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DEATH-BY-INCARCERATION IN ILLINOIS

Joseph Dole*

INTRODUCTION

The State of Illinois, like too many states in our union, is experiencing an unacknowledged and little-known humanitarian crisis where thousands of people are over-sentenced to death-by-incarceration (DBI).¹ These DBI sentences destroy thousands of people's lives for no legitimate penological purpose, are a historical anomaly in Illinois and around the world, and are completely unnecessary for public safety.

In 2005, Adam Liptak, Supreme Court correspondent for the *New York Times*, noted that the United States had become unique in the world for its expanding population of people "whose only way out of prison is likely to be inside a coffin."² While DBI sentences are not unheard of around the world, no other country kills as many people via DBI as the United States—the alleged "home of the free." According to the Sentencing Project, the "United States now holds an estimated . . . 83% of those serving life [imprisonment] without the possibility of parole" worldwide, and there are now more people serving life sentences in the United States (206,000) than the country's entire prison population in 1970.³

A century ago, there were no life in prison without parole (LWOP) sentences in the United States. The federal government defined "life" as fifteen years.⁴ Fifty years ago, there were zero DBI sentences in Illinois. A sentence of "life," or of any significant number of years in prison in Illinois, carried with it an opportunity for parole after eleven years and three months.⁵ In the majority of other countries that share the United States' democratic

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¹ For purposes of this Essay, the term "death-by-incarceration" (or "DBI" for short) denotes both sentences of life without the possibility of parole (LWOP) and de facto LWOP (i.e. sentences that require someone to serve forty years or more in prison, which is what the federal government and Illinois Supreme Court have determined constitute a de facto LWOP sentence). See Glenn R. Schmitt & Hyun Konfrst, *Life Sentences In The Federal System*, U.S. SENTENCING COMM'N (Feb.

2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf; *People v. Buffer*, 137 N.E.3d 763 (Ill. 2019).

² Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times (Oct. 2, 2005), <https://www.nytimes.com/2005/10/02/us/to-more-inmates-life-term-means-dying-behind-bars.html>.

³ *People Serving Life Exceeds Entire Prison Population of 1970*, THE SENTENCING PROJECT (Feb. 20, 2020), <https://www.sentencingproject.org/publications/people-serving-life-exceeds-entire-prison-population-1970/>.

⁴ Peter B. Hoffman, *History of the Federal Parole System*, DEP'T OF JUST. 7 (2003), <https://www.justice.gov/sites/default/files/uspsc/legacy/2009/10/07/history.pdf>.

⁵ Gregory W. O'Reilly, *Truth-In-Sentencing; Illinois Adds Yet Another Layer of Reform to Its Complicated Code of Corrections*, 27 LOY. U. OF CHI. L.J. 985, 991 (1996).

ideals, sentencing someone to serve the remainder of their life in prison with no opportunity for release does not happen. The act itself is viewed as inhumane, unconstitutional, or both.⁶

While Illinois had the death penalty until 2011, it was only handed out about a dozen times per year statewide.⁷ At the height of the death penalty in Illinois—when many innocent people sat awaiting execution—death row never held more than 200 people.⁸ Today, Illinois sentences more than 200 people to death-by-incarceration on a yearly basis.⁹ This has resulted in the steady growth of Illinois’s “slow-death row.”¹⁰ By September 2018, Illinois had 1,594 people sentenced to LWOP, 2,473 people sentenced to de facto LWOP, and hundreds of others sentenced to terms of imprisonment they will not outlive.¹¹ Nearly 2,000 people (1,940) were sentenced to DBI for crimes that occurred when they were younger than twenty-six years old, meaning that they had a greater capacity for rehabilitation.¹²

⁶ See, e.g., Vaidya Gullapalli, *The Way Forward Against Death by Incarceration in Pennsylvania*, THE APPEAL (Nov. 18, 2019), <https://theappeal.org/the-way-forward-against-death-by-incarceration-in-pennsylvania/>; Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 78 (Charles J. Ogletree, Jr. & Austin Sara eds., N.Y.U. Press 2012) ("At the crux of these [European] sentencing policies is the belief that 'no human being should be regarded as beyond improvement and therefore should have the prospect for release,'" quoting Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT'G REP. 39, 40 (2010)); Ben Miller & Daniel S. Harawa, *Democrats Should Stop Saying Some People Should Die In Prison*, SLATE (Jan. 22, 2020), <https://slate.com/news-and-politics/2020/01/elizabeth-warren-life-without-parole-death-penalty.html> ("In 2017, by a 16-1 decision, the European Court of Human Rights ruled that denying a person the chance for parole is "inhumane and degrading treatment" in violation of the European Convention on Human Rights.").

⁷ See Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 382 (2005) (After *Furman v. Georgia*, 408 U.S. 238 (1972), 289 defendants in total were sentenced to death in Illinois).

⁸ *Id.* at 382. See also George Ryan, *In Ryan's Words: 'I Must Act,'* N.Y. TIMES (Jan. 11, 2003), <https://www.nytimes.com/2003/01/11/national/in-ryans-words-i-must-act.html>; *History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty>.

⁹ *The Dead: 2010-2019*, ILL. DEATHS IN CUSTODY PROJECT (2019), <http://ildeathincustody.org/the-dead-2010-2017/> (last visited June 16, 2020).

¹⁰ See Richard Gross, *Death by Incarceration: Cruel and Unusual*, PEN AMERICA (Sep. 9, 2019) (referring to an LWOP sentence as “the slow death penalty” and explaining “[r]egardless of the cause of death, if someone enters a prison never to leave there alive, it is a death sentence”).

