LIFE WITHOUT PAROLE AS A CONFLICTED PUNISHMENT

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> There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him *undangerous*? Why still punish? Punishing itself is terrible."
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> Friedrich Nietzsche, *Beyond Good and Evil*[1]

> A sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society.
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> Graham v. Florida[2]

INTRODUCTION

In his 1979 polemic defending the death penalty, at a time when the practice had almost ceased in the United States, Walter Berns despairingly invoked Nietzsche's critique of the "pathologically soft" last man.[3] Berns argued that only a squeamishness about, and even aversion to, punishing criminals could explain the direction of

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1. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 114 (Walter Kaufmann trans., Vintage Books 1989) (1966).

2. 130 S. Ct. 2011, 2029–30 (2010).

3. *See* WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 78 (1979).

American attitudes toward the death penalty.[4] A little more than three decades later, Berns's lament seems dated. Within years of the publication of his book, the constitutionality of the death penalty was firmly established, and its practice surged—so much for the soft American. Recent years have witnessed declining numbers of executions[5] and formal abolition of the practice in a few states,[6] perhaps hinting that Berns's predictions are belatedly coming true. But this would fail to account for the most notable development in American criminal justice: the rise of life without parole.

Life without parole, known in the parlance of criminology by the infelicitous acronym LWOP, is today the distinctive American punishment. The death penalty still attracts disproportionate scholarly interest, but academics in this regard are characteristically out of touch with reality.[7] As already noted, there are fewer executions, and considerably fewer death sentences, than there were a decade ago.[8] Furthermore, the perennial charge that the death penalty distinguishes America from the rest of the world betrays a European focus; China and Japan, the second- and third-largest economies in the world, still practice this punishment.[9]

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4. *See id.* at 10 ("[O]ur penal system, so inadequate and increasingly seen to be so, is in large part the result of our attempt to avoid punishing criminals and, above all, to avoid executing them.").

5. *See infra* note 127 and accompanying text.

6. *See* Samuel R. Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1922 & n.94 (2012) (counting five states formally abolishing the death penalty since 2007).

7. A search in the Westlaw JLR database of "death penalty" and date (2012) generates 1,488 hits. Westlaw JLR database search, WESTLAW, http://www.westlaw.com (sign into Westlaw; then search "jlr" in the "Search for a database" box; then search "death penalty" enclosed by quotation marks in the search field; then select "Specific" in the "Dates" drop-down box and search "2012") (last visited Sept. 24, 2013). A search of (life /5 parole) and date (2012) generates 341. Westlaw JLR database search, WESTLAW, http://www.westlaw.com (sign into Westlaw; then search "jlr" in the "Search for a database" box; then search (life /5 parole) enclosed by parenthesis in the search field; then select "Specific" in the "Dates" drop-down box and search "2012") (last visited Sept. 24, 2013). The first book-length treatment of LWOP was published in 2012. *See generally* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012). Prior to that, some of the most perceptive academic commentary was in the form of student notes. *See, e.g.*, Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006); Julian H. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529 (1990).

8. *See infra* notes 126–29 and accompanying text.

9. *See Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries (last updated Dec. 31, 2012). India, the world's second most populous country, still preserves the death penalty in its criminal law, although the sentence is rarely imposed. *See* David T. Johnson, *Asia's Declining Death Penalty*, 69 J. ASIAN

What distinguishes the American criminal justice system and brands it as distinctively harsh by comparison with the civilized, and even uncivilized, world is the frequency with which it banishes its own citizens to cages for the duration of their lives and with no pretense of offering a legal mechanism for freedom.

Such a punishment, although only recently implemented on a grand scale, was conceived centuries ago. The eighteenth century Italian criminologist Cesare Beccaria is widely praised for criticizing the death penalty, but less-emphasized in the tributes to his wisdom is his enthusiastic embrace of "perpetual enslavement" as an alternative.[10] Beccaria's avowed intention was to replace the death penalty with a punishment worse than death itself and thus with even greater deterrent effect upon would-be criminals.[11] Europeans today widely subscribe to Beccaria's rejection of the death penalty, but many nations regard LWOP as so cruel as to be inconsistent with human dignity; those nations that permit LWOP limit its scope to the narrowest of cases.[12] In America, LWOP has soared in usage as the death penalty has waned. Elected officials regularly embrace LWOP, often as an alternative to the death penalty, by emphasizing the sentence's profound harshness.[13] This complicates the narrative proposed by Walter Berns, for any nation capable of employing a punishment so cruel as to be rejected by most of the "civilized world" would seem to be safe from the charge of "pathological softness."[14]

A pair of recent Supreme Court cases, *Graham v. Florida*[15] and *Miller v. Alabama*,[16] arguably portends a transcontinental convergence of views on LWOP. Both opinions express reservations with America's robust adoption of LWOP, noting the features of the sentence that give so many Europeans pause. It is not simply the purported irrevocability; it is also the expressive judgment implied—that a human being is so awful that we brand him with the mark of Cain, banish him from our midst, and pronounce at an end our interest in him and his capacity for improvement. In an older Jewish tradition, it is tantamount to sitting *shiva* for one who is alive but who has so shamed the community that it conducts what

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STUD. 337, 339 (2010) ("India executed one person in the 10 years between 1998 and 2007 . . . .").

10. *See infra* notes 25–39 and accompanying text.

11. *See* CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 45–47 (Branden Press Inc. 4th ed. 1983) (1775) ("Perpetual slavery, then, has in it all that is necessary to deter the most hardened and determined, as much as the punishment of death. I say it has more.")

12. *See infra* notes 63–87 and accompanying text.

13. *See infra* notes 100–08 and accompanying text.

14. *See supra* note 3 and accompanying text.

15. 130 S. Ct. 2011 (2010).

16. 132 S. Ct. 2455 (2012).

are in effect funeral rites.[17] Or, in the legalistic language of the *Graham* opinion, LWOP "forswears altogether the rehabilitative ideal."[18]

This Article focuses on that phrase and tests whether, as much academic commentary assumes,[19] it is a fair and complete characterization of LWOP today. This Article argues that the Court's treatment of LWOP captures only a partial truth. LWOP is intended as a punishment of distinctive cruelty, more horrible than a prison term of many years and on par with or worse than death itself. In practice, however, LWOP emerges as a softer punishment,

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17. One reason for such treatment was marrying outside the Jewish faith. *See* Uriel Heilman, *The War Against Intermarriage Has Been Lost. Now What?*, JTA (Aug. 6, 2013, 2:45 PM), http://www.jta.org/2013/08/06/news-opinion/united-states/the-war-over-intermarriage-has-been-lost-now-what. A more historically rooted practice was *cherem*, which entailed the expulsion of those who committed various acts of apostasy. *See* STEVEN NADLER, SPINOZA: A LIFE 121 (1999). Such a fate would befall Baruch Spinoza, as discussed *infra* notes 157–58 and accompanying text. *See* NADLER, *supra*, at 120–27.

18. *Graham*, 130 S. Ct. at 2030.

