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**THE DILEMMAS OF EXCESSIVE SENTENCING:
DEATH MAY BE DIFFERENT BUT HOW
DIFFERENT?**

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THE DILEMMAS OF EXCESSIVE SENTENCING: DEATH MAY BE DIFFERENT BUT HOW DIFFERENT?

By
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“I care a great deal about capital punishment, but sometimes I think that the focus ...on life and death detracts from the attention that should be put on situations in which people are sentenced to huge terms ...”²

It’s a great pleasure to initiate this lecture series in the name of a man who practiced a form of academic life that gives honor both to the calling of philosopher *and* the role of advocate. Hugo Bedau never lowered his standards while invoking the gods of social transformation but he also knew the difference between words and deeds.

I’ll repeat what I said three years ago in his presence. Because of his death penalty work, lawyers whose vision often is narrowed to the case before them were able to understand the history and the evolving story of the death penalty in America. He was a true pioneer and, as important, he was both accessible and generous.

¹ Matthews Distinguished University Professor of Law, Northeastern University School of Law. The text which follows was delivered, with only modest changes here, at Tufts University on March 28, 2014 as the first Hugo Adams Bedau Memorial Lecture. Many thanks to Constance Putnam and Erin Kelly for support and assistance. Copyright © Michael Meltsner 2014.

² Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California’s Three Strike Law*, 21 STAN L. & POL’Y REV. 311, 317-18 (2010) (quoting Guido Calabresi).

Justice Holmes once wrote that “academic life is but half life— ... a withdrawal from the fight in order to utter smart things that cost you nothing...”.³ Plainly he didn’t know Hugo Bedau. Little you hear this afternoon will be new or startling because an increasing number of talented scholars, lawyers and activists have been working hard to change the excessive, disproportionate, costly and ineffective pattern of excessive incarceration that is my subject. I’d like to name them all but then I’d have little time left to say anything else.

Only two years ago the consensus among those who focus on the sentencing of criminals was that it was difficult to imagine any deep and lasting structural change that would transform the American way of punishment. Since then there has been a chorus of calls for reform; voices have been raised from elites in a manner that usually presages a policy shift.

We have the strange sight of senators Dick Durbin, Rand Paul and Mike Lee on the same page. Attorney General Holder, the NY Times editorial board, a number of leading academic commentators and frustrated trial court sentencing judges have urged that something be done to curtail excessive sentencing and mass incarceration. Legislation has been introduced in Congress and hearings scheduled.

Under the gun of court orders to deal with overcrowding, California has started to parole some lifers.

³ Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), in OLIVER WENDELL HOLMES, PAPERS (University Publishers of America, 1985) (Holmes was urging Felix Frankfurter to reject an offer to join the Harvard Law School faculty. He suggested Frankfurter keep practicing law.).

Responding to recent Supreme Court decisions, many states are trying to sort out what sort of parole hearings and parole standards to use with juveniles who have been sentenced to life.

These are all signs that point to a reform movement and that is a good thing. It also suggests being careful because the easy reforms—only going after narrowly defined nonviolent offenses, weighing the crime to the exclusion of changes in behavior when considering parole, restricting changes to youthful offenders---will not reach the core of our problem with a widespread policy of warehousing.

And piecemeal actions will simply not change much. It is a little like climate change where there is a consensus among the experts and very little movement in what most people refer to as the “real” world. Perhaps the most likely reforms, such as fewer incarcerations for non-violent crimes and narrower three strike laws, are the penal equivalent of a climate change policy that focuses on better curbside recycling.

Hugo published The Death Penalty in America in 1964, a year after Jack Greenberg gave us the go ahead at the NAACP Legal Defense Fund to mount a campaign to abolish the death penalty through litigation.⁴ Fifty years of glorious victories and devastating defeats later we still have a capital punishment system –diminished as it may be—but we also have a much worse penal regime and record of incarceration.

⁴ MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 12 (Quid Pro Books, 2nd ed. 2011); EVAN J. MANDERY, A WILD JUSTICE 33-34 (2013).