¹¹ Joseph Dole & Jonathan Hernandez, *Over sentenced In Illinois* (forthcoming 2021), citing *Prison Population on 9-30-18 Data Set*, ILL. DEPT. OF CORRECTIONS (2019), <https://www2.illinois.gov/idoc/reportsandstatistics/Pages/Prison-Population-Data-Sets.aspx>.

¹² See Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, WASH. POST (Feb. 1, 2005), <https://www.washingtonpost.com/wp-dyn/articles/A52687-2005Jan31.html>; Christopher Bergland, *Why is the Teen Brain So Vulnerable?*, PSYCHOLOGY TODAY (Dec. 13, 2019), <https://www.psychologytoday.com/us/blog/the-athletes-way/201312/why-is-the-teen-brain-so-vulnerable>; Mathew Mientka, *Adulthood Extended to Age 25 by Child Psychologists in U.K.*, MED. DAILY (Sept. 24, 2013, 5:31 PM), <https://www.medicaldaily.com/adulthood-extended-age-25-child-psychologists-uk-257835>; DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND THE ROAD TO REPAIR, 167 (The New Press 2019); Nazgol Ghandoosh, *The Next Step: Ending Excessive Punishment For Violent Crimes*, THE SENTENCING PROJECT, 5, 27–28 (2019), <https://www.sentencingproject.org/publications/the-next-step-ending-excessive-punishment-for-violent-crimes/>.

How did we get to the point where we sentence hundreds of men and women every year to spend decades in prison until they die there? It is a complicated question to answer, and one that would require an entire book to fully explain. What we know for sure is that the change was made neither out of necessity nor after rational contemplation. Instead, we arrived at the current humanitarian crisis through emotional hyperbole, racism, political gamesmanship, the abandonment of rehabilitation as an ideal, and mass demonization and dehumanization of “criminals.”¹³ Part I of this Essay describes the realities of enduring DBI. Part II explains the ongoing trauma of living with a DBI and Illinois’s role in perpetuating this trauma. Part III offers avenues for reform.

I. ENDURING DBI

If we are going to sentence hundreds of people to die in prison every year, all of us must understand what it is like to suffer decades in prison until you die there. Unfortunately, trying to describe what it is like to experience a DBI sentence firsthand is an exercise in futility. Conveying the true and full extent of how destructive a DBI sentence is to an incarcerated person, to his or her relationships, sense of self, and family is nearly impossible.

While the United States Supreme Court has noted that LWOP is “the second most severe penalty permitted by law,”¹⁴ others have called it “a sentence of permanent, continual, and complete incapacitation”¹⁵ and a “fate worse than death.”¹⁶ Professors Charles J. Ogletree, Jr. and Austin Sarat note that LWOP “strips inmates of hope and produces a chronic state of apathy, depression, and despair in a thoroughly dehumanizing environment.”¹⁷

I am currently on year twenty-three of a DBI sentence. Over a decade ago, I attempted to describe it as: a persistent dashing of hopes as appeal after appeal is arbitrarily denied; a permanent experiment in self-delusion as you strive to convince yourself that there is still hope; a lifetime spent wondering what your true potential really is, and yearning for the chance to find out; and a compounding of second upon second, minute upon minute, hour upon hour of wasted existence, and decade upon decade of mental and emotional torture culminating in a final sentence of death.¹⁸ Yet it is so much more than that—so much worse than all that. As Ben Miller and Daniel S. Harawa explain, “[a] life-without-parole sentence sends an unmistakable message: A person is irredeemable and beyond rehabilitation no matter what happens over the next 25, 30, 40 years in prison.”¹⁹

¹³ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROWE: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015); MARC MORJÉ HOWARD, *UNUSUALLY CRUEL: PRISONS, PUNISHMENT, AND THE REAL AMERICAN EXCEPTIONALISM*, Ch. 8 (2017); JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

¹⁴ *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991).

¹⁵ Henry, *supra* note 6, at 68.

¹⁶ Ryan, *supra* note 8.

¹⁷ *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 16 (Charles J. Ogletree, Jr. & Austin Sara eds., N.Y.U. Press 2012).

¹⁸ Joseph Dole, *The Meaning Of 'Life'*, THE REAL COST OF PRISONS PROJECT, http://www.realcostofprisons.org/writing/Dole_The_Meaning_of_Life.pdf.

¹⁹ Miller & Harawa, *supra* note 6.

A person with a DBI sentence is forever demonized as a threat to society. Society says that any person with a DBI sentence is incapable of controlling their anger and (falsely or irrationally) believes that person will kill someone the first chance they can after being released. Society says this without knowing a single thing about the person, the circumstances of the crime, or the person's level of participation in it. It does not matter if the person never killed anyone to get the DBI sentence. It does not matter if statistics dispute the allegation that the person is a threat to society. Nor does it matter if that person could put up with years or decades of dehumanizing treatment, with no hope of release while in prison, and do so without ever harming their tormentors who they cannot walk away from. Despite what society says—that person is not a threat to society.

If you have a DBI sentence, you know daily that it is probable that you will die alone with no family around. You will be surrounded by strangers who have no sympathy for your suffering and no desire to ease your final moments on earth. It is a “life” of missing out on every important event in your children's lives, unable to raise them, powerless to protect them or assist them in any meaningful way. It means your children will grow up resenting you for the thousands of times they needed you and you were not there—and that is if you were fortunate enough to procreate prior to incarceration and are not one of the unfortunate to be relegated to permanent virginity by your incarceration. A life sentence means you are powerless to take care of your grandparents in their old age and powerless to assist your family and friends during any of their lives' struggles. Those “living” DBI sentences understand that while the above is by far the worst part of it, a DBI sentence is also an existence of permanent suspicion, vulnerability, exploitation, struggle, and, above all, trauma.