19. *See, e.g.*, Catherine Appleton & Brent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 611 (2007) ("LWOP removes any prospect of reward for change and is therefore fundamentally inhumane."); William W. Berry III, *More Different than Life, Less Different than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1127 (2010) ("[LWOP] extinguishes the opportunity for redemption."); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1764 (2012) (likening LWOP to a sentence of "life with hopelessness"); Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 7, at 25, 43 ("[O]nce we scratch below the surface, it becomes less clear that LWOP is definitively milder [than the death penalty] . . . ."); Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW & INEQ. 263, 301 (2013) ("[A] LWOP sentence effectively extinguishes the offender's life."); Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 8, at 66, 76 (preferring the phrase "death-in-prison," or "DIP," to "LWOP," and arguing that DIP sentences "fail to recognize the intrinsic worth of the incarcerated person"); Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439, 457 (2013) ("[I]n both an execution and a life sentence without the possibility of parole, there is no hope for redemption or reform . . . ."); Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 7 (2010) ("If the capacity for change and moral growth is regarded as a core attribute of humanity, then LWOP might be seen as a profoundly inhumane punishment—as a denial of the offender's capacity to live a fully realized human life."). Journalistic critiques of LWOP are often caustic, likewise lamenting the sentence's repudiation of hope, rehabilitation, and human dignity. *See, e.g.*, David R. Dow, *Life Without Parole is a Terrible Idea*, DAILY BEAST (Apr. 27, 2012, 12:00 AM), http://www.thedailybeast.com/articles/2012/04/27/life-without-parole-is-a-terrible-idea.html ("Life without parole is as dehumanizing as death itself, and in some ways it is even worse.").

accommodating a concern for the inmate and a hope for his rehabilitation. LWOP, viewed in both aspects, is a conflicted punishment, inspired by a congeries of penological goals, including rehabilitation. One might, with some fairness, argue that LWOP is not simply conflicted but incoherent, as its practical effect is to incarcerate physically decrepit and morally reformed men long after the community's hatred has evaporated. If the crime was so horrible, why not simply execute the criminal? But if not resorting to the ultimate punishment, why not provide a clear legal mechanism for release at some point?[20] Life without parole, this Article argues, is the synthesis of the retributive impulse that would otherwise result in the death penalty with a rehabilitative impulse Nietzsche describes as pathological softness. Others, of course, recognize LWOP as a reflection of our moral progress.

A brief road map will suffice. Part I sketches the history of LWOP, from its philosophical origins centuries ago through its modern European rejection, enthusiastic American embrace, and recent judicial reservations. Parts II and III test the proposition, first articulated by Beccaria and now presumed in *Graham* and *Miller*, that LWOP expresses unmitigated revulsion. Part II collects supporting evidence in the rhetoric of hatred that surrounds an LWOP sentence and argues that LWOP is a modern analog to the ancient punishment of banishment. Part III turns to the counterevidence, cataloging the ways in which LWOP recognizes the possibility of reform, provides opportunities for self-improvement, and holds out the possibility of release, albeit outside legal channels. Part IV draws upon the preceding sections to expose the simplistic assumptions that undergird the *Graham* and *Miller* opinions. LWOP, this Article argues, is a conflicted punishment, imposed by a community that may lack the hardness of heart to impose the death penalty but enters into a bond with the victims and promises to banish the criminal forever. The community indulges its thirst for vengeance when imposing the sentence, but, over time, softer impulses insinuate themselves. Except perhaps in the most extreme cases, rehabilitation is not foresworn but is preserved as a possibility.

Before proceeding, two stylistic points are in order: First, unless the defendant is a woman, I use the masculine pronoun in describing those sentenced to LWOP. This is a concession to the fact

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20. The point is also made by Robert Blecker, who almost alone among scholars criticizes LWOP from a retributivist perspective as inadequate punishment. *See* Adam Liptak, *Serving Life, with No Chance of Redemption*, N.Y. TIMES (Oct. 5, 2005), http://www.nytimes.com/2005/10/05/national/05lifer.html?pagewanted=all&_r=1&. Blecker's work is considered *infra* notes 278–80 and accompanying text.

that 97% of inmates serving LWOP are men.[21] Second, this Article includes accounts of crimes that might be regarded as overly elaborate. Critics of LWOP often resort to artful euphemisms and convenient elisions that strip crimes that ordinarily culminate in LWOP of their horror.[22] It is, however, by confronting that horror that one can make the most compelling case for the moral intelligibility of life without parole.

I. AMERICAN EXCEPTIONALISM

To what extent American and European cultures are distinct with respect to taxes, welfare policy, litigiousness, and moral attitudes can be debated.[23] But with respect to criminal justice, and in particular sentencing, the division is stark, with European leniency on the one side of the Atlantic and American harshness on the other.[24] LWOP has supplanted the death penalty as the most striking evidence of this divide. In Europe, the sentence is rejected in much of the continent and is strictly limited in those countries that retain it as a possibility. In the United States, LWOP was rare forty years ago but is commonplace today. Yet the starkness of this European/American divide has been thrown into question by

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21. *See* Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010) (finding that approximately 3% of the 41,095 inmates sentenced to LWOP as of 2008 were women).

22. For an examination of one airbrushed treatment, see Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 350–51 (2011).

23. Peter Baldwin makes the case for a convergence of American and European political cultures. *See generally* PETER BALDWIN, THE NARCISSISM OF MINOR DIFFERENCES: HOW AMERICA AND EUROPE ARE ALIKE (2009) ("[B]oth Europe and the United States are, in fact, parts of a common, big-tent grouping . . . ."). For an appreciative, albeit critical, review of Baldwin's thesis, see generally Dennis Boyles, *Vive la Différence*, 10 CLAREMONT REV. BOOKS 32 (2010) (reviewing BALDWIN *supra*), *available at* http://www.claremont.org/publications/crb/id.1711/article_detail.asp.

24. *See generally* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (examining the stark contrast between American and Western European practices of criminal punishment). This broad statement needs clarification. Some nations in Europe, such as the UK, are "harsher" than the nations on the continent. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 9 (2001) (discussing the UK government ministers' urging to "condemn more and understand less"). Also, in the United States, one jurisdiction, Alaska, might be called "softer" than others, as Alaska has rejected the death penalty and LWOP. *See Life Without Parole*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/life-without-parole (last visited Nov. 6, 2013). But these pedantic quibbles aside, the observation of a European/American divide is sufficiently true to be a launching point for the argument in this Part.

Graham and *Miller*, which express European-styled reservations about LWOP.