Sadly, much of this situation is an unexpected consequence of our campaign to abolish the death penalty. Because I was there I can tell you with some authority that the legal abolitionists of the sixties and seventies did not worry about Life Without Parole (LWOP); Quite understandably too because we saw our business as saving lives of clients in jeopardy of execution, overwhelmingly due to race and poverty.

But let's leave the past for a moment. Allow yourself to look to the future. Imagine if you will the following scenario: The composition of the Supreme Court has changed. The new majority composed of justices chosen by Presidents Obama and Hilary Clinton look at trends from the period 2006-12 where six states abolished the death penalty and 15 to 20 gave indication that they are uncertain about how and when to resume executions.

This new Court also sees that in 2012 only 39 men were executed, down from 78 in little more than a decade and notes that while in 2000 there were 224 death sentences handed down by American courts in 2012 there were only 80. Remember that this is a country with yearly homicides in the five figures.

The Justices note that capital punishment is largely a regional phenomenon. In 2012 only nine states conducted an execution; Texas accounted for 15 of the 43. And they remember that since 1976 when authority to execute was restored, of the 1300 to 1400 men and women sent to death over 1100 were from Southern and border states. And they will further note that of the over 3,000

individuals on the death rows of America's prisons today a majority are black and Hispanic.

Recognizing that these abolition trends signal capital punishment has run afoul of "evolving standards of decency" --the oft cited test for interpretation of the [Eighth Amendment](#)'s prohibition on [cruel and unusual punishment](#)—and additionally that the actual record of criminal justice system behavior confirms a major shift away from the use of capital punishment has taken place, the Justices decide to restrict the death penalty to a very, very small number of cases dealing with some form of mass killing or extreme terrorism.

They do this despite knowing that support for the death penalty is still strong and also knowing that judicial restriction of the death penalty has in the past led to intense criticism and being further aware that this is a country where horrible crimes are committed every day which when reported by the media understandably encourages public outrage.

Legal Science fiction, you ask? Maybe, but I believe such a scenario will come to pass, though I am quick to say that when it happens (*if it happens*) many of us in the community of advocates who have pursued this end since the 1960s will have left the scene. Suppose against all odds I prove to be right? Well, of course, it would be no small thing to abandon this expensive, unnecessary, unreliable and brutal sanction, a step that I hope might advance the cause of managing the violence among us. But even if such progress occurs, if we take a hard look at our criminal justice system we will see an alarming, multi

layered evil that abolition of the death penalty will not cure and may, in the short term at least, worsen.

Let me explain it this way: We will never execute the vast majority of those we now hold on death row whether we terminate the lives of 39 a year or even double or triple that number. Thousands of these mostly men will die in prison. (By the way, the average time between conviction and execution for those (very) few who lose this ghastly lottery is about 15 years.)

Now look at the growing number of life sentences and the growing number of life without parole sentences (LWOP). Life sentences probably add up to 140,000 to 150,000 inmates, and this does not include sentences that are de facto life—say 50 years for a 50 year old man. It has been estimated that 1 in 11 of all persons in prison are serving life. 49 states authorize such sentences. Nationally, perhaps 40 to 50,000 of the 150,000 life sentences are life without parole. In 1970 Louisiana, to pick out one representative state, had 143 inmates serving LWOP sentences. Today that number is 4,637.

Add to this picture the fact that parole release has been abolished completely in the federal system and a number of states. And to make sure we have the whole picture, consider also that commutation, once a common way of mitigating the harshness of criminal sentences, is now rare.

With the large number of those imprisoned in the United States comes the dramatic cost of incarcerating them. During the great recession, corrections was the fastest expanding segment of state budgets, and over the past

two decades its growth as a share of state expenditures has been second only to Medicaid. State corrections costs now top \$50 billion annually and consume one in every 15 discretionary dollars. Prisons employ almost half a million guards and related personnel.

This rise in spending was the result of policy choices that sent more people to prison and kept them there longer. In the 1970s there were 350,000 held; the number today tops 2 million. We have five per cent of the world's population and 25 per cent of its prisoners. This doesn't count the millions on probation or parole or awaiting trial--- in 2010 about 1 in every 48 adults in the U.S. was under supervision.