A. A Life of Suspicion

If you have a DBI sentence, you are forever a suspect. Everywhere you go you are viewed with suspicion and unjustly seen as not credible. Therefore, whenever there is a disciplinary report or dispute with staff, you will always encounter an unjust credibility deficit, while the prison staff will gain from an unjust credibility surplus. The staff knows this, so they have zero compunction about lying, and they know that they will never be disciplined if caught lying. This means you will never get a fair hearing on any disciplinary charge. If you are lucky enough to successfully challenge your sentence or conviction, you will be viewed with suspicion for having had the audacity to question the court and for refusing to just lay down and die.

Not only are you viewed with suspicion by staff and society, but you are viewed suspiciously by other incarcerated people, and you view them with the same suspicion. This is by design—by those charged with ensuring that the condemned die in prison. Sowing dissension among the prison population is a full-time job for staff. Staff intentionally want to prevent people in prison from uniting around common causes. It is a basic tenet of any system of control and oppression.

B. A Life of Vulnerability

A DBI sentence gives you a lifetime of vulnerability with little to no means of protecting yourself. You are literally at the mercy of the State. Unfortunately, the State, by design, has no mercy for you. As Alexandra Natapoff noted:

Our penal system has little sympathy for criminal offenders. With the decline of the rehabilitative ideal and the punitive rhetoric of "tough on crime" politics, offenders whose rights are violated or who are physically or psychologically harmed during the criminal process are often perceived to be getting what they deserve for having broken the law in the first place.²⁰

This hostility contributes to what legal scholar Jonathan Simon calls a "waste management" vision of corrections, in which a growing population of offenders is warehoused in increasingly harsh and dehumanizing conditions.²¹ This societal attitude colors every aspect of one's life in prison. It causes one to be exceedingly susceptible to contracting communicable diseases and viruses, to being tortured both physically and mentally, to being denied adequate medical care if they become ill or injured, and to dying a premature death.

Rules and policies are written solely to ease the job of staff at the expense of the imprisoned. The health and safety of the incarcerated are almost never taken into account, and even when rules or procedures are written for that purpose, staff ignore those rules. For instance, due to decades of medical neglect and unsanitary prison conditions, rates of contracting both HIV and hepatitis are much higher than on the street. The Illinois Department of Corrections (IDOC) requires all incarcerated men and women to test negative for both HIV and hepatitis before they can work in the kitchen preparing or serving other people's food.²² However, here at Stateville Correctional Center, the kitchen workers are never tested beforehand. As I write this, there are several people preparing our meals who have HIV and/or hepatitis. Thus, no matter how careful I am about not sharing any razors, etc., I am always vulnerable to contracting a deadly disease.

Similarly, we are always at risk of contracting whatever cold or virus the guards bring in. Our risk is much higher than in the outside world because we are literally prohibited from possessing things like facemasks, bleach, alcohol pads, and hand sanitizer.²³ When guards came in and infected us all with the coronavirus, there was little we could do.²⁴ There is no social distancing when you are confined with another person in a six by eight foot cell that has one wall of bars that cannot be sealed off, and where cells are stacked five stories high and run in rows thirty cells long in a giant warehouse. As a consequence, we now suffer for weeks on end listening to dozens if not hundreds of people cough and wheeze all day, hearing guys yelling for medical assistance, and receiving the news of the

²⁰ ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE*, 39 (N.Y.U. Press 2009) (citing JONATHAN SIMON, *GOVERNING THROUGH CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR*, 143, 152 (Oxford Univ. Press 2007)).

²¹ *Id.*

²² See 410 ILCS 650/10 (1995).

²³ Stateville Correctional Center Warden's Bulletin #2020-17, February 26, 2020, rule 11. The rule against face coverings was relaxed after the coronavirus pandemic began, and hundreds of incarcerated men and staff in Stateville caught the virus. All the other items are still prohibited, the facemask one used to be considered a security issue. We were not allowed to cover our faces as it would be considered hiding your identity and impeding surveillance.

²⁴ See Elizabeth Weill-Greenberg, *Prisoners in Illinois Describe Dire Conditions Amid Coronavirus Outbreak*, THE APPEAL (Apr. 7, 2020), <https://theappeal.org/illinois-stateville-prison-conditions-coronavirus-covid-19/> ("It took Russell dying just for them to pass out a single extra bar of soap").

latest death. This is all while the IDOC feeds the public propaganda about how great they are doing in protecting the lowly inmates.²⁵

This societal attitude also means that you will very likely be denied adequate, or any, medical care for whatever ailment you have—whether it be a hernia, hemorrhoids, hepatitis, or who knows what type of cancer—for years or decades, all to increase the profit margins of Wexford Health Sources.²⁶ When you tell a doctor about your pain, they often retort, “yeah, but you’re tough, you can take it.” This is as if, in addition to being inhumane monsters, we are all also simultaneously superhuman with an unlimited pain threshold. I repeatedly heard this for the decade that I was denied surgery for my hernia.

You are also vulnerable to being stripped naked or felt up at any time for any reason because as a “prisoner,” your body belongs to the State—and staff can violate it at will as long as it does not cross into the realm of the clearly sexual. You will also have an increased risk of heart disease and other stress-related ailments because, like a soldier at war, you must maintain constant situational awareness. Your altered mental state results not just from the threat of assault from other incarcerated men, but also from the threat that staff may run into your cell and assault you or destroy your property at any point,²⁷ and you are powerless to stop them. Add to that the deplorable living conditions in general due to underfunding of prisons (asbestos, contaminated water, lead paint, poor food quality, crumbling infrastructure, rodents, insect infestations, etc.²⁸), and it is no wonder that people in prison are vulnerable to a premature death and are likely to live a shorter life.²⁹

The United Nations labels long-term isolation for what it is: torture.³⁰ Long-term isolation “profoundly alters the brain chemistry.”³¹ Unfortunately, the United States disagrees, and the courts have yet to rule as such. As a result, everyone in prison with DBI sentences continues to be vulnerable to this type of torture. Even if we abandon long-term isolation, the system will always design and use new forms of torture and other forms of cruel and unusual punishment until the courts or social pressure force them to stop. Unfortunately, the societal attitude about “criminals” and “prisoners” ensures that torture while incarcerated is unlikely to stop.