A. The European Experience

Few criminologists are as reflexively praised as Cesare Beccaria, author at age twenty-seven of *On Crimes and Punishments*.[25] Celebrated as the "boy genius of Enlightenment criminal law thought,"[26] Beccaria is renowned today for his rejection of torture and the death penalty.[27] Less recognized is that Beccaria's rejection of the death penalty (on the grounds that it does not deter would-be criminals and barbarizes those who administer it[28]) was linked to enthusiastic support for the alternative of life imprisonment. Beccaria embraced the punishment of "perpetual slavery"—a "miserable condition" so horrible that it commands obedience more effectively than the death penalty.[29] According to Beccaria, citizens behold with "salutary terror" the "continued suffering" of those whose lives have been reduced to "beast[s] of bur[d]en."[30] Beccaria argued that a sentence of life imprisonment without any hope of release is a better—*harsher*—punishment than the death penalty.[31] Nearly four decades later, Beccaria served as one of several advisors in a project to reform the criminal law of Austrian Lombardy.[32] The minority report he coauthored recapitulated his earlier arguments against the death penalty (adding, as a criticism, its irrevocability) and proposed instead "perpetual enslavement and forced labour."[33]

There are two aspects of Beccaria's account of life imprisonment. First is *imprisonment*. For much of human history, the death penalty was meted out for serious offenses.[34] For lesser offenses, the state deployed corporal punishment, fines, shaming penalties, and banishment to ensure law-abidingness.[35] Prisons were few in number and existed not to punish but to coerce men (into paying a debt) or to detain them (until they faced trial).[36] In

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25. *See* BECCARIA, *supra* note 11.
26. WHITMAN, *supra* note 24, at 50.
27. *See, e.g.*, John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 197–98 (2009).
28. *Id.* at 197, 224.
29. BECCARIA, *supra* note 11, at 46.
30. *Id.*
31. *Id.*
32. Bessler, *supra* note 27, at 224.
33. *Id.* at 224–25.
34. *See* J.C. Oleson, Comment, *The Punitive Coma*, 90 CALIF. L. REV. 830, 837 (2002).
35. *See id.* at 837 & nn.29 & 31.
36. *See id.* at 837–38 & n.32 (noting the maxim "[c]*arcer enim ad continendos homines non ad puniendos haberi debet*," which means "prisons exist only in order to keep men, not to punish them").

recent years, alternative punishments—principally some form of probation—have become commonplace for nonviolent crimes.[37] But for more serious offenses, the only civilized punishment is incarceration; it would be barbaric to cane criminals.[38] Whether the latter punishment might achieve equal or greater deterrence and be more likely to promote rehabilitation (and for that matter do so at a lower cost to society) is a nonstarter. At least this part of Beccaria's work—his rejection of "torture" in all its forms—is now gospel.[39]

The other part of Beccaria's recommendation, *life*—that is, his embrace of the punishment of "perpetual slavery"—is more controversial. In the late nineteenth century, John Stuart Mill spoke against a proposal in Parliament to abolish the death penalty, and in doing so, he agreed with Beccaria's claim that an irrevocable life sentence was the more horrible punishment.

> What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?[40]

Properly understood, and harshly enforced, a life sentence is a form of torture that renders death a mercy. Yet will society really impose "the hardest and most monotonous toil" for the remainder of a criminal's life? Beccaria was confident on this score, or perhaps missed the problem altogether, but Mill proved himself the more

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37. Probation can be coupled with electronic surveillance. *See* Graeme Wood, *Prison Without Walls*, ATLANTIC, Sept. 2010, at 92–93, *available at* http://www.theatlantic.com/magazine/archive/2010/09/prison-without-walls/308195/?single_page=true.

38. Such punishments continued, albeit rarely, into the twentieth century. For example, the whipping post was used in Delaware as late as 1952. *The Whipping Post*, DEL. PUB. ARCHIVES BLOG (Dec. 2, 2011), http://archives.blogs.delaware.gov/2011/12/02/the-whipping-post/.

39. For doubts about the vaunted humanitarianism of modern carceral punishment, see generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Pantheon Books 1977) (1975).

40. John Stuart Mill, In Favor of Capital Punishment, Speech Before Parliament (Apr. 21, 1868), *in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 271, 272–73 (Gertrude Ezorsky ed., 1972). A somewhat similar point is made by a character in Anton Chekhov's short story, *The Bet*:

> [T]he death penalty is more moral and more humane than imprisonment for life. Capital punishment kills a man at once, but lifelong imprisonment kills him slowly. Which executioner is the more humane, he who kills you in a few minutes or he who drags the life out of you in the course of many years?

Anton Chekhov, *The Bet*, EAST WEB, http://www.eastoftheweb.com/short-stories/UBooks/Bet.shtml (last visited Nov. 6, 2013).

sophisticated thinker in suggesting doubts. Once the "memory of the crime is no longer fresh," Mill predicted that there will be "almost insuperable difficulty in executing" a hard life sentence.[41] Mill was, it seems, skeptical of a community's ability to sustain a level of hatred toward the criminal over time.

Mill was also less convinced than Beccaria that the sentence of life imprisonment, even if it is in fact more terrible than a death sentence, would impress itself upon the imagination of would-be criminals with the same horror.[42] As Justice Holmes suggested decades after Mill, the "common understanding"—and the one likely adopted by criminals, to the extent they give the matter any attention—is that "imprisonment for life is a less penalty than death."[43] Mill thus hinted that life imprisonment, although possibly a harsher punishment than the death penalty, has less deterrent effect. He consequently concluded that the death penalty was preferable to life imprisonment, for "while it inspires more terror, [it] is less cruel in actual fact than any punishment we should think of substituting for it."[44]

The British Quaker William Tallack, a younger contemporary of Mill, articulated an even more radical critique of criminal punishment, rejecting both life imprisonment and the death penalty.[45] Unlike Beccaria and Mill, Tallack was no armchair criminologist. He not only studied the laws in several European nations and in the United States, but he also visited prisons and talked to inmates and wardens.[46] Tallack tartly noted that few of "the persons who advocate the abolition of capital punishment . . . have taken the trouble . . . [to design] an effectual substitute for that penalty."[47] It was—and is—easy to condemn the death penalty. What is difficult is conceiving and implementing a penalty that comparably promotes the penological goals of deterrence and retribution. The facile suggestion, commonplace then and now, that one should "put them away for life," glosses over the defects of incarceration. Tallack (following Mill on this point) noted that prison conditions are apt to become indulgent with time;

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41. Mill, *supra* note 40, at 272.

42. *Id.* (arguing that although a life sentence is more horrible than death, it "very probably would not be" recognized as such).

43. Biddle v. Perovich, 274 U.S. 480, 487 (1927).

44. Mill, *supra* note 40, at 273.

45. *See* WILLIAM TALLACK, PENOLOGICAL AND PREVENTIVE PRINCIPLES 151–52, 161 (1889) (describing the "further evils" that imprisonment for life adds to the already "objectionable features" of long imprisonments). For a rare article discussing Tallack, see Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 n.62 (1998).

46. TALLACK, *supra* note 45, at vii–viii.

47. *Id.* at 152.

this in turn "diminish[es] the fear of punishment amongst the criminally-disposed portion of the outside community."[48]

Notwithstanding these qualifications, Tallack (and here again following Mill) suggested that irrevocable life imprisonment is, for the majority of inmates, a cruel and barbaric punishment.[49] Sweden provided a test case for this proposition, for its prisons were, even a century ago, renowned for their relative comforts.[50] If irrevocable life imprisonment could ever be bearable, it was here. Yet Tallack reported the groans of Swedish inmates serving life sentences.

