor should be the final guardian against the State's improper use of lethal force against its citizens. Second, governors can provide oversight of prosecutorial decisions in capital cases, and of the grounds upon which they seek death sentences.

Likewise, prosecutors, as members of the executive branch, ought to be encouraged to seek death sentences only on accepted grounds (retribution and deterrence) and not based on the perceived future dangerousness of an individual. Unfortunately, other than downward political pressure on appointees or upward political pressure on elected prosecutors, prosecutors generally operate free of constraint in deciding how (and whether) to prosecute capital cases. Even worse, the political pressure typically encourages them to seek harsher punishment.[203] Nonetheless, prosecutors should be challenged to forego the use of future dangerousness evidence in capital cases.

2. Legislative Challenges

The ability to reform the various death penalty statutes provides another opportunity to reduce the influence of future dangerousness on the outcomes in capital cases. The first step would be to remove future dangerousness, as discussed above, as a requirement for a finding of death. Second, would be to remove future dangerousness from the list of potential considerations in capital sentencing. The goal, however, should be to prohibit the consideration of future dangerousness *at all* in capital cases.

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200. *See supra* notes 2, 7. Of course, Governor Rick Perry of Texas has demonstrated the opposite approach to potential problems, shutting down the investigation into the case of Cameron Todd Willingham. *See* Grann, *supra* note 2.

201. *See supra* note 10.

202. Ohio Governor Ted Strickland, among others, has shown a willingness to use clemency power, although it is still underutilized by most executives. *See, e.g.*, Douglas A. Berman, *Governor Ted Strickland Grants Clemency to 78 Persons in Ohio*, SENT'G L. & POL'Y BLOG (Nov. 23, 2009, 6:38 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2009/11/governor-ted-strickland-grants-clemency-release-to-78-persons-in-ohio.html.

203. Indeed, it is the pressure of satisfying the public demand for immediate justice that often results in the prosecution of the wrong individual. *See, e.g.*, DAVID ROSE, THE BIG EDDY CLUB: THE STOCKING STRANGLINGS AND SOUTHERN JUSTICE (2007).

The issue here is whether legislators can reverse the trend of penal populism and the onslaught of policies that continually increase criminal penalties.[204] As the individual votes of jurors indicate, the intellectual disconnect between future dangerousness and the need for execution may provide a politically plausible approach for eliminating future dangerousness from capital statutes. The approach would be to emphasize that reform would ensure that the "right" criminal defendants were sentenced to death. In other words, death sentences would be based on defensible rationales, not arbitrary predictions of future dangerousness.

3. Litigation

a. Constitutional

The first litigation approach would be to challenge statutes using future dangerousness on Eighth Amendment grounds. As explained above, the Court's evolving standards of decency jurisprudence and the absence of a stare decisis restriction would allow such challenges to at least be considered by the Court.[205] Further, the statutes that *require* a dangerousness determination would provide the best opportunity for extending the Eighth Amendment to prohibit consideration of future dangerousness.[206]

b. Evidentiary

The second approach would be to challenge the admission of future dangerousness testimony on grounds of relevance. Federal Rule of Evidence (FRE) 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[207] Federal Rule of Evidence 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[208]

As discussed above, future dangerousness evidence is clearly irrelevant to the question of whether an individual deserves to die. This is true under either standard. Under FRE 401, future dangerousness does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In

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204. The potential to shift the "majority" view here may predict the possibility of the Court ever using the Eighth Amendment to restrict the use of dangerousness in capital cases. *See* Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 45–55 (2007) (arguing that the Court's decision-making in Eighth Amendment cases is largely majoritarian).

205. For an argument about the proper application of stare decisis in capital cases, see Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847 (2007).

206. *See supra* note 28 and accompanying text.

207. FED. R. EVID. 401.

208. FED. R. EVID. 403.

other words, evidence of future dangerousness does not make it more likely that a capital sentence is needed to achieve "just deserts" retribution. Such evidence likewise does not make it more likely that a capital sentence will deter others from committing capital crimes.

Even if future dangerousness evidence were relevant, it should be barred by FRE 403. Future dangerousness has virtually no probative value to the question of whether the defendant deserves to die for his past acts or to deter others from committing similar acts in the future. In addition, future dangerousness, as has been demonstrated, clearly presents a high likelihood of unfair prejudice toward the defendant, typically has the effect of misleading the jury, and often results in the confusion of the relevant issues. Under FRE 403, then, the prejudicial nature of future dangerousness evidence substantially outweighs any probative value of such evidence in almost every case.