²⁵ See Shannon Heffernan, *As COVID-19 Spreads, Advocates Sound Alarm for People in Prisons and the Communities Around Them*, WBEZ CHICAGO (Apr. 5, 2020), <https://www.wbez.org/stories/as-covid-19-spreads-advocates-sound-alarm-for-people-in-prisons-and-nearby-communities/770052a9-7875-4826-bb44-bd8521d7ce70>.

²⁶ Wexford Health Sources is a “private company that gets more than \$1.4 billion from Illinois to provide health care services to 40,000 state prisoners.” Stephanie Goldberg, *Illinois comes up short in another area: Prison health care. Investigation blames treatment delays for preventable deaths*, CRAIN’S CHICAGO BUS. (Feb. 14, 2020), <https://www.chicagobusiness.com/health-care/illinois-comes-short-another-area-prison-health-care>.

²⁷ Brian Dolinar, *Orange Crush: The Rise of Tactical Teams in Prison*, TRUTHOUT (Jan. 2, 2017), <https://truthout.org/articles/orange-crush-the-rise-of-tactical-teams-in-prison/>.

²⁸ *Dobby v. Weilding*, No. 1:13-cv-01068 (N.D. Ill. Filed Feb. 8, 2013).

²⁹ Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL’Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/.

³⁰ Caroline Isaacs and Lowen Matthew, *Buried Alive: Solitary Confinement in Arizona’s Prisons and Jails*, AM. FRIENDS SERVICE COMM. (May 2007), <https://www.afsc.org/document/buried-alive-solitary-confinement-arizona%E2%80%99s-prisons-and-jails>.

³¹ James Ridgeway & Jean Casella, *Confronting Torture in U.S. Prisons: A Q&A with Solitary Watch*, SOLITARY WATCH, (June 17, 2011), <https://solitarywatch.org/2011/06/17/confronting-torture-in-u-s-prisons-a-qa-with-solitary-watch/>.

Because of laws and policies in the United States and Illinois, the decade I sat in solitary confinement being arbitrarily denied release, and having to fight off suicidal impulses daily, was all legal and acceptable to the public. Those around me who succumbed to the temptation and killed themselves did not even make the evening news.

C. A Life of Exploitation

Serving a DBI sentence also means “living” a life of perpetual exploitation. You will be exploited by anyone and everyone. Just about every other actor in the criminal (in)justice system has a hand in the exploitation.

First, the sentence alone means you were exploited by politicians using “tough on crime” rhetoric and machinations to get themselves elected and get the harsh sentencing laws passed into existence. So, even though these laws may have been enacted long before you were born — make no mistake—they were passed at your expense and to benefit politicians’ careers.

Second, you were probably exploited by the prosecutor who overcharged you to increase his or her chances of securing a conviction and a longer sentence during plea bargaining. You were probably also exploited by a judge who sentenced you to longer than necessary to prove his or her “tough on crime” bonafides to ensure reelection. Moreover, for that same reason, that same judge will be reluctant to overturn your conviction or sentence no matter how unjust or unconstitutional it is.

Third, if you had a paid attorney, you or your family were likely exploited by him or her as well. Lawyers often charge by what they can get out of you—not by a reasonable amount for the actual level of representation they provide. They may charge tens or hundreds of thousands of dollars, bankrupting you or your family, failing to do adequate discovery, lying about the work they are performing, or abandoning you on appeal without any notice. As Nicole Gonzalez Van Cleve noted, defense lawyers in Cook County more often than not look at their clients as “mopes” and consider themselves part of the same team as the judges and prosecutors.³²

Fourth, your incarceration will be exploited by the American Federation of State, County, and Municipal Employees (AFSCME), the union representing IDOC prison guards, and others who benefit from keeping prison beds filled. AFSCME opposes any sentencing reforms and rehabilitation programs out of their self-interest in their own job security. AFSCME probably backed the very sentencing laws that led to your own harsh sentence, such as Truth-In-Sentencing.³³ After all, more people in prison means more jobs for guards needed to dehumanize the incarcerated.

³² NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (Stan. U. Press 2016).

³³ The Truth-In-Sentencing law more than doubled the time served for people convicted of violent crimes and greatly increased the number of people sentenced to *de facto* LWOP sentences. See Joseph Rodney Dole, II, *Preliminary Findings Concerning the Financial Cost of Implementing Illinois’ Truth-In-Sentencing Laws (2002-2004)* (Jan. 11, 2011), <http://www.realcostofprisons.org/materials/dole-preliminary-findings.pdf> (citing David E. Olson, Ph.D., Magnus Seng, Ph.D., Jordan Boulger, & Melissa McClure, *The Impact of Illinois’ Truth-In-Sentencing Law on Sentence Lengths, Time to Serve, and Disciplinary Incidents of Convicted Murderers and Sex Offenders*, ICJIA (JUNE 2009), <http://www.icjia.state.il.us/assets/pdf/ResearchReports/FINAL%20REPORT%20The%20Impact%20of%20Illinois%20Truth-in-Sentencing%20Law%200609.pdf>).