> Why did you spare us from this infliction of death, only to keep us here in association with the vilest criminals? You have buried us alive. The King's clemency to us is no real mercy. On the contrary, it is the severest aggravation of our punishment, to compel us to drag out our lives, without a ray of the hope of mercy.[51]

Deprived of any "hope of ultimate restoration to the friendships and pleasures of free life," inmates were sunk in a "darkness of despair."[52] Furthermore, consistent with the Quaker emphasis on moral and spiritual regeneration (which he called "matters of still higher importance"), Tallack raised doubts about life imprisonment as a mechanism for encouraging inmates to "prepar[e] for a happy eternity."[53] Tallack wrote that "spiritual conversion" would be rendered unlikely, given "the unavoidable conditions of life-imprisonment . . . [and] the perpetual association . . . with other criminals."[54] His final recommendation, to eliminate the death penalty *and* life imprisonment, took its model from Portugal, where the maximum sentence for any criminal offense was a twenty-year term of imprisonment.[55] Society could rest assured that such a long fixed sentence provided sufficient deterrence.[56] Moreover, Tallack argued, the "element[] of hope" would mitigate the harshness of the sentence and spur the offender in his rehabilitative efforts.[57]

Yet why should society have any interest in promoting hope and mitigating the sentence's harshness? From Beccaria to Tallack, the

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48. *Id.* at 151.
49. *Id.* at 152.
50. Swedish prisons today could be profiled in IKEA catalogs. *See* Kevin Tang, *Scandinavian Prison or American Office?*, BUZZFEED (Jan. 2, 2013, 2:56 PM), http://www.buzzfeed.com/sludgepunkslimeharpy/scandinavian-prison-or-american-office-82dk.
51. TALLACK, *supra* note 45, at 154–55. One cannot help wondering if Tallack employed authorial license in paraphrasing the inmates' complaints.
52. *Id.* at 151.
53. *Id.*
54. *Id.* at 152.
55. *Id.* at 162.
56. *Id.* at 163.
57. *Id.*

attitude toward life imprisonment has shifted dramatically. Tallack assumed that one goal (among several) in punishing heinous criminals is reducing pain and promoting moral regeneration, concerns that were absent in Beccaria's treatment of life imprisonment. To be sure, other passages in Beccaria's principal work emphasize the need to temper punishments, but in the chapter on the death penalty or the alternative of life imprisonment[58]—that is, when considering criminals who have committed the gravest offenses that merit the most severe punishment allowable by law—Beccaria displays an indifference to the offender's body and soul. Indeed, he seemed to regard it as acceptable, and even salutary (as a deterrent to others), to publicly degrade the offender in "perpetual slavery."[59] Tallack, by contrast, argued that even the worst of criminals should be encouraged to "prepar[e] [themselves] for a happy eternity."[60] For Tallack, a sentence of perpetual imprisonment, in depriving the offender of hope, launches him into a "darkness of despair" unlikely to promote spiritual self-examination.[61] Beccaria's treatment of "perpetual imprisonment" is devoid of such concerns.

Today, Beccaria is as celebrated as Tallack is obscure, but in this dispute it is the latter who has emerged triumphant, at least if victory is measured by influence over the law in European nations. Irrevocable life sentences, although not completely unknown in Europe today, are viewed with misgivings. To be sure, Tallack's allusions to a soul facing divine judgment are absent from official European documents. In their place are references to "human dignity" and other principles that emanate from a mélange of neo-Kantianism and vestigial Christianity.[62] That wrinkle aside, Tallack's horror of irrevocable life sentences pervades European criminal codes today.

This development can be traced back at least to the 1970s, when European authorities began calling into question the morality of life sentences. A 1975 memorandum of European ministers concluded that "it is inhuman to imprison a person for life without any hope of release" because "[n]obody should be deprived of the chance of

58. BECCARIA, *supra* note 11, at 101.
59. *Id.*
60. TALLACK, *supra* note 45, at 151.
61. *Id.* at 151–52.
62. *Cf.* JACQUES MONOD, CHANCE AND NECESSITY: AN ESSAY ON THE NATURAL PHILOSOPHY OF MODERN BIOLOGY 171 (Austryn Wainhouse trans., Alfred A. Knopf 1971) (1970) ("For their moral bases the 'liberal' societies of the West still teach—or pay lip-service to—a disgusting farrago of Judeo-Christian religiosity, scientistic progressism [sic], belief in the 'natural' rights of man, and utilitarian pragmatism.").

possible release."[63] Elaborating on this claim two years later, the German Federal Constitutional Court held that "human dignity," which it called "the primary norm of the German constitutional order," foreclosed any life sentence for which the only possibility of commutation was executive clemency.[64] The following year, Spain amended its constitution to prohibit any sentence that foreclosed "reeducation and social rehabilitation."[65]

In recent years, the question has been framed as whether life sentences violate Article 3 of the European Convention of Human Rights, which prohibits all "inhuman or degrading" punishment.[66] In the 2008 case *Kafkaris v. Cyprus*,[67] this issue divided the seventeen-judge European Court on Human Rights ("ECHR").[68] Five judges argued that life sentences without any judicial parole mechanism violate Article 3 because they include no "real and tangible prospect for release."[69] In the 2012 case *Vinter v. United Kingdom*,[70] a panel of seven judges on the ECHR revisited the issue and narrowly upheld life sentences imposed on three British nationals.[71] Under the law of England and Wales, only the Secretary of State can commute such a sentence, with the stated grounds being either terminal illness or serious incapacitation.[72] The dissenting judges in *Vinter* emphasized that their objection was not to a life sentence per se, but to the absence of what they called a "suitable release mechanism."[73] Because there was no possibility of

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63. EUR. COMM. ON CRIME PROBLEMS, SUBCOMM. NO. XXV, GENERAL REPORT ON THE TREATMENT OF LONG-TERM PRISONERS ¶ 77 (1975), *quoted in* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW 320 (2002).

64. Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT'G REP. 39, 40 (2010); *accord* Appleton & Grøver, *supra* note 19, at 612 ("To lock up a prisoner and remove all his or her hope of release compromises principles of human rights and human dignity . . . ."). On the general importance of "dignity" in European law, see Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202–04 (2008).

65. Constitución Española [Constitution], B.O.E. n. 311, Dec. 29, 1978 (Spain). For a discussion of the amendment, see Amanda Ploch, Note, *Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives*, 44 N.Y.U. J. INT'L L. & POL. 887, 916 (2012).

66. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, E.T.S. No. 5.

67. App. No. 21906/04, Eur. Ct. H.R. (2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85019.

68. *Id.* at 59.

69. *Id.* at 67; *see also* van Zyl Smit, *supra* note 64, at 39 (discussing *Kafkaris*).

70. App. Nos. 66069/09, 130/10, & 3896/10, Eur. Ct. H.R. (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108610.

71. *Id.* at 35.

72. *Id.* at 10.

