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Dehumanising Capital Offenders through Incarceration: Functionality and Irrevocability

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Abstract

Measured in executions, the death penalty in the USA is declining. Yet, under that shadow, death sentences continue to be imposedandoffendersare destined to spend longer in that incarceration than ever before. Even the punctuation of death penalty decline, five legislative death penalty abolitions, has little effect on death row; in threestates abolition was not retroactive and death row incarceration remains. This article argues that the dominant manner of death row incarceration, punitive, retributive incarceration and its dehumanising effect is functional in maintainingstereotypes and thus death penalty support. Moreover,it is the cultural recognition and permanence of the commonly attributed labels and descriptions attached to capital offenders that explains the continuation of death row incarceration in newly abolitionist states.

Keywords: death row; death penalty; stigma; abolition; United States

With 32 current death penalty retentionist states in the USA there are 32 high security prisons that hold death sentenced offenders; a number increased when female offenders, recent non retroactive state abolitions, and the federal and military death penalties are considered. In total, 3,095 are currently incarcerated under a sentence of death across the country (NAACP Legal Defense and Educational Fund 2013:1).

Those under a sentence of death are incarcerated in some of the most oppressive and punitive conditions of detention that the United States has to offer: a commonality in death row confinement across the country from Florida to California.

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"A living death is what death row offers its inhabitants. It is a world purposefully divested of normal social functions and rewards. Condemned men are allowed only the barest existence – enough to sustain the physical organism while its emotional and spiritual counterparts wither and die. "The living dead is actually what it adds up to...What does a maggot do? A maggot eats and defecates. That's what we do: eat and defecate. Nothing else. They don't allow us to do nothing else" (death sentenced offender cited in Johnson 1981:116).

Death row conditions have changed over time, since Johnson's pioneering work in the 1980s: death row conditions have worsened (Hudson 2000, Babcock 2008).Old buildings have been left to deteriorate, exposing inmates to dangerous and unsanitary conditions (Balsamo 2002, Kupers 2002, Vassallo 2002) whilst new buildings have been constructed to deliberately impose oppressive conditions and reduce human contact (King 1994). Within the walls of death row, inmates have increasingly less access to education, self improvement, and work opportunities (Hudson 2000, Babcock 2008). Subjected to the sensory and environmental assault of life on the rownumerous inmates come to exhibit several markers of both physical and mental degradation and decline.

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

This paper is the result of a three year research project examining the effects and utility of death row incarceration across the United States. Part one introduces the conditions that typically characterise death row confinement across the country, whilst offering a theoretical explanation for those conditions. Part two then asserts a dependency upon and purpose to such confinement in the shadow of a declining execution rate whilst part three strengthens that assertion by noting the exception to the general rule of death row incarceration: Missouri.

Finally, the paper concludes by exploring the corollary effect of death row dehumanisation: when that treatment, and its communication, becomes a barrier to retrospective state abolitions of capital punishment.

Conditions of Confinement

Inmates on death rows across the United States are routinely incarcerated for 23 hours a day, or more. Shackled whenever they leave their cell, arbitrarily denied even the most basic services: showering, exercise, unspoiled food, psychological and medical care, from the very moment the death sentenced offender takes up residence on a death row the process of dehumanisation begins. The capital offender is regarded and treated as undeserving of even the most basic human respect. Moreover, since an average stay of 51 months in the late 1970s, the average time an offender spends on death row had more than trebled by 2009 to 169 months; from just over four years to more than fourteen years. An enduring period of dehumanisation and mistreatment all endured under the threat that a sentence of death could be carried out, and an execution date set.

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

Although there are some subtle differences in death row confinement, with the exception of Missouri where death sentenced inmates are mainstreamed into the general prison population, discussed below, such difference is generally limited to variations on the themes of degradation and dehumanisation of the offender, their abuse, their neglect, and the withholding of services, amenities, and privileges (Johnson 1981, McGreal 2009, Johnson 1998, Babcock 2008), solely based on their status as a capital convict. Although such confinement may have the capacity to offend onlookers, observers, and analysts such as Robert Johnson, quoted above, to assert that there is neither mandate nor justification for such incarceration is to oversimplify the status of capital punishment and capital offenders as well as falsely assuming that the death sentence, execution, will be applied. This is the current status of the death penalty in the United States; few executions and death row as the sole, extra judicial punishment for the majority of capital offenders.