Fifth, you are exploited economically by dozens of companies that see you as a captive consumer where normal rules of fair business practices do not apply. Those companies will lobby the legislature for legislation detrimental to both your freedom and economic interests and will conspire with the Department of Corrections to exploit not only you but your family and friends as well. Your family will be exploited financially by both the IDOC and numerous companies like JPay, GTL, Keefe, and Securus, which will each prey on your family's desire to maintain contact with you or to send you money to help you survive. For instance, GTL, which sells tablet computers to people incarcerated in IDOC and provides overpriced music, games, and a form of "email," reaps millions of dollars in profit from the poorest people in the state (incarcerated people and their families) through monopolistic practices. In addition, IDOC also demands a ten cent kickback on every message sent in or out of prison. This doubles the cost of each message sent. IDOC also takes a six cent per minute kickback on all video visits. These kickbacks cost incarcerated people and their loved ones more than a quarter of a million dollars in 2019.³⁴

Having your family be exploited by your incarceration is especially hard to live with as it erodes your self-esteem. Rather than protecting your family from being exploited, you are forced to be complicit in exploiting them. The exploitation of your family is especially acute when one considers that your family likely went from having you as either being the sole or secondary provider to then becoming a financial liability or burden.

Finally, the State will try everything it can to exploit your labor for as long as your body holds up and will then throw you back into your cell to die. The State will intentionally keep you impoverished by obstructing your ability to earn money through business ventures or non-IDOC employment—all to increase the likelihood that you will work for the State.³⁵

IDOC will also refuse to provide adequate basic necessities like soap, toothpaste, deodorant, toilet paper, clothing, blankets, towels, and food, forcing you to purchase such items from commissary where IDOC adds at least a 25% surcharge.³⁶ You are forced to pay this surcharge for the rest of your life, a surcharge from which IDOC reaps millions of dollars annually. This too will increase the likelihood that you will work for the State. In maximum security prisons especially, you will be so desperate for out-of-cell movement that you will probably accept a job from the State at slave wages.³⁷

II. LIFE IN PRISON IS A LIFE OF STRUGGLE

Overall, a life in prison is a life of struggle. Not only are you struggling physically, mentally, emotionally, and economically, but you are also struggling to protect your rights, to accomplish something positive with your life, and to fight for your own freedom.

³⁴ IDOC took over \$180,000 for kickbacks on messages and \$80,000 for kickbacks on video visits in 2019 alone (information obtained via FOIA requests to the IDOC and collated by this writer for an upcoming report on exploitative kickbacks paid to IDOC by private companies; the report will be posted on www.paroleillinois.org (forthcoming) (on file with author).).

³⁵ 20 ILL. DEP'T OF CORR. ADMIN. CODE § 445.30 (1987).

³⁶ Joseph Dole, *Illinois Prisoners are Bilked out of Millions through DOC Commissary Charges*, THE PUBLIC I (Mar. 2010), <http://publici.ucimc.org/2010/03/illinois-prisoners-bilked-out-of-millions-through-doc-commissary-surcharges/>.

³⁷ The vast majority of jobs pay only \$18.80 per *month*. Many men work full time, every day of every week for that \$18.80. They literally make pennies per hour of labor.

Prison administrators are often clueless as to what their job actually entails. For instance, when IDOC administrators were asked by state auditors to “provide a list of all statutory mandates in effect during the examination period” to test IDOC’s compliance with state standards, administrators failed to identify thirty-nine out of the fifty “applicable laws with specific mandates significant to the Department.”³⁸ If administrators do not know the laws they are supposed to follow, it is unlikely that line guards know about these laws or the constitutional rights of those incarcerated.

Due to epistemic arrogance, most guards believe the only “rule” they need to know is “might makes right.” Since guards are in positions of power, they believe whatever they say goes. Unprofessional staff often fabricate rules because they want to deny your rights simply because they believe you do not deserve them. If you challenge them, they will write you a disciplinary ticket for alleged insubordination or for disobeying a direct order, allowing them to try to take away the meager “privileges” you retain, like phone calls, “emails,” and commissary. Every positive accomplishment you achieve while in prison requires an intense struggle to overcome, circumvent, or blatantly break the departmental rules. All the while, you have to struggle to convince yourself daily that your life has value when the rest of the world tells you that you are worthless.

IDOC denies those with a DBI basic necessities and makes conditions so deplorable that enslavement and oppression seem reasonable, to the point where people literally beg to be enslaved and contribute to their own oppression. If you fall for it, you will then literally be worked to death. There is no overtime pay, nor paid vacations, and definitely no Social Security, 401(k)s, or retirement accounts. Your body will be used to the point of inutility. After decades of working for the State for what are essentially slave wages, when you become too frail to work you will be fired, put back in your cell, still be denied adequate medical care, lose your coveted slave pay, and be “allowed” to die in poverty.

To add insult to injury, you will be made aware that if you do not accept the job some other desperate soul will. You will also learn that the only way the carceral state can survive is through this type of slave labor. Otherwise, mass incarceration becomes prohibitively expensive. For example, imagine the State were required to pay prevailing union wages, or even the current federal minimum wage, to the thousands of incarcerated men and women working for the IDOC. The State cannot even afford mass incarceration today, and staffing costs already make up the majority of the IDOC budget. Therefore, people currently serving a DBI sentence and working for IDOC go to work each day with the knowledge that they are contributing to the State’s ability to keep them incarcerated and to the State’s ability to incarcerate and enslave more people for life and dehumanize many others.

You will struggle with a Kafkaesque grievance system designed to uniformly deny you relief,³⁹ and you will then struggle to gain access to a court system designed to both procedurally bar you from raising your claims and to protect the people who violated your

³⁸ State of Illinois, Department of Corrections, *Compliance Examination for The Two Years Ended June 30, 2018*, 66 (2019), <https://www.auditor.illinois.gov/Audit-Reports/Compliance-Agency-List/Corrections/FY18-DOC-Comp-Full.pdf>.