73. *Id.* at 39 (Garlicki, Björgvinsson, and Nicolaou, JJ., dissenting in part).

release except by elected officials acting upon narrowly defined grounds, the dissenting justices complained that the sentence failed to "afford a measure of hope to the convicted person" or to "remove the hopelessness inherent in a sentence of life."[74]

As a practical matter, these concerns may seldom arise: It is likely that in the entire European continent, there are fewer than one hundred inmates whose sentences implicate the concerns of the dissenting judges in *Vinter*. The only European nations that appear to impose sentences that approximate LWOP—that is, life sentences for which the only mechanism for release is executive clemency—are the Netherlands (thirty-seven inmates), England and Wales (thirty-six inmates), and France (three inmates).[75] Other nations may provide for such a punishment as a theoretical possibility, but two recent studies have not unearthed any inmates facing such a sentence.[76]

Several other nations permit life sentences but on the condition that there is a release procedure, apart from the possibility of executive clemency, after a minimum number of years. This list includes the following: Austria, Belgium, the Czech Republic, Estonia, Germany, Lithuania, Luxembourg, Poland, Romania, Russia, Slovakia, Slovenia, and (possibly) Switzerland.[77] In a few of these countries, such as Austria[78] and Germany,[79] those sentenced

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74. *Id.* at 37. A recent case suggests that the Court of Human Rights may become more active in striking down irreducible life sentences. *See* David Barrett, *Jeremy Bamber Wins Human Rights Victory over "Life Means Life" Sentences*, TELEGRAPH (July 9, 2013, 10:35 AM), http://www.telegraph.co.uk/news/uknews/law-and-order/10168351/Jeremy-Bamber-wins-human-rights-victory-over-life-means-life-sentences.html.

75. Van Zyl Smit, *supra* note 64, at 40–41.

76. *Id.* at 41; *see also* Marek Szydlo, Vinter v. United Kingdom, 106 AM. J. INT'L LAW 624, 626 (2012) (discussing generally the presence and enforcement of irreducible sentences in European countries).

77. This list is drawn from Szydlo, *supra* note 76. With respect to Swiss law, according to Szydlo, an indeterminate life sentence is possible, but even then the defendant is eligible for release if "new scientific evidence" emerges demonstrating that he is no longer a threat. *Id. But see* van Zyl Smit, *supra* note 64, at 41 (concluding that an irreducible life sentence is possible in Switzerland). Whatever the theoretical status of LWOP in Switzerland, no inmate is serving such a sentence. *Id.*

78. For example, Johann "Jack" Unterweger raped and murdered an eighteen-year-old woman in 1974, for which he was sentenced to life imprisonment. Adrian Bridge, *Murderer's "Final Freedom": The Bizarre Life of Jack Unterweger, Poet and Killer of Prostitutes, Ends at His Own Hand*, INDEPENDENT (July 3, 1994), http://www.independent.co.uk/news/world/murderers-final-freedom-the-bizarre-life-of-jack-unterweger-poet-and-killer-of-prostitutes-ends-at-his-own-hand-1411194.html. Released in 1990, Unterweger was hailed as the "poster child for the rehabilitative model" and traveled to Los Angeles, where he murdered six more people in the span of a year. *See* JOHN LEAKE, ENTERING HADES: THE DOUBLE LIFE OF A SERIAL KILLER 39–42 (2009).

79. Although parole is routinely granted to most inmates, an exception was made in the case of war criminal Josef Schwammberger, who died in prison.

to life must be considered for parole after as little as fifteen years.[80] Three other nations—Norway,[81] Spain,[82] and Portugal[83]—prohibit all life sentences. Many Americans were amazed to discover,[84] for example, that Anders Breivik, the Norwegian convicted of killing seventy-seven people, faced a maximum punishment of twenty-one years in prison.[85] Likewise, the mastermind of the Madrid train bombings, which killed 191 people, can expect to be released from prison in forty years.[86] In sum, European nations have generally adopted Tallack's attitude toward LWOP as a sentence of such barbarity that it is never, or almost never, appropriate. In the words of two English criminologists, urging their own nation to embrace the approach taken on most of the European continent, "To

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See Joseph Schwammberger, 92, Nazi Labor Camp Commander, Dies, N.Y. TIMES, Dec. 4, 2001, at A17.

80. Belgium requires life-sentenced defendants to be considered for release after ten years; Austria, Germany, Luxemborg, and Switzerland after fifteen years; the Czech Republic and Romania after twenty years; Poland, Russia, and Slovakia after twenty-five years; Lithuania after twenty-six years; and Estonia after thirty years. *See* van Zyl Smit, *supra* note 64, at 40.

81. Norwegian law imposes a maximum prison term of twenty-one years, even in the case of multiple homicides. *See* Mark Lewis & Sarah Lyall, *Norwegian Mass Killer Gets Maximum Sentence: 21 Years*, N.Y. TIMES, Aug. 25, 2012, at A3.

82. Spanish law forecloses life imprisonment, and the maximum sentence for murder is twenty years, or thirty years if the crime involved an act of terrorism. Michelle Tsai, *40,000 Years in Spanish Prison?*, SLATE (Nov. 1, 2007, 7:02 PM), http://www.slate.com/articles/news_and_politics/explainer/2007/11/40000_years_in_spanish_prison.html.

83. The Portuguese constitution was amended in 1976 to foreclose life imprisonment. *See* CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] Apr. 2, 1976, art. 30, § 1 (Port.), *available at* http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf. In 1997, the constitution was further amended to prohibit extradition to any country where a suspect might face life imprisonment. *Id.* art. 33, § 4. The Penal Code prohibits a sentence of more than twenty-five years for any crime. CÓDIGO PENAL PORTUGUÊS art. 41, § 2 (Port.), *available at* http://legislationline.org/download/action/download/id/4288/file/Portugal_CC_2006_en.pdf.

84. The leniency of the European criminal justice systems can come as a shock to ordinary Europeans as well. When a Belgian judge released a woman who had participated in the abduction, torture, and murder of six young girls, "[s]ome 300,000 took to the streets in protest. The government teetered on the brink of collapse, prompting King Albert to call on it to reform the judiciary." Robert Wielaard & Don Melvin, *Michelle Martin, Belgium Pedophile Marc Dutroux's Ex-Wife, to Be Released from Prison*, HUFFINGTON POST (Aug. 1, 2012, 11:05 AM), http://www.huffingtonpost.com/2012/07/31/michelle-martin-marc-dutroux-ex-wife_n_1723563.html.

85. *See* Lewis & Lyall, *supra* note 81.