Wider culture has created a mythology of the death sentenced offender and his detention (Lyon & Cunningham 2005 – 2006:2): death sentenced offenders are regarded as the 'worst of the worst', they are "unfeeling psychopaths … figures who are something less than human" (Haney 1995:549), "not quite in the realm of human, thereby not worthy of consideration for human rights" (Lynch 2002:224). That construction renders the offender as undeserving of anything other than a sentence of death, even one of life without parole (Glaberson 2010, Associated Press 2000, Rell 2009).According to wider culture, the capital offender is a monster, having committed the most monstrous of offences, and "there is no middle ground with monsters" (Johnson 1984:571). This offender construction and description is then borne out in his detention: caged, quarantined, viewed as dangerous, and punished by the restrictions and deprivations of his imprisonment.

This is then fed back to wider culture, in a self affirming loop, through mass market books (Berry Dee & Brown 2003), death row analyses (Johnson 1981, Johnson 1998), offenders themselves (Chessman 2006), executioners (Solotaroff 2002) and fictional accounts of 'life on the row', just as powerful, if not more so, than factual accounts (Wardle and Gans-Boriskin 2004). There is then, in that communicative loop, a reinforcement of the manner of death row incarceration common around the United States, and of the propriety of capital punishment. Death sentenced offenders are regarded as not only the worst of the worst, but, if permitted opportunity, will seek to kill again. Death row incarceration reflects that feeling by imposing the most austere and retributive method of incarceration, a manner of incarceration that is ostensibly justified as the only way to contain the danger of inmates until they are executed. When those conditions, and implicit need, are publicised in any form (and no account of death row portrays it as a lenient or easy form of imprisonment) then the original cultural stereotype and belief is corroborated and, along with it, a need for capital punishment: a different type of penalty for an inherently different type of offender. So, death row incarceration is functional as an active generator and maintainer of death penalty support. Robert Johnson, however, seemingly looks for a more tangible mandate and immediate justification for that treatment.

There is an official mandate for current death row incarceration, contrary to Johnson's assertion: firstly, that tacitly bestowed by the legal system. Before the current era of the death penalty death row was loosely structured and at a time when the scope of the penalty was far less refined, before Furman v Georgia 1972.

In the twentieth century, as recently as the 1950s and 1960s, offenders were sentenced to death for offences as, comparatively little to the intentional murder with aggravating circumstances that characterize capital convictions today, of robbery or arson. More than thirty five years of legal regulation has though, sought to refine offences and make the capital offender 'the worst of the worst', having committed the worst of crimes and, as such, having demonstrated a lack of the humanity that characterizes free society and the evolving standards of decency by which the death penalty is regulated. In short, he is now so monstrous he needs to be expunged (Garland 2007a:447), permanently removed from society (and general prison incarceration is a society(Sykes 1958)) thus his incarceration reflects that feeling, reflects his dangerousness (an aggravating factor to warrant the imposition of a death sentence in states such as Oregon and Texas), reflects his 'otherness', and communicates the regard he is held in.

Additionally, there is justification for such incarceration from a systemic perspective, beyond simple holding awaiting execution: to ensure the continuation of support for the death penalty (particularly at a present time when the status of capital punishment is threatened by a confluence of factors ranging from high profile exonerations to a simple lack of drugs required to perform an execution(McBride 2014, Fernandez 2013, Amnesty International 2011)). Some offenders are so monstrous and dangerous that, while justifying the existence of the death penalty generally, at the level of their prison management, they need to be confined in such a manner that reflects and adds credence to their description, quarantined to only the most basic existence (what Robert Johnson would term a "living death" (Johnson 1984:575)). In this way, thecontinuing and future dangerousness of offenders, prophesised by the very imposition of a death sentence, can be safely managed and controlled. The current manner of death row incarceration then not only affirms the legal depiction of the condemned, but also affirms the wider cultural depiction of him: imprisonment in general prison population, for example, would undermine the assertion of his continuing threat and, with the availability of services in the general prison population, undermine the description of him as beyond human recognition.