³⁹ Shannon Heffernan, *The Way Prisoners Flag Guard Abuse, Inadequate Health Care and Unsanitary Conditions Is Broken*, WBEZ/PROPUBLICA (Dec. 2, 2020 6:00 AM), <https://www.propublica.org/article/the-way-prisoners-flag-guard-abuse-inadequate-health-care-and-unsanitary-conditions-is-broken>.

rights.⁴⁰ It means that you will struggle for years to obtain an understanding of criminal law and procedure to be able to adequately challenge your conviction and sentence, only to be repeatedly told by one court after another that you should have been able to learn it all in a tenth of the time it takes a trained lawyer to learn. This is all while you were literally being denied access to the legal resources necessary to do so. Your struggle for your freedom will be so overwhelming that you either completely abandon it or you accept that it will consume massive amounts of your time, energy, and resources to have any chance of proving your innocence or overturning your conviction or sentence.

Living a DBI sentence is a never-ending struggle to maintain your sanity.

A. *Powerlessness is Trauma*

The conditions of a DBI sentence create a feeling of powerlessness among those who experience life in prison. Danielle Sered describes trauma as “fundamentally an experience of powerlessness” when explaining the trauma experienced by crime survivors.⁴¹ For someone serving a DBI sentence and whose entire life is one of powerlessness with no hope of relief, it is nothing but traumatic—even more so because society will not recognize it as such. The longer a person’s prison sentence is, the worse the struggle with powerlessness becomes. A person is better able to cope with any adverse condition if he or she knows it is a temporary state or if he or she has hope that it will end soon. For those serving a DBI sentence, who only have death as an avenue for ending their suffering, each additional day increases the overall effects of powerlessness.

While many people will acknowledge that people in prison are suffering under inhumane living conditions, very few consider that society is inflicting trauma upon people in prison on a daily basis. The executive director of the National Center for Victims of Crime, Mai Fernandez, is one of very few people in her position that recognize “[t]here are a lot of offenders who have severe trauma backgrounds. We need to look at them also as victims.”⁴² But society also needs to consider the trauma the State then inflicts upon people while in prison.

While working on this Essay, I mentioned to the editor that writing it was traumatizing—and it was. As a survival instinct, people in prison, especially those serving sentences of DBI, try our best to ignore many of the daily disrespectful and dehumanizing acts committed against us by staff and society. Writing about the daily injustices forced me to relive all of that trauma at once and made it that much more difficult to ignore the many injustices I have faced. For example, being stripped naked just because I wanted to obtain my dinner meal in the dining hall or ignoring the two pat downs I had to go through the

⁴⁰ Joseph Dole, *Mass Incarceration Brought About Mass Denial Of Court Access For Anyone In Prison* (forthcoming) (on file with author).

⁴¹ DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 26 (The New Press 2019).

⁴² Anthony W. Accurso, *It's Time for The Feds To Fund College Education For Prisoners, Again*, 22–23 PRISON LEGAL NEWS (March 2020); SERED, *supra* note 41 at 26–27 citing Bruce J. Winick, *Forward: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA. L. REV. 540 (2009); Yvette G. Flores, *Sexual Abuse*, OXFORD ENCYCLOPEDIA OF LATINOS AND LATINAS IN THE UNITED STATES, (Suzanne Oboler & Deena J. Gonzalez, eds., Oxford Univ. Press 2005); Mary Achilles & Howard Zehr, *Restorative Justice for Crime Victims: The Promise, the Challenge*, RESTORING COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 88 (Gordon Bazemore and Mara Schiff, eds., Routledge 2001).

next day just to obtain my lunch. Writing about DBI only acts to highlight my powerlessness and highlight the fact that—as a lifer—this is my permanent state; that absent some extraordinary act by the Governor, legislature, or the courts, I will continue to suffer these daily traumas until my last breath. This in turn forces me to start to contemplate whether it is better that the last breath arrives sooner rather than later.

Even if you believe that someone who commits a heinous crime like rape or murder deserves all of the above for eternity, what about those of us who are incarcerated for a crime but never hurt anyone? The popular image of a person given a DBI sentence is extremely misleading. Society imagines that only serial rapists, psychopathic axe-murderers, terrorists, or mass shooters are being sentenced to suffer the remainder of their lives in prison. The reality is much different. There are many men and women sentenced to DBI in Illinois who never physically harmed anyone.

B. Illinois is Broken

Illinois is an outlier among the states for its methods of obtaining convictions when giving non-principal defendants the same sentence as the principal perpetrators of the crime. For instance, Illinois's accountability law requires anyone who aided and abetted another person before or during the commission of a crime to be seen as equally culpable and subject to the same sentencing ranges as if that person actually committed the crime themselves.⁴³ This has allowed prosecutors to use the accountability statute as a street sweeper to charge and convict numerous people for a single person's crime, and then sentence them all to DBI.

Illinois's felony-murder statute is also an outlier. It allows the state to convict and sentence people for murder even if they never harmed anyone.⁴⁴ For example, if five young adults rob a store with a gun with no bullets, and a trigger-happy owner kills one of the young adults, five lives are likely to be lost; the life of the youth shot and killed by the owner and the lives of his or her four friends who can all be charged with "murder" because their friend's death occurred during the course of committing a felony—armed robbery. Due to mandatory minimum sentencing laws, they would all likely receive DBI sentences—especially if they are racial minorities or members of a gang.

Only recently have the accountability and felony-murder laws begun to come under scrutiny.⁴⁵ However, hundreds of people currently serving DBI sentences in Illinois are victims of these methods of conviction. Many of these men and women should be considered "non-violent offenders" because they have not personally committed an act of violence. Regardless, they will be forced to die in prison all the same.