86. Unlike Norwegian law, the sentences can be run consecutively. *See* Tsai, *supra* note 82. As a consequence, the men convicted of the 2004 Madrid bombings were sentenced to up to 43,000 years in prison for homicide and miscellaneous other offenses. *Id.* Yet Spanish law additionally provides that the maximum punishment, regardless of the number of crimes, is forty years in prison. *Id.*

lock up a prisoner and remove all his hope or her hope of release compromises principles of human rights and human dignity [and] ignores the capacity for redemption and rehabilitation."[87]

B. The American Experience

A century ago, life without parole was rarely imposed in any American jurisdiction. Wisconsin, for example, was one of four states in the mid-nineteenth century that replaced the death penalty with LWOP, but the results were not deemed encouraging.[88] An official report portrayed "the indescribable horror and agony incident to imprisonment for life" and recommended its replacement with "long, but definite, terms," which would "leave some faint glimmer of hope for even the greatest criminals."[89] The report prevailed, and LWOP vanished as an imposed punishment in Wisconsin. The Wisconsin Supreme Court in 1962 reported that even "one who is sentenced to life imprisonment becomes eligible for parole in a fraction more than eleven years."[90]

Through the 1970s, convicted American defendants sentenced to "life" were almost invariably eligible for parole, often after a relatively short prison term. In the federal system, starting in 1913, those sentenced to "life" were eligible for parole after just fifteen years;[91] sixty years later, Congress reduced the minimum term for parole eligibility to ten years.[92] In his concurring opinion in *Furman v. Georgia*[93] in 1972, Justice Brennan noted that what is called "life imprisonment" was really "a misnomer today."[94] He added that "[r]arely, if ever, do crimes carry a mandatory life sentence without possibility of parole."[95]

Furman (which imposed a temporary moratorium on executions) had one consequence unintended by the Supreme Court: it spurred interest in life without parole. Three years after *Furman* was decided, the Alabama legislature enacted a statute creating an LWOP sentence.[96] The Supreme Court's apparent foreclosing of the death penalty, coupled with a perception of rising crime rates, galvanized support for LWOP. It was hailed as a sentence that not

87. Appleton & Grøver, *supra* note 19, at 612.

88. *See* Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641, 1661 (2004) (reviewing STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002)).

89. TALLACK, *supra* note 45, at 155.

90. State v. Esser, 115 N.W.2d 505, 517 (Wis. 1962).

91. Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910–1972)*, 61 FED. PROBATION 23, 25 (1997).

92. Note, *supra* note 7, at 1840.

93. 408 U.S. 238 (1972).

94. *Id.* at 302 n.54 (Brennan, J., concurring).

95. *Id.*

96. ALA. CODE § 13A-5-9 (2013).

only deterred criminals but also satisfied the community's demand for proportionate punishment.[97]

In 1976, the Supreme Court lifted the moratorium on the death penalty and returned the issue to the political realm.[98] Unlikely bedfellows began touting the virtues of LWOP. On the one hand were law-and-order advocates, generally on the political right, and on the other hand were death penalty abolitionists, generally on the political left.[99] The latter reasoned that the electorate would be more willing to abolish the death penalty if LWOP was firmly established in the law.[100] A further consideration was that jurors in individual cases would be less likely to vote for a death sentence if presented with LWOP as an alternative.[101] Abolitionists were careful, however, not to offend the sensibilities of a general public that still supported the death penalty. Many channeled their inner Beccaria, linking denunciations of the death penalty with celebrations of the harshness of the sentence they proposed in its place. For example, Steven Brill, founder of Court TV and *The American Lawyer*, wrote in 1987, "I . . . think we're insanely permissive about murderers. Liberals ought to understand that parole for murderers—parole of *any* kind for *any* murderers—is at least as disrespectful of the sanctity of human life as the death penalty is. Besides, it's just plain crazy."[102]

Brill's repudiation of parole "of *any* kind" adumbrated one of the most notorious political advertisements of the twentieth century. Presidential candidate George H. W. Bush ran a series of ads attacking Governor Michael Dukakis for releasing Willie Horton, who had been sentenced to LWOP, on weekend furloughs.[103] On one such furlough, Bush's ads reported, Horton kidnapped and raped a woman.[104] Politicians learned their lesson from the Horton fiasco, as evidenced by an editorial by Governor Mario Cuomo, in which Cuomo explained his repeated vetoes of legislation to reintroduce the death penalty in New York: "Th[e] alternative is life imprisonment without the possibility of parole. No 'minimums' or

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97. Wright, *supra* note 7, at 548.

98. Gregg v. Georgia, 428 U.S. 153, 187 (1976).

99. Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 158 (2008); *see also* Note, *supra* note 7, at 1854.

100. Steiker & Steiker, *supra* note 99, at 176.

101. *See id.*

102. Steven Brill, *Throw Away the Key*, AM. LAW., July–Aug. 1987, at 3, *quoted in* Danya W. Blair, *A Matter of Life and Death: Why Life Without Parole Should Be A Sentencing Option in Texas*, 22 AM. J. CRIM. L. 191, 205 n.66 (1994) (emphasis in original).

103. Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 11 J. INST. JUST. & INT'L STUD. 87, 101 n.64 (2011).

104. *Id.*

'maximums.' No time off for good behavior. No chance of release by a parole board, ever. Not even the possibility of clemency. It is, in practical effect, a sentence of death in incarceration."[105]

The prudence reflected in Cuomo's editorial is still widely practiced. In advocating the abolition of the death penalty, politicians do not simply embrace LWOP but sketch its horrors as a life at "hard labor."[106] When the Governor of Connecticut signed a law abolishing the death penalty, he boasted that Connecticut was joining "every other industrialized nation," perhaps forgetting about Japan.[107] But lest he be accused of being a soft European, Governor Malloy wrote, "Going forward, we will have a system that allows us to put these people away for life, in living conditions none of us would want to experience. Let's throw away the key and have them spend the rest of their natural lives in jail."[108] For American politicians, any suggestion that the death penalty should be abolished is typically counterbalanced with stern talk about punishing criminals and an embrace of LWOP as a penalty with just as much deterrent force, if not more, than the death penalty. Such rhetoric can provide immunity from accusations of the sort of softheaded squeamishness that Nietzsche had predicted, Walter Berns lamented, and Michael Dukakis supposedly embodied on his way to catastrophic electoral defeat in 1988.

As more and more states amended their laws to authorize LWOP, the Supreme Court initially hinted at a willingness to scrutinize such sentences, as it does with the death penalty.[109] In *Solem v. Helm*,[110] the beneficiary of the Court's attention was a defendant sentenced to LWOP under a South Dakota habitual offender statute.[111] The trial judge had told Helm that his long record demonstrated that he was "beyond rehabilitation."[112] In rejecting this conclusion, the Supreme Court explained:

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105. Mario M. Cuomo, Editorial, *New York State Shouldn't Kill People*, N.Y. TIMES (June 17, 1989), http://www.nytimes.com/1989/06/17/opinion/new-york-state-shouldn-t-kill-people.html.

106. *See Mike Bloomberg on Crime*, ON ISSUES, http://www.ontheissues.org/2008/Mike_Bloomberg_Crime.htm (last visited Sept. 5, 2013).

107. Peter Applebome, *Bill to Repeal Death Penalty in Connecticut Goes to Malloy*, N.Y. TIMES, Apr. 12, 2012, at A21.

108. *Id.* at A21, A24.