In addition to the evidentiary problems under FRE 401 and 403, the absence of reliability in future dangerousness determinations should prevent (or at least severely limit) experts from proffering such evidence.[209] The Court currently applies the *Barefoot v. Estelle* standard which allows psychiatrists to testify without having interviewed the defendant.[210] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court interpreted the then-new FRE 702 to require courts to apply a heightened admissibility standard, such that "any and all scientific testimony or evidence admitted is not only relevant, but reliable."[211]Given the lack of reliability of future dangerousness determinations, as discussed, FRE 702 should be applied to bar, or at least severely limit, expert testimony concerning future dangerousness. Such a rule would not be novel. In fact, two states, California and Mississippi, now prohibit expert testimony concerning future dangerousness in capital cases.[212]

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209. *See* Eugenia T. La Fontaine, Note, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207 (2002).

210. 463 U.S. 880 (1983) (allowing psychiatrists to testify about future dangerousness and answer hypotheticals about defendant's future conduct despite having never met or examined defendant). Dr. James Grigson, a.k.a. "Dr. Death," has made a career out of helping prosecutors sentence Texas capital defendants to death based on his predictions of their future dangerousness, testifying in numerous cases for substantial fees over a long period of time. *See* Ron Rosenbaum, *Travels with Dr. Death*, VANITY FAIR, May 1990, at 141–74. As of 1994, Dr. Grigson had appeared in at least 150 capital trials on behalf of the state, and his predictions of future dangerousness had been used to help convict at least one-third of all Texas death row inmates. Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 372 (1998). In 1995, Grigson was expelled from the American Psychological Association for unethical conduct. *Id.* at 352–53.

211. 509 U.S. 579, 589 (1993); *see* Michael H. Gottesman, *From* Barefoot *to* Daubert *to* Joiner: *Triple Play or Double Error?*, 40 ARIZ. L. REV. 753, 755–56 (1998).

212. *See, e.g.*, People v. Murtishaw, 631 P.2d 446, 471 & n.40 (Cal. 1981) (finding an expert psychiatric prediction of future violence unreliable and far more prejudicial than probative in this case); Balfour v. State, 598 So.2d 731, 748 (Miss. 1992)

C. An Appeal to Non-Abolitionists

Finally, death penalty advocates should also favor the elimination of future dangerousness in capital cases. Continuing to allow the use of irrelevant factors to determine the imposition of death sentences will only continue to undermine the legitimacy of the institution of capital punishment. With most of the world—including all of Europe—having abandoned capital punishment, and in light of the growing concerns about error and the execution of innocent individuals, another challenge to the efficacy of capital punishment might be the final straw that facilitates abolition.[213] On the other hand, eliminating the use of future dangerousness would significantly increase the legitimacy of death verdicts then imposed.

By eliminating sentences based on future dangerousness, the cost of using the death penalty might also decrease. Other than the issues described herein, the high cost of administering the death penalty appears to be the greatest threat to its continued use. By focusing resources on the defendants that committed the most serious crimes and trying those cases based on the need for retribution, prosecutors can reduce both the number of capital cases and the amount of error in such cases, potentially reducing costs.

By allowing the accepted purposes of the death penalty to become the focus of the inquiry, instead of future dangerousness, the use of capital punishment might become less arbitrary and more rational. In other words, eliminating future dangerousness would be one significant step toward fixing a broken system. As explained by death penalty advocate Judge Alex Kozinski, "[w]hatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims' families—these purposes are not served by the system as it now operates."[214]

CONCLUSION

This Article has advocated for the removal of future dangerousness from capital sentencing, and suggested such an approach could be a strategy for achieving de facto abolition. After demonstrating the dominant role that future dangerousness plays in capital cases, the Article provided three separate rationales—commonsensical, jurisprudential, and empirical—for excluding dangerousness from capital cases. Finally, the Article suggests that in light of the success achieved by life without parole, the executive, legislative, and judicial branches of government could adapt current policy to reduce the use of future dangerousness in capital cases.

Abolitionists and death penalty advocates alike should heed the words of Thomas Jefferson when considering the presence of future dangerousness in

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(holding that "propensity for future dangerousness" is not among the statutory aggravating factors under Mississippi law).

213. *See generally* sources cited *supra* note 5 (citing a number of articles addressing the likely persistence of the death penalty).

214. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 4 (1995).

capital cases: "We are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it."[215]

215. Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), *available at* http://www.loc.gov/exhibits/jefferson/75.html.