Incarceration over Execution

Nearly forty years of experience affirm the notion that capital punishment does not always, or even in the majority of cases, or the majority of states, produce death (more people are killed each year by lightning Garland 2010:312, Garland 2008:137): increasingly death row is *the* punishment. Yet, a person so convicted, of a capital crime, is affirmed by that conviction as the worst of the worst, and even without execution he is stigmatised with a label, a label that is reinforced by the conditions of his incarceration, which in turn are imposed because of that label. The death sentenced offender is treated much more severely, much more controlled and scrutinised than his counterpart in the general prison population, even though his counterpart may have committed similar offences. The legal system and wider society, however, has not declared the offender in the general prison population, even when serving life without parole, to be the worst of the worst - particularly in light of the overuse of the sentence - not when the death penalty is retained, he therefore does not face the worst of the worst conditions of detention. Once rejected by society as undeserving to live, the death sentenced offender is rejected by the planners of his incarceration and the pains of imprisonment are purposefully exacerbated: liberty is lost by all prisoners but the death sentenced inmate is far more controlled and restricted, contact with loved ones is lost by all prisoners, but death sentenced visitation is so curtailed that physical contact is eliminated: all of which can be done under the guise of institutional and societal security.

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

Yet, such are the restrictions and deprivations imposed upon capital offenders that death row, rather than an expression of security concerns, can be read as an expression of retributive impulses. Indeed, death sentenced offenders are regarded as one of the most manageable prisoner groups (Marquart and Sorenson 1988, Sorenson and Wrinkle 1996) even after security and governing regimes have been relaxed (Cunningham, Reidy, and Sorenson 2005:313).

Simply, numerous studies suggest that capital convicts are not the blood thirsty, eternally dangerous offenders that have become caricatures in wider culture, descriptions and images that perpetuate the dominance of retributive support for the death penalty (Gallup 2009, Amnesty International 2011:6).

The treatment of those on death row is undoubtedly punitive and thus comports with the dominant supportive rationale of capital punishment (Gallup 2009, Amnesty International 2011:6). So the changes in the death penalty over time, less executions (executions at which displays of retribution and violence are denied by lethal injection (Sarat 2004:29, Merrill 2008 – 2009:189, Denno 2002:65, Amnesty International 2011:12)) and a greater reliance on death row to punish can be read as a natural evolution of the death penalty, following the same evolution in punishments generally where the body is less and less the targeted site of punishment (Foucault 1977). The death penalty has had to evolve before over time to remain in place, in regard to execution methods, public hangings, or capital offences, for example, so this change, to a death penalty that does not produce wholesale executions can be read as simply another evolutionary turn.

Moreover, as Zimring & Hawkins (1986) have noted, a sudden reversal in execution output to counteract the execution decline would likely increase social division over the death penalty and endanger its continuation by increasing the likelihood of greater identification with the condemned and less agreement with the state, particularly in light of the number of death row exonerations in recent years (Unnever & Cullen 2005:3). After Louisiana executed eight men in an eleven week period in the summer of 1987, death sentences handed down by jurors plummeted from an average of 10 per year to just one (Deparle 1991). As executions nationally decline, the deterrent and retributive messages of capital punishment (even if a deterrent message is increasingly less sought, approved or even recognised (Radelet & Lacock 2009)) must be found from another source: death row detention. Whilst this may only be temporary in some states owing to drug shortages to carry out executions, or their relative unpopularity, remains to be seen, in some states however, where executions are never, in the past fifty years at least, pursued by the state (New Hampshire, Kansas, South Dakota, Pennsylvania, for example) this change in death penalty character has a greater prospect of longevity.

In all executing states, however, there is an increasing reliance upon death row to punish; from a national high of 98 persons executed in 1999, rates have fallen to less than half of that amount every year since 2010.