It shouldn't surprise you that all these numbers also reflect an enormously disproportionate treatment of African Americans and other minorities. One example among many--it has been estimated that 65 per cent of those serving LWOP sentences are minorities. Michelle Alexander has argued persuasively that these numbers amount to an effort to control a feared underclass— young black men seen as dangerous---with devastating results for the poor and in particular for black families. Federal Judge Michael Ponsor in a recent op-ed column asks "how did the "the 'land of the free and home of the brave' "' become the world's biggest prison ward."⁵

He answers either we Americans are far more dangerous than other people or something is seriously out of whack in the criminal justice system. This formulation doesn't explicitly include the fear factor and in my estimation it is

⁵ Michael Ponsor, *The Prisoners I Lose Sleep Over*, WALL STREET JOURNAL (Feb. 14, 2014), available at <http://online.wsj.com/news/articles/SB10001424052702304680904579365440971531708>.

fear that drives the punitive. Fear is an emotion particularly tied to its object and the greatest source of American fear, though over time sublimated and dispersed to others, is still dark male skin

I ask myself what are the differences between the death row inmate and the life-sentenced man. The shocking answer is very, very little. To begin with both groups are likely to die in prison. As the arbitrariness of death sentencing is undeniable, those facing execution are no more or less dangerous than the lifer. The two populations are demographically similar. As far as prison living and working conditions are concerned it is generally thought that lifers have a slightly better deal but the pattern is uneven and depends on the practice in each state and sometimes each institution. Professor Eva Nilson's has concluded that "[T]he prison experience is, in many ways, harsher than it has ever been. Prisons are crowded, with double-and triple-celling being the norm. New technology has led to increased use of isolation cells and centralized monitoring."⁶

But many death row inmates are better off than anyone confined in one of the 40 or so super max prisons where solitary confinement is common. These are inhumane places calculated to destroy personality. On the other hand, many states treat men sentenced to death as if they were wild beasts, holding them in cells 23 hours a day and chaining them on the few occasions they are let out of their cells.

⁶ Eva S. Nilson, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 116 (2007).

In both groups there are many who are mentally ill or have serious personality disorders. In both groups there are men with violent dispositions who don't seem affected much by the passage of time and there are others who, despite the pains of custodial control and the disarray of daily life as caged men, grow and change and pose no great threat to society, a condition that is clearly age related in many, and in others depends greatly on whether they have family or other support. In short, inmates are as varied as the crimes they have committed—conditions not accurately captured by labels describing the crimes in the criminal code or on the media. Note that not all lifers are murderers and not all murderers are sociopaths by any means.

The similarities between the populations are many but the difference in the way the law treats them is great. One group has a constitutional right to individualized sentencing and the other group doesn't. The standards for measuring the effectiveness of counsel or the proportionality of the sentence to individual culpability is much higher in one case than the other.

The results tell the story that this "death is different" treatment yields. The odds of some form of judicial relief in a death case are at least 5 or 6 times better than in cases of life sentences or the many de facto life cases where a judge has tacked on to the sentence a number in excess of the inmates life expectancy. Two thirds of capital cases are in some fashion reversed for further proceedings. In the lifer cases the percentage is less than ten, some think less than five.

No wonder that many California death row inmates came out against the recent referendum that would have abolished the death penalty in that state and substituted life without parole in its place. A defense attorney commented: “Many of them say, ‘I’d rather gamble and have the death penalty dangling there but be able to fight to right a wrong.’”⁷ Death *is* different but is it so different that the law should ignore that the vast majority of the people we are talking about will die of natural causes in the same custodial environment regardless of their sentence?⁸

Life without parole sentences were rare until in the 1980s and 90s they were authorized in state after state as an alternative to the death penalty. Polls indicate that support for capital punishment precipitously drops when an LWOP alternative exists. A recent national poll of 1,500 registered voters showed growing support for alternatives to the death penalty compared with previous polls. A clear majority of voters (61%) choose a punishment other than the death penalty for murder when life sentences without parole was an option.