There are also a large number of people sentenced under Illinois's "Habitual Criminal" law (Illinois's version of three-strikes⁴⁶) for three or more relatively minor crimes who are serving a DBI sentence. Although the crimes they are charged with

⁴³ 720 ILCS 5/5-1-5/5-3 (2012).

⁴⁴ 720 ILCS 5/9-1(a)(3) (2012).

⁴⁵ See, e.g., Abolishing the Felony Murder Rule in Illinois: A Conversation with Jobi Cates, Executive Director Restore Justice University of Chicago Law School (Nov. 15, 2019).

⁴⁶ See *Sentencing Enhancement—“Three Strikes” Law*, U.S. DEP'T JUST. ARCHIVES (last updated Jan. 21, 2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-1032-sentencing-enhancement-three-strikes-law> (“The following text was taken from a March 13, 1995, memorandum to all United States Attorneys from Assistant Attorney General Jo Ann Harris (Criminal Division) on the subject of the “Three Strikes” law. (18 U.S.C. § 3559(c))”).

committing do not result in a DBI sentence individually, collectively the sentences mandate a Life Without Parole sentence based on the habitual criminal law.⁴⁷ Many of these “habitual criminals” committed all three crimes before they even made it out of their teenage years, long before it could be determined that they would never grow out of their criminal activity.

Even more heinous than sentencing the marginally culpable to DBI is that too many people serving DBI sentences are actually innocent. The cavalcade of recently exonerated lifers demonstrates this fact. Unfortunately, not everyone who is innocent yet serving a DBI has the resources or support necessary to take on the State and prove their innocence. As a result, innocent people will die in prison.

In 2003, Governor Ryan cleared Illinois’s death row because he felt the state’s death penalty system was broken.⁴⁸ Unfortunately, he and many others misdiagnosed the problem. It was not simply the death penalty system. Rather, the state’s entire criminal justice system is broken. The death penalty system was simply the canary in the coal mine.

The canary showed us that more people on death row were innocent than were executed over the nearly three decades after Illinois reinstated the death penalty.⁴⁹ This should have alerted everyone to problems affecting the entire criminal legal system in Illinois.⁵⁰ However, the only reason all of those wrongful convictions came to light was because a death sentence provides heightened due process. During appellate and post-conviction proceedings, there is often intense scrutiny over the fairness of the trial and sentencing hearing, and there are more procedural opportunities to raise challenges.

Thousands of men and women go through this same broken system, with all of its police and prosecutorial misconduct, ineffective and overworked public defenders or unscrupulous hired counsel, and politicized and biased judges. However, those without a death penalty hanging over them are denied that heightened scrutiny solely because they are not deemed “evil” enough to need executing. For the wrongfully convicted, the chance that their wrongful conviction is overturned is much greater if they are sentenced to be murdered by the State rather than sentenced to DBI. As one former federal circuit court judge noted, innocent people sentenced to execution are better off because they receive “a whole panoply of rights of appeal and review that you do not get in other cases.”⁵¹

⁴⁷ See 730 ILCS 5/5-4.5–95 (2009) (Anyone twice convicted of certain felonies that contain the same elements of the current (third) offense is adjudged as a habitual criminal and required to be sentenced to LWOP.).

⁴⁸ See Warden, *supra* note 7, at 381.

⁴⁹ *Historic Illinois Hearings Address Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 15, 1999), <https://deathpenaltyinfo.org/stories/historic-illinois-hearings-address-innocence-and-the-death-penalty>. See also Warden, *supra* note 7, at 382 (“Stunningly, for each defendant executed in Illinois, 9.5 death sentences had been overturned.”).

⁵⁰ See e.g., Ashley Nellis, *Point: A Death by Any Other Name*, INSIDE SOURCES (Dec. 27, 2019), <https://www.insidesources.com/point-a-death-by-any-other-name/> (“The well-documented deficiencies of the death penalty process should raise serious concerns about sentences of life imprisonment, sentences that receive substandard critical review.”).

⁵¹ Stephen B. Bright, *The Modern View of Capital Punishment, a debate with Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit*, 34 AM. CRIM. L. REV. 1353, 1360–61 (1997). See also *A Matter of Life And Death: The Effect of Life-without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV., 1838, 1853 (2006) (“Unlike death sentences, which merit a heightened level of appellate review, life without parole sentences receive no special consideration from appellate tribunals.”) [hereinafter *Matter of Life and Death*].

This fact is borne out by statistics. Seventy-three percent of people on death row have their convictions overturned due to serious, reversible error, but only seven percent of lifers have their convictions overturned.⁵² Thus, one could estimate that over half of lifers had serious, reversible errors in their trials that went unacknowledged by the courts, and many imprisoned in Illinois are actually innocent.

Illinois has thus far failed to heed the canary's true message and reform the State's criminal legal system. Instead, all it did was kill the canary—the death penalty. Illinois's criminal justice coal mine is still as lethal and unjust as it ever was. A disproportionate number of people who are black, and many people who are innocent, are sentenced to suffer for decades in prison until they die there.

III. HOW TO FIX IT

Any serious examination of death-by-incarceration sentences reveals the inherent injustices of DBI. First, as noted above, the sentences themselves are historical anomalies. They are unnecessary and serve no true penological purpose. We never needed DBI sentences before, and we do not need them now—they do not deter crime and instead over-incapacitate to the point that significant state resources⁵³ (resources that could be used to *actually* prevent crime) are diverted solely to satiate society's appetite for revenge and sanctimony. Moreover, DBI sentences are inhumane.