109. The first Supreme Court case to raise the constitutionality of LWOP was *Schick v. Reed*, 419 U.S. 256 (1974). President Eisenhower commuted the death sentence of Maurice Schick on the condition that he never be eligible for release. *Id.* at 257; Comment, *Presidential Power of Commutation: From Death to Life Without Parole,* Schick v. Reed, *483 F.2d 1266 (D.C. Cir. 1973)*, 1973 WASH. UNIV. L. Q. 919, 919 & n.2. On Schick's ultimate fate, see *infra* note 294.

110. 463 U.S. 277 (1983).

111. *Id.* at 296–97.

112. *Id.* at 282–83.

> Helm . . . [was] not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.[113]

Helm was not a "professional" criminal if by this the Court meant someone who made a good living from the proceeds of crime; but crime seldom pays, and few criminals are so skilled as to eschew gainful employment or lawful government subsidies of any kind. The Court also made much of the fact that all of his crimes were "nonviolent."[114] Yet as the detective Sam Spade noted in a different context, one must be impressed by the sheer number—seven—of felony convictions Helm had accumulated over the course of his life.[115] At some point, as the dissenting Justices asked, is it reasonable to ask whether even a nonviolent offender is "incorrigible"?[116]

Helm was apparently addicted to both crime and alcohol, and no doubt the latter addition fueled the former. The Court's argument that an LWOP sentence would deprive him of any incentive to treat his alcoholism or enter "any other program of rehabilitation" would seem to raise the question, to which I plan to return: Does incarcerating someone, even for the duration of his life, extinguish all incentives to improve? In any event, no incentives or disincentives had so far pried Helm from the lure of alcohol (and crime) outside prison. Is it not possible that he would be more likely to remain sober (and law-abiding) in a supervised prison?

South Dakota, in seeking affirmance of Helm's sentence, pointed to *Rummel v. Estelle*,[117] a decision rendered just three years earlier. In that case, the Court upheld a life sentence *with* the possibility of parole imposed on a habitual offender of crimes comparable in severity to those of Jerry Helm.[118] As South Dakota argued, both inmates *could* be released before they died: Rummel

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113. *Id.* at 297 n.22.

114. Helm had been varied in his crimes, and at least one could arguably be categorized as violent. *See id.* at 279, 279–80 n.1 (noting that he had been convicted of burglary, albeit of the third degree).

115. After cataloging the seven reasons why he has to turn Brigid O'Shaughnessy in to the police, Sam Spade says, "Maybe some of them are unimportant. I won't argue about that. But look at the number of them." DASHIELL HAMMETT, THE MALTESE FALCON 263 (1930).

116. *Solem*, 463 U.S. at 317 (Burger, C.J., dissenting) ("Surely seven felony convictions warrant the conclusion that respondent is incorrigible.").

117. 445 U.S. 263 (1980).

118. *See id.* at 264–66. *Compare id.* at 265–66, *with Solem*, 463 U.S. at 281.

could be paroled, and Helm could receive executive clemency.[119] The Supreme Court rejected this argument:

> [P]arole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.[120]

Such language, drawing a sharp distinction between parole and commutation, foreshadowed concerns raised in the *Kafkaris* and *Vinter* cases, which were discussed earlier.[121] In this view, parole, which makes inmates eligible for release upon the satisfaction of articulated criteria, provides inmates clear guideposts, and thereby hope, in their aspiration for freedom. Commutation or clemency, which may or may not be exercised at the whim of an elected official, provides no such guideposts and extinguishes virtually all hope of release.

Yet if *Solem* intimated a possible movement in a European direction, fraught with qualms and equivocations about the harshness of LWOP, *Harmelin v. Michigan*,[122] decided just eight years later, returned America to its distinctively punitive path. In *Harmelin*, the Court upheld a mandatory LWOP sentence imposed on a defendant who possessed 672 grams of cocaine.[123] Justice Scalia, writing for a majority of the Court on this point, backtracked on the *Helm* Court's claim that LWOP radically differed from other life sentences. Although LWOP foreclosed some "flexible techniques for later reducing his sentence," others remained, such as "retroactive legislative reduction and executive clemency."[124] Justice Kennedy, in his concurring opinion, distinguished *Helm* on the basis of the severity of the crime (passing a no-account check versus possession of a large amount of cocaine). In theory, this intimated a willingness to apply meaningful scrutiny to LWOP sentences imposed for minor offenses.[125] In practice, however, this

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119. *Solem*, 463 U.S. at 300.

120. *Id.* at 300–01 (citations omitted).

121. *See supra* notes 67–74 and accompanying text. *Cf. Solem*, 463 U.S. at 303 ("The possibility of commutation is nothing more than a hope for an *ad hoc* exercise of clemency." (internal quotation marks omitted)).

122. 501 U.S. 957 (1991).

123. *Id.* at 961.

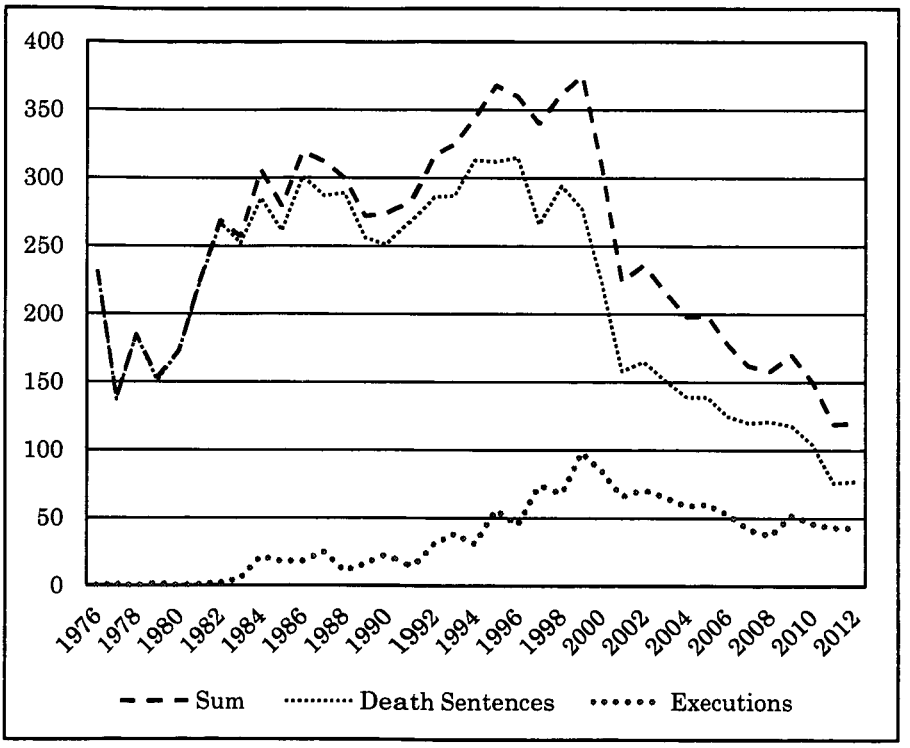
124. *Id.* at 996 (internal quotation marks omitted).