By the way, LWOP was supported by some but not all anti death penalty advocates. One who didn’t was Hugo Bedau who came out against LWOP as early as 1989. But more representative was the view of the ACLU of Northern California:

⁷ Bob Egelko, *Death Row Inmates Oppose Prop. 34*, SFGATE, <http://www.sfgate.com/news/article/Death-Row-inmates-oppose-Prop-34-3891122.php> (last updated Apr. 30, 2014).

⁸ *Id.*

“The death penalty costs more, delivers less, and puts innocent lives at risk. Life without parole provides swift, severe, and certain punishment. It provides justice to survivors of murder victims and allows more resources to be invested into solving other murders and preventing violence. Sentencing people to die in prison is the sensible alternative for public safety and murder victims’ families.”⁹

To meet the state’s argument to the jury that the defendant should be executed as a way of ensuring that he will never walk among us defense lawyers came to argue for a sentence of comparable if not identical harshness. One former prosecutor pointed out that once legislators became familiar with LWOP and courts warranted their constitutionality they were applied to all manner of crimes under three strike and similar laws. For the growth of LWOP, he blamed “death penalty abolitionists” --whom he characterized as having a fervor suggesting “fanaticism”—willing to go to any lengths to eliminate the death penalty.¹⁰ Of course, capital defenders urged juries to spare their clients by using LWOP. They could hardly do otherwise. They may or may not have been abolitionists but they were defense counsel. Should they have not used arguments that could and in many cases did save the lives of their clients?

Some critics suggest that LDF should have waited until there was an organized abolition movement to bring its challenges to the death penalty. But even if LDF could

⁹*The Truth About Life Without Parole: Condemned to Die in Prison*, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison> (last visited June 4, 2014).

¹⁰ I. Bennett Capers, *Defending Life*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 167, 173 (Charles J. Ogletree Jr. & Austin Sarat eds., 2012).

have somehow put aside the interest of clients under sentence of death if we had waited then we would still be waiting because there has never arisen a broad based national coalition of the sort that had the power to significantly influence legislators to abolish. When I hear this particular argument I remember that it has also been used to critique Brown v Board of Education. Critics of Brown claimed segregation would wither away if only the courts would stay their hand. But it was second Brown decision in 1955 that brought us the “all deliberate speed” implementing principle that ensured in many places integration of the schools would happen beyond the horizon.

In Gregg v Georgia,¹¹ the Supreme Court yielded to public opinion as it had in Brown II and reversed the direction it had painfully carved out four years earlier. It’s hard to blame abolitionist lawyers for what the Court did in Gregg any more than one could blame Thurgood Marshall for “all deliberate speed.” But certainly pressure to abolish played a major role in the problem we confront today along manipulative politicians, pandering media and most of all a quickly reactive public that is understandably concerned by violence and criminality while largely untroubled by the consequences of maintaining a vast world of prisons, the most prominent characteristic of which is that they are racially skewed warehouses for humans, places to store or deposit not to educate, help or reform.

We seem to have forgotten that justice is for the guilty as well as for the innocent and for the victim. My submission is that we should get past our excessive focus on death is

¹¹ Gregg v. Georgia, 428 U.S. 153 (1976).

different and when it comes to life sentences we need to grant parole eligibility across the board. Eligibility, of course, does not in any way mean letting everyone out. Charles Manson and Sirhan Sirhan come up for parole regularly and it is denied. There are many, many people who are too far gone, too dangerous and too sick.

But the common rejection of parole solely on the basis of the crime committed years before is inconsistent with what we know about who commits crimes and how they develop. A parole board should certainly take into consideration what the inmate did but also who he has become. Certainly parole boards make mistakes but for every Willie Horton, the furloughed Massachusetts prisoner whose committed a murder and rape and became the cudgel that beat down Mike Dukakis's presidential bid, there are many paroled inmates who spend the rest of their lives respecting the law. By the way, the program that released Horton was otherwise overwhelmingly successful.