Whilst the death penalty is increasingly a sentence of life without parole incarceration on death row, for a significant number of states this is not a new phenomenon: in some states prosecutors seek a death sentence, and juries impose a death sentence, but a death sentence does not equate to an execution. A death penalty kept in place by voters and their taxes does not necessarily require executions and, it can be argued that after many years such death penalties, in states such as Kansas or New Hampshire, are recognised as something other than a system that imposes physical death. Rather, some states seemingly only require a unique condemnation of the worst offenders, the abstract threat of execution and, pivotally, an expression of condemnation through the imposition of death row confinement. The last execution in New Hampshire, for example, took place in 1939, whilst the last execution in Kansas was in 1965. Similarly, the last time the State of Pennsylvania pursued an execution, discounting those offenders who have waived their appeals and volunteered to be put to death, was in 1962, in South Dakota, 1947. In these states, and others with similar execution statistics, death sentences are gestures that do not equate to an execution. Death sentences apparently do not necessarily need a high conversion rate to achieve the instrumental aims of retaining the death penalty, whatever those instrumental aims may be: expressing public sentiment, communicating public values, marking political distinction, promoting social solidarity or merely denouncing specific crimes (Garland 2007b:125).

The effect of imposing a death sentence then, in states such as Kansas, or any state with a low execution rate, can still have a very real wider effect even if it does not translate into regular executions. It can be assumed that effects other than execution are indeed acknowledged and intended, citizens pay taxes that keep the death penalty 'business' going, people vote for those officials that, in the very least, do not propose abolishing the death penalty in their state, prosecutors seek capital verdicts, juries impose death sentences, and in some states, such as Pennsylvania, the Governor even signs a relatively high number of death warrants (which go unfulfilled); all actions that, simply, do not lead to executions. In New Hampshire, despite no execution having taken place in the state for over fifty years the legislature, in 2011,approved expansion of its death penalty statute to include murder committed during a home invasion.

In 2014 a repeal bill failed (Seelye 2014). In Connecticut, in 2009, then Governor, Jodi Rell, vetoed an abolition bill despite the state not having pursued a non voluntary execution since 1960, and in Kansas, a state with no executions whatsoever under its current capital punishment legislation, a legislative debate on the issue conducted in 2010 recommended the retention of the death penalty in the state. The death penalty in some states is clearly functional, retained, paid for, used, and protected as it is, yet too easily functionality is weighed only in execution numbers: too often state death penalties are dismissed as hollow, empty, merely symbolic (Steiker and Steiker 2005 – 2006) and, too often on that reading, on the denial of any instrumentality, on the verge of abolition. Indeed, Capital punishment may not be wholly lethal, but it can still be effective, particularly as a means of communication by voters and politicians (Garland 2010).

Juries, in a demonstration of this knowledge, communicate community values in their imposition of the death penalty, particularly when imposed over the alternative of life without parole, even if they are not imposing a physical death. Indeed, it is not unreasonable to assume that jurors, as citizens, are aware of the true meaning of a death sentence, as borne out by previous capital jury research:

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

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

When few offenders are executed social division over the issue, arbitrariness or biasness of its infliction, is lessened (Zimring& Hawkins 1986) and the legal mandate of imposing the death penalty upon only a few, the worst of the worst offenders, is affirmed. Simply, the death penalty generally, in this current era of few executions, is supported by death row in its current form.

There appears to be some level of constitutional acceptance of this version of a 'death' penalty. Despite the relatively longstanding nature of this change to the death penalty in some states, the legal establishment still remains unprepared to regulate this evolution:

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

However, more than thirty five years later, should the legal establishment venture to make any substantive changes to death row confinement it would be undermining its own philosophy: that capital offenders are now the most deserving of punishment, are the most dangerous prisoners and pose a continuing risk to both free and prison society. Since Furman v Georgia 1972, this has been the very purpose of death penalty regulation, regulating offences, regulating procedures, regulating offenders, all done to ensure, theoretically at least, that capital convicts are the very 'worst of the worst'.