Both the inhumanity and inutility of DBI sentences are evinced by the fact that the United States is the only country that uses DBI so extensively and that many of our allies have banned LWOP and DBI sentences completely. In 1992, the United States ratified the International Covenant on Civil and Political Rights (ICCPR).⁵⁴ Connie de la Vega and colleagues noted that “[s]entence severity in the United States has reached an extreme that contradicts its stated human rights obligation to direct its prison system towards the primary goals of reformation and social rehabilitation, as set forth in the [ICCPR].”⁵⁵

Former United States Supreme Court Justice Anthony Kennedy admonished the country by stating that our punishments are too severe, and while “[c]ourts may conclude the legislature is permitted to choose long sentences . . . that does not mean long sentences

⁵² *Matter of Life and Death*, *supra* note 51, at 1838. (In Illinois, “[a] landmark study found that forty-three percent of Illinois death penalty cases had been reversed on direct appeal or at the post-conviction stage as of 1995. Of the cases that graduated to the federal habeas corpus stage, the study found forty percent had been remanded for retrial or re-sentencing.”); *see also* Warden, *supra* note 7, at 381–82 (citing James Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, COLUM. LAW SCHOOL, Public Law Research Paper No. 15, 61 tbl. 6, 66 tbl. 7 (2000), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2220&context=faculty_scholarship).

⁵³ *See e.g.*, JUST. POL’Y INST., *DEFINING VIOLENCE: REDUCING INCARCERATION BY RETHINKING AMERICA’S APPROACH TO VIOLENCE 20* (Aug. 2016) (According to the National Conference on State Legislation, Illinois currently spends over 800 million dollars per year incarcerating people convicted of violent offenses); Goldberg, *supra* note 26.

⁵⁴ *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> (last visited Mar. 17, 2021).

⁵⁵ Connie de la Vega, Amanda Solter, Soo-Ryun Kwan, & Dana Marie Isaac, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, U.S.F. SCH. OF L. 15 (2012) (citing INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, December 16, 1966. S. Treaty Doc. No. 95-20 (1992), art. 10(3), 999 U.N.T.S.171.).

are wise or just.”⁵⁶ Neither judges nor legislators possess crystal balls that forecast whether someone will continue to pose a threat to society for the rest of a person’s life; their hubris only makes them think they do. That is why we are now in the predicament we are in with DBI.

Given all that, what can we do here in Illinois to fix it? Most people who study the problem have come to the same conclusion, recommending nearly identical fixes: 1) abolish the practice of sentencing people to LWOP; 2) implement a fair and inclusive parole system, giving everyone the opportunity to prove they deserve release after fifteen or twenty years of incarceration, or cap all sentences at twenty or thirty years; and 3) expand the use of executive clemency.⁵⁷

In reality, it will take a long time to roll back the many decades of unjust sentencing laws and procedural barriers to court access. However, the above recommendations are a good place to start to minimize the number of people who die behind bars, both the innocent and guilty. As others have noted, “for LWOP, there’s no strong public safety argument supporting the policy since its elimination only opens up a possibility for release and certainly no guarantee.”⁵⁸

In Illinois, there are several quick options that could be implemented to allow for a more humane justice system while we work at fixing the plethora of overly punitive sentencing laws. First, the Illinois General Assembly (ILGA) should abolish sentences of LWOP and de facto LWOP through a series of statutes. The ILGA should pass Senate Bill 2333, which would create a system of Earned Discretionary Re-Entry (EDR). EDR would provide every incarcerated individual an opportunity to prove to the Illinois Prisoner Review Board that they deserve early release after twenty years in prison.

Likewise, if the ILGA refuses to pass SB2333, the Governor could grant blanket clemency to everyone currently serving a DBI or other lengthy sentences. He could grant everyone who is currently incarcerated parole-eligibility after serving fifteen or twenty years in prison. In that manner, the Governor could effectively clear Illinois’s “slow-death row” just as Governor Ryan cleared Illinois’s old death row.⁵⁹ Neither of the above options guarantee everyone will be released, but both options acknowledge the clear injustices in our current criminal legal system and provide deserving individuals an opportunity to rejoin society as contributing members.

Legislatures should also immediately implement a reform providing anyone sentenced to more than ten years in prison the same heightened due process people received for the death penalty. This must include both the heightened scrutiny on appeals and collateral attacks as well as the nullification of all the procedural bars like time limits to file appeals.

⁵⁶ Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting: An Address by Anthony M. Kennedy Associate Justice, Supreme Court of the United States (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03.

⁵⁷ See e.g. MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES* 163–67 (The New Press 2018); Ghandoosh, *supra* note 12, at 40; MARC MORJÉ HOWARD, *UNUSUALLY CRUEL: PRISONS, PUNISHMENT, AND THE REAL AMERICAN EXCEPTIONALISM* (2017).

⁵⁸ Marie Gottschalk, *No Way Out? Life Sentences and the Politics of Penal Reform*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 252 (Charles J. Ogletree, Jr. & Austin Sara eds., N.Y.U. Press 2012) (quoting a personal email from Marc Mauer dated Jan. 26, 2011).

⁵⁹ Joseph Dole, Campaign for Corrective Clemency white paper (forthcoming) (on file with author).

CONCLUSION

I know that there are many people who will read this and think nothing should be done. People who will relish in the fact that not only will people spend decades in prison until they die, but also in the fact that they will endure incredibly harsh, inhumane, and trauma-inducing prison conditions. If you are one of them, you will probably say that the people we put in prison are all “evil” and deserve their “fate.” There is probably nothing that I can say to change your mind.

However, for those of you who do not think that way, I would ask you to ponder this: Many people in prison are in constant contact with a person who has physically harmed them or who has killed or harmed their family members, friends, or other loved ones. Yet these people in prison are still able to forgive the person who harmed them, or treat him or her cordially. So, I ask you, who is really “evil?” Those who can grow and mature and see the humanity of a person responsible for harming them or their loved one(s)? Or those out in society who arbitrarily hate people they have never met, and take joy in another’s suffering simply because the State labels that other person a “murderer” or some other derogatory term?