Here is law professor and capital case lawyer David Dow:

'It's an undeniable fact that even people who do terrible things can change. A kid who commits murder when he's twenty can be a substantially different person when he's fifty, much less sixty. ...The core defect of LWOP is that it prevents even reformed murderers from serving their families or their society. [It]...robs people of hope; it exaggerates the risk to society of releasing convicted murderers; and it turns prisons into geriatric wards, with inmates rolling around in taxpayer-funded wheelchairs carrying oxygen canisters in their laps."¹²

¹² David R. Dow, *Life Without Parole: A Different Death Penalty*, DAILY BEAST (Apr. 27 2012), <http://www.thedailybeast.com/articles/2012/04/27/life-without-parole-is-a-terrible-idea.html>.

And here's one story among many:

In 1972, 19 year old Arnie King, high on drugs, tried to rob and ended up killing a young man who had just passed the bar exam and was out celebrating on the streets of Boston. He is now 61. In 2007, a parole board considering whether to recommend commutation to the governor unanimously found that his rehabilitation during incarceration was "exceptional." By any rational measure, King is the very model of a successful rehabilitation. Arriving in prison as an ignorant and barely literate high school drop out, he is currently a Ph.D. student at the University of Massachusetts, after earning a bachelor's degree and a Masters from Boston University.

While confined and while on furloughs he has organized, administered and directed scores of programs for prisoners. He is well known for his counseling of youth. His applications for commutation have been supported by community groups, local leaders, politicians, religious leaders, former teachers, and prison workers. Hundreds of supporters have come to public hearings attesting to the strength of his social support network. King had a series of disciplinary tickets for minor matters while incarcerated over 40 years but none recently. He has been granted scores of furloughs outside prison walls during his years in prison, completing every one successfully. He used the time to nurture a family and appear before school and community groups. It is clear from the record of his efforts to win commutation that King has totally remade himself into a widely loved and respected man.

In 2007, the Parole Board unanimously recommended Arnie's sentence be reduced but Governor Romney failed to act. So he tried again in 2010. After a hearing but

before a decision was reached, a released parolee robbed a jewelry store and killed a police officer. Here was the Willie Horton phenomenon. Governor Patrick demanded the Parole Board resign, and on exactly the same record as the earlier Board the new Board he appointed rejected King's application for a commutation recommendation.

You get a sense of the politics governing the issue when you consider that these are the actions of a state with one of the most liberal and farsighted governors in America, a former civil rights lawyer for the Legal Defense Fund and a man who is **not** up for reelection, though of course he may one day seek higher office. You might think that if any public official would have enough empathy and political courage to stare down Willie Horton and let Arnie King return to the community it would be Deval Patrick but it hasn't happened.

This is the choice often involved in such release decisions: A terrible crime. Forty years in prison. Startling changes in behavior. Little if any danger in release but ever present uncertain when predicting human behavior. What do we do? A series of recent decisions concerning juveniles under 18 may point the way. A divided Supreme Court has ruled out mandatory life without parole sentences regardless of whether a homicide or a lesser offense is involved. The Court likened life without parole sentences to death sentences and as a result required "demanding individualized sentencing" whereby the sentencing judge would be able to consider the "mitigating qualities of youth."¹³ On the surface these cases do not apply to any adult life sentences. They don't

¹³ Miller v. Alabama, 132 S.Ct. 2455 (2012), Graham v. Florida, 560 U.S. 48 (2010).

even ban LWOP sentences for juveniles but only require they be individualized. And given the composition of the present Court it is unlikely that these precedents will change the way adults are treated in the foreseeable future. But probe a bit and you can see a rough foundation for action.

Juveniles are said to be less culpable because of immaturity, an “undeveloped sense of responsibility” leading to “recklessness, impulsivity and heedless risk-taking” They are subject to negative influences and outside pressure, “have limited control over their own environment” and “lack the ability to [have] extricated themselves from horrific crime-producing settings.” All this leads to the conclusion that the juveniles actions are less likely to be “evidence of irretrievable depravity” and thus insufficient to justify the harshest penalty.