125. *Id.* at 1002 (Kennedy, J., concurring).

qualification proved easy to satisfy, as states typically reserved LWOP for offenses involving violence or drugs; repeat nonviolent offenders could be dispatched to prison for long determinate sentences.

With this small adjustment, LWOP had received Supreme Court validation, and it vaulted ahead of the death penalty in adoption and usage. The graph below tracks the death penalty from 1976 to the present[126]:

DEATH SENTENCES AND EXECUTIONS BY YEAR



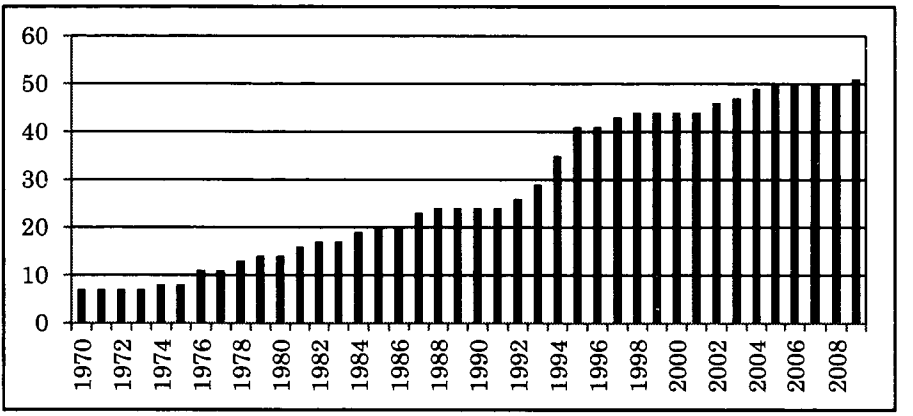
The number of executions in 2012, half its peak in 1999, still exceeds annual totals in the 1980s.[127] But if one adds the number of executions and death penalty sentences, the sum has plummeted

126. *Executions by Year Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year (last updated Oct. 10, 2013). One could argue that the "sum" double counts executions, as any inmate who was executed also received a death sentence. This is of course true, but several years separate the events. My point in summing here is to give a sense of the prominence of the death penalty each year, which could be said to reflect the number of trials that issued a death sentence plus the number of executions that actually occur.

127. *Id.*

and now is less than what it was in 1976.[128] While the death penalty beats a retreat, legislatures in the United States have, with the Supreme Court's endorsement, signed onto LWOP in growing numbers[129]:

U.S. JURISDICTIONS WITH LWOP



This graph understates the developments in the past forty years, as it is likely that the seven jurisdictions in which LWOP was technically a possibility in 1970 seldom imposed such a sentence. In any event, at this point, of the fifty-two jurisdictions in the United States (the fifty states plus the District of Columbia and the federal government), only one (Alaska) does not authorize such a sentence.[130] Nationwide data on the total number of inmates serving LWOP sentences are difficult to compile, but using three

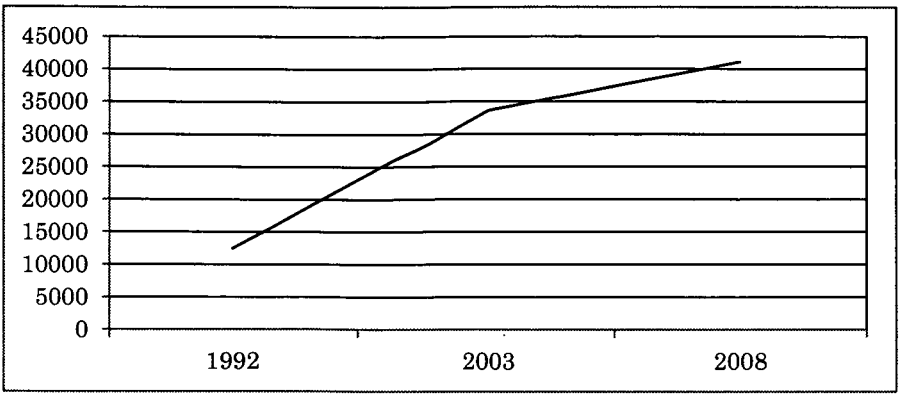
128. *Death Penalty Trends*, AMNESTY INT'L, http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-trends (last visited Sept. 30, 2013).

129. *Year that States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR. (Aug. 10, 2010), http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing.

130. *Id.* It is sometimes reported that New Mexico does not have LWOP, but when the state abolished the death penalty in 2009, it in fact adopted LWOP as a possibility. *See* N.M. STAT. ANN. § 31-18-14 (2009) ("When a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole."). Although a theoretical possibility, it does not appear that there are any persons serving LWOP in New Mexico prisons today. Telephone Interview with Alex Tomlin, Pub. Affairs Dir., N.M. Corr. Dep't (Sept. 10, 2013); Email from Jim Brewster, Gen. Counsel, N.M. Corr. Dep't, to author (Sept. 11, 2013, 4:04 PM) (on file with author); Email from Catherine Earl, Paralegal, Office of Gen. Counsel, N.M. Corr. Dep't, to author (Sept. 13, 2013, 6:51 PM) (on file with author).

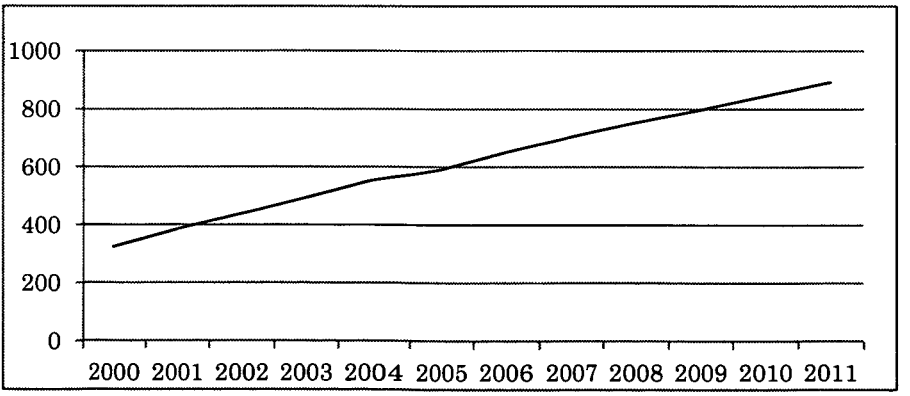
points, we may infer a dramatic escalation over the past twenty years:[131]

LIFE WITHOUT PAROLE SENTENCES



More reliable and granular data can be obtained on a state-by-state basis. Here is Virginia's experience with LWOP over the past decade:[132]

VIRGINIA LIFE WITHOUT PAROLE, 2000 TO 2011



In 2000, there were 324 LWOP inmates; in 2011, that figure had surged 170% and stood at 893.[133] It is possible that the

131. In 1992, a study found 12,453 LWOP inmates nationwide; a 2003 study found 33,633 LWOP inmates; a 2008 study found 41,095. *See* ASHLEY NELLIS & RYAN S. KING, SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 9–10 & fig.2 (2009), *available at* http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/No%20Exit-%20The%20Expanding%20Use%20of%20Life%20Sentences%20