Whilst death row reform may not occur as a result of legal intervention, death row researcher Robert Johnson, however, can "readily envision" a different form of death row than commonly exists today: a 'humane death row' (Johnson 1998:213). Such a death row, he asserts, would be very different to the conditions that currently characterise death row confinement,

"Such a setting would be staffed by mature, service – orientated correctional officers able to relate to condemned prisoners as persons in the process of dying at the hands of the state, a class of individuals analogous to and as deserving of humane care as terminally ill patients ... Visits would be encouraged, as would recreational activities and programs of work or study that can take place in cells or in small groups. Also encouraged would be self help programs, preferably developed by and for the prisoners, which would be promoted as collective adaptations to the stresses of death row confinement and impending execution" (Johnson 1998:213).

Robert Johnson, however, in this imagining of humane death row confinement reminiscent of hospice, palliative care, also, even if unwittingly, points out a fundamental flaw impeding its realisation: the presumption underlying the implementation of such death row confinement would be the recognition of the humanity of the condemned, that even the worst of the worst offenders deserve respect and an acknowledgment of the person (Johnson 1998:214). Seeking such recognition was in fact the very downfall of previous abolitionist strategy (Girling 2004:277). Aside from the difficulties this reformed death row would engender for prison officials in conducting any executions, relating to and caring for the person in life and then playing a part in taking that life, it also undermines the presentation of the condemned at trial and sentencing, and, wider support for the death penalty in general. That support is increasingly based on retributive urges (Amnesty International 2011:6) and without executions (and even in light of the use of lethal injection and its medical impression when executions occur), more so death row confinement is required to be a means of imposing retributive punishment upon the offender: a sense of punishment in direct opposition to that death row which Robert Johnson imagines.

As an alternative, Robert Johnson also cites the possibility of alleviating the suffering of the condemned through the complete abolition of death row and the wholesale mainstreaming of death sentenced offenders into general prison populations (Johnson 1998:216). Such a move does have a precedent, though in Missouri all capital offenders have been mainstreamed into the general prison population since 1991.

An Exception to the Rule: Missouri Mainstreaming

Prior to the mainstreaming experiment, several employees of the Potosi Correctional Center had noted the irony of an institution divided according to sentence but housing offenders of a generally similar nature. At the time of mainstreaming, the vast majority of inmates housed in the general prison population at the Potosi Correctional Center were serving long sentences: life without parole, or a fifty year term before parole could even be considered. As Lombardi, Sluder, and Wallace note, "In essence, although capital and non–capital inmates had been convicted for the same offense, the only difference between the two groups was their sentences" (Lombardi, Sluder, & Wallace 1996). Lombardi Sluder and Wallace, however, succinctly summarise the less tangible, more subtle ways that mainstreaming has benefitted death sentenced offenders,

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

Mainstreaming capital inmates into the general prison population has allowed for increased access to recreational opportunities, eight hours each day, as well as hobby - craft activities, available for six hours a day. Death sentenced offenders were then able to compete for jobs throughout the prison working in the prison laundry, law library, food services, and the tailor shop. Opportunities for visitation were expanded, owing to the lower levels of staffing required once a segregated death row was dismantled, providing more visiting days for death sentenced offenders. Once capital punishment inmates were moved into the general prison population medical serviceswere easier to access and the difficulties associated with distributing medication to offenders on death row were eliminated. Additionally, counselling staff had a greater flexibility to talk with death sentenced offenders and work with them on a more informal basis (Lombardi, Sluder, & Wallace 1996).

It is telling, however, in an era with increased strain on correctional budgets, and the Missouri mainstreamingexperiment proved to have significant savings attached (Lombardi, Sluder, & Wallace 1996) Missouri has remained an outlier in its form of incarcerating the condemned. Perhaps a partial explanation, at least, can be found in the difference between the executing behaviour of states. Whereas for a number of states, death row is, in reality, a storage facility, where few executions are performed, thus giving a death sentence a new meaning of life without parole; Missouri is different. Recent abolitionist states that failed to conduct a non voluntary execution, still maintain a death row, Connecticut and New Mexico, for example, discussed below, whilst Kansas, New Hampshire, Pennsylvania, Idaho, South Dakota, and Oregon, similarly, operate a death penalty with no non-voluntary executions. The non voluntary execution rate for Missouri, however, is high, death sentenced offender confinement in Missouri is only a temporary step and execution is far more probable than in other states. Indeed, Missouri is the most prolific executing state outside the south and, in fact, outpaces several southern executing states including North and South Carolina, Alabama, and Georgia (Death Penalty Information Center). Only Texas, Virginia, Oklahoma, and Florida have put more people to death in the contemporary death penalty era than Missouri (Death Penalty Information Center) and of those states, both Texas and Virginia have experienced successful breakouts from death row (Kolker & Hart 1998, McKelway 2009),adding to their specific instrumental defence of death row conditions.