These words apply directly to the Arnie Kings of this world as much as to those who acted out before their 18th birthday. If these factors require individual sentencing at time of trial they also should require looking into changes that have taken place after years of incarceration. It is totally illogical to conclude youth are “less fixed” to use the Court’s term and therefore cannot be sentenced without consideration of individual traits and not also conclude that many of these “less fixed” youth will not be considered “irretrievably depraved” years later. How can we at a time near the crime consider the potential changeability of youth and not do so later when a change in personality and behavior has actually occurred?

Secondly, It is obvious that many of the traits recognized as reducing the culpability of youth apply to other

prisoners who weren't under 18 when they offended. It's not news that the adult population we are dealing with is short on self-control, long on impulsivity and significantly touched by various forms of mental disorder, childhood abuse and social deprivation. Many will look totally different after years in prison than when they were younger.

The problems with politically validating reform ideas of this sort are numerous and astute observers are skeptical anything major will take place. After all, many of the crimes we are dealing with seem to deserve a strong penal response especially in a country like ours with a strong retributivist tradition. One journalist recently called Americans punishment addicts. Parole boards, when they exist, are heavily influenced by politics and media. The idea of running prisons with rehabilitation foremost in mind has been rejected by the public and many professionals.

There are also technical impediments. No easy lines exist to distinguish LWOP and other life sentences from other serious offenses and this makes it difficult especially for courts to fashion modest reforms that don't expose the public to the dangerous. The Supreme Court has a long history of narrowly reviewing potentially excessive sentences under the Eighth Amendment's Cruel and Unusual Punishment Clause. And Anti capital punishment activists may see in reforms to LWOP a great threat to the withering away of the death penalty. Finally, any plan that requires individual sentencing and discretionary parole justifies skepticism about our capacity to make choices that aim to predict future behavior.

But at the heart of our difficulty at envisioning reform of the vast prison world we have created is, I think, a lack of trust. We don't trust sentencing judges to use their discretion properly and parole boards to be able to pick out the rehabilitated. The public doesn't trust the politicians to protect them and the politicians don't trust the voters to recognize Willie Horton type demagoguery for what it is. Most striking is the gap between what the social science professionals derive from study of the criminal justice system and what the public hears and believes.

And there is a large risk aversion problem. Decision makers run no risk of criticism for permissiveness if they incarcerate; only when they bend toward release. This risk aversion contains both the truth of a human right to security and the lie that all will be well if we just lock up miscreants and throw away the key. But if the core objection to the death penalty is that it treats individuals as objects, the truth is that any scheme that refuses to look at individual circumstances fails the same test. If we reject torture because of what it does to personality, to a sense of self, to human dignity, as much as because it involves pain, the system we have approaches torture.

What can be done? There are some obvious reform proposals but I stress the issue is not the rationality of reform but cultural forces, the fear and the racial dynamics that close off major portions of the population from seeing that rationality. There are, however, obvious moves that would shift the landscape.

Firstly, both at sentencing and at points during incarceration offenders should be given a meaningful

opportunity to introduce mitigating evidence and proof of change in an effort to win either a reduced sentence or supervised release.

Second. As Michael Romano of the Stanford Law School Three Strikes Clinic argues a trial attorney's failure to look for and present mitigating evidence should without more constitute ineffective assistance of counsel.

Third. The disjunction between resources available to death sentenced defendants and life sentenced defendants should be equalized.

Fourth. A meaningful parole process must be available to all life-sentenced prisoners, the essence of which is that the offense itself is not the only or dominant consideration weighed by board members.

Fifth. If we want to decrease the chances of recidivism, we must end government's indifference to the problems of offender reentry to the community.

Sixth. More attention should be given to the role of the media in reporting crime and criminal court proceedings and to the gap between what criminologists and other students of the justice system report and what the public receives and believes.

Seventh. The Supreme Court should take challenges to LWOP as an opportunity to right one of its greatest wrongs-- our modern day Dred Scot decision---when it turned a blind eye to the implications of disparate sentencing of African Americans in McCleskey v. Kemp.¹⁴

¹⁴ McCleskey v. Kemp, 481 U.S. 279 (1987).