After mainstreaming in Missouri, not one of the executions it conducted in the 1990s, from 1991 onwards, was of an offender who volunteered for execution; indeed, when volunteers are discounted from the execution total, calculating from the executions of the 1990s (chronicled by the Death Penalty Information Center), Missouri accounted for over 9% of all executions in the decade. Additionally, that will to execute did not dissipate in the following years: in 2001, using the same execution data compiled by the Death Penalty Information Center, Missouri accounted for more than one in ten of all executions that year, and more than 8% the following year. Whilst the rate appeared to reassert itself after no executions were conducted by Missouri in 2004, and its contribution to the national execution total in 2003 was less than 4%, in 2005 again, the state accounted for nearly one in ten of all offenders put to death in the country (9.43% of all executions in the year). With such executing behaviour, no recent history of escape or escape attempts, death row has not been required in Missouri to communicate the status and regard of the condemned.

For the overwhelming majority of other states, death row is essential in maintaining the distinction of the death penalty and the offender through its treatment of condemned prisoners, all the more vital in a period of declining executions.

Now that death row is the punishing element of the death penalty for many offenders, a distinction in prisoner incarceration is required. The movement of death sentenced offenders into general prison populations in states with no executions or few executions, particularly when these only occur as a result of an offender waiving his appeals and volunteering to be executed, means that the death penalty, along with all its associated costs, would be no different than a sentence of life without parole. The refusal to replace the death sentence with one of life without parole even in states that do not execute gives some indication that states would be unwilling to make such a move.

For those few that are executed, the theory has a different application. Death row treatment is purposeful to dehumanise them ahead of their execution date, making it easier to kill them, both in the immediate sense for the execution team, and more widely, for general support for that execution by denying the personality and individuality of the condemned. Wider culture dictates that death sentenced offenders are 'animals', as less than human, they are then treated as, and affirmed as such, and the abolitionist movement has been unable to gain any ground by challenging the contrary (Sarat 2002, Girling 2004). Current death row incarceration prohibits the condemned from asserting the contrary. If offenders are death sentenced and then housed in a general prison population then the denunciation, dehumanisation effect, particularly without a resulting execution, would be lost and the continuation of the death penalty endangered. Whilst death row inmates see the conditions and rules of death row as a "gratuitous assault on their humanity" (Johnson 1998:100) they are far from gratuitous and, in fact, entirely instrumental, instrumental beyond any institutional security concerns.

The Permanence of Death Row in a Time of Abolition

Since 2007 there have been five legislative abolitions of state death penalties: New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), and Maryland (2013).

In New Mexico, Connecticut, and Maryland abolition was prospective only and, in the most recent failed repeal bill, in New Hampshire, support could only be assured on the basis that that too, would be prospective only (Associated Press 2014).

"[I]f I had my way, we would have no death penalty for everyone, including the 11 that this bill will leave on death row [in Connecticut]. . . . But the reality is that I am in a room with 150 other people . . . [I]n 2009 when I attempted to completely abolish the death penalty, I came to the realization that the only way to move forward was with the bill that was prospective" (Sponsor of Connecticut's repeal bill, Representative Gary Holder-Winfield, cited in Barry 2014b:108)

Two states appear as anomalies in the list of recent legislative abolitions: New Jersey and Illinois. When the death penalty in New Jersey was abolished, eight offenders had their sentences commuted and death row, as a separate form of incarceration, was abolished along with the prospect of execution. However, this anomaly can be explained in the lack of precedent, in the modern era, for a legislative abolition. New York's death penalty was effectively abolished in 2004 when it was ruled unconstitutional (*People v. Stephen LaValle,* 2004), but before New Jersey there had been no legislative repeal; no precedent. When viewed chronologically, the New Jersey experience was a test of how death penalty abolition could proceed in the current death penalty era. Abolition was unusually quick to progress in New Jersey (Peters 2007) and, pivotally, occurred during a much publicised execution moratorium, forced upon states until the United States Supreme Court reviewed mounting challenges to lethal injection protocols (which it did the following year in Baze v Rees). After the fact, there were calls to reintroduce the penalty, specifically for the murder of police officers and children under the age of 14 (Amnesty International 2011:60).

Specific outrage was evident after the 'quick' abolition, as the convicted killer of Megan Kanka, the sex offender whose murder prompted the creation of 'Megan's law', had his sentence commuted (Jacoby 2007). Halfway abolition, non retroactive abolition, after New Jersey, ensured that no more 'monsters', so readily described and stigmatised as such, would leave death row; killers such as Joshua Komisarjevsky and Steven Hayes (the Connecticut home invaders that formed the basis of the decision of Governor Jodi Rell to veto death penalty repeal (Daily Mail Reporter 2012, Rell 2009)).

Prospective only abolition then becomes the safer middle ground, labels do not have to be removed, and conceptions of hated capital killers do not have to be rethought; initial contempt and justification for their suffering is not challenged. Indeed, prospective only clauses in abolition bills have been crucial for attempted and successful death penalty repeals since New Jersey (Barry 2014a, Barry 2014b, Seelye 2014, Fenster 2012, Pilkington 2012); with the exception of Illinois.

Illinois stands out, perhaps more than New Jersey, for its chronological placement in the line of non retroactive death penalty abolitions; Illinois, however, is a distinct case. Freed through the investigative efforts of a journalism class, Anthony Porter came within hours of being executed before being released from death row in 1999: Porter would become the figurehead associated with innocence and wrongful capital convictions (Mills 2011).Even, by the time of Porter's release, the certainty of the death penalty was eroding after a succession of vacated death sentences and convictions (Mills 2011). Increasingly the capital punishment system of the state was regarded as broken; the men on death row were not unquestionably guilty they were not, unquestionably, 'the worst of the worst'. Following the exoneration of Porter that uncertainty grew, and the following year Governor Ryan declared a moratorium on executions. In total, 20 death sentenced offenders were exonerated in Illinois; by the time of abolition the communicative loop between wider culture and death row, affirming offender stereotypes, and the propriety of the death penalty itself, had been permanently disrupted: death row was no longer a site of justifiable, punitive detention, but an unjust manner of incarceration imposed upon innocent men.

There was never convincing evidence of the uniform guilt of those sentenced to death in Illinois, numerous reports of exonerations and questionable convictions became the norm; unless undoubtedly guilty offenders can never, with certainty, be permanently stigmatised with the commonly used label of a monster (Lynch 2000, Lynch 2002, Haney 1995) as a group, regarded as unworthy to live and unworthy of any recognition of their humanity. Other abolitionists, prospective only abolitionists, are states in which death sentences have been used sparingly; when guilt is not in question and where feelings of hatred based on the character, or lack thereof, of capital offenders, is well entrenched (Rell 2009, Associated Press 2000).

Reports of offenders languishing on death row, suffering on death row, means the communicative loop that affirms cultural stereotypes of capital offenders, and the propriety of the death penalty itself, was well established; in Illinois that communicative loop was interrupted by numerous and forceful accounts of innocence and wrongful convictions.

When guilt is not in question, so permanent are the descriptions and labels attributed to death row inhabitants in local and wider cultures, means that support for complete, retroactive abolition, is difficult to garner, even from state governors who are in themselves abolitionist and actively support repeal of the death penalty for future cases (Fenster 2012). It is then, the communication of messages and descriptions to and from death row that not only supports retention of the death penalty in the majority of states but also bars any retroactive application for prospective abolitionists.

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