Without going into this sorry history in detail I will say this: the Court has rejected claims of systematic discrimination in sentencing by requiring proof in particular cases that intentional discrimination took place. But this is an impossible standard to meet. Judges and jurors today are hardly likely to come forward and assert they sentenced on the basis of the defendant's race. It's a decision that ignores institutional, systemic and latent racism and it's bizarre that a modern judiciary that continually decides major issues on the basis of objective data should take such a position.

Finally, the real power in the criminal justice system has devolved to the prosecution. By adding charges, prosecutors increase the cost of going to trial prohibitively and thereby induce guilty pleas. As a result, power has passed from the courthouse to the district attorney's office. The late William Stunz, proposed that judges have power to decline to impose any sentence that seemed "unduly harsh." Statutory maxima would still apply and prosecutors could still negotiate with the defense for lower sentences than the maximum but judges would be free to impose a ceiling. Such a proposal flows from a perception that legislators power to define crimes and prosecutors to charge them needs to be checked by a more muscular judicial response if we are to contain a system that is dominated that almost invariably by the notion the heavier the sentence the better.

And here for me things turn back to the abolition of capital punishment for so long as life sentences without parole appear as leniency, a benefice to the defendant, it will be difficult if not impossible to show how excessive they are in certain cases.

While parts of the world try experiments in reconciliation, even in cases of genocide, we hold tight to its opposite, retribution, which often seems not “just deserts” but a cover for vengeance. Perhaps the retributive-reconciliation binary is too much a zero sum game. For myself I would be satisfied by proportionality-- which requires individuation and limits. This is a value oft mentioned, occasionally implemented, but mostly rhetorical in our system.

The idea that criminals can't change as a foundation for mandatory minimum sentences and LWOP is ludicrous, especially in a society as uncommitted to history and in love with today as ours. Here's just one theory of change, from David Brooks of the Times, a mysterious subject but one that we no longer seriously attempt to explore with prisoners: “Human behavior flows from hidden springs and calls for constant and crafty prodding more than blunt hectoring. The way to get someone out of a negative cascade is ... to go on offense and try to maximize some alternative good behavior. There's a trove of research suggesting that it's best to tackle negative behaviors obliquely, by redirecting attention toward different, positive ones.”¹⁵

Plainly our prisons don't do much to maximize “alternative good behavior.”

Some day we will truly recognize what William Bradford, our second Attorney General wrote in 1793: Every criminal penalty “which is not absolutely necessary” is “a cruel and tyrannical act.”¹⁶ Even the most misguided

¹⁵ David Brooks, *How People Change*, NEW YORK TIMES, Nov. 26, 2012, at A31.

¹⁶ William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania*, 12 AM. J. LEGAL HIST. 122, 126 (1793).

constitutional originalist will concede that lopping off ears, an accepted penalty in Massachusetts in 1791 along with branding an M on the forehead of a man convicted of manslaughter, now violates the constitution. You needn't be a cockeyed optimist to conclude that our present obsession with warehousing will end. Thousands once were lynched in this country. Men were sentenced to death with scant attention to procedures that are now considered necessities. While the virus of racial sentencing is still with us and retributive urges run deep in our society so does our modern attention to data, cost and effective policy. The problems I canvassed this afternoon will not yield to short-term solutions but that's not an excuse to keep from working to resolve them.

But I leave you with a challenge. I have reached the point where I mistrust words divorced from action--even my words. So if you take away anything from what I've said please understand that their author feels they are of nothing unless brigaded with some move in the direction of what these words suggest. Consider Arnie King. He has a web site (www.arnoldking.org), he is on Facebook and he has or will soon have an application for a parole board recommendation to the governor coming up soon. Check out his story. If you are of a mind don't just give a mental nod or share a lament at his plight. Get on the phone. Get on your computer. Write an email. Tell this governor that Willie Horton is dead and gone and that an act of courage on his part will endure.

When the Legal Defense Fund began its challenge to the death penalty few aside from Hugo Bedau thought we had a chance to win a case like Furman. Evan Mandery in his remarkable book, A Wild Justice, says it was an "audacious idea," like aiming to put a man on the moon.

This time it may be Mars but we'll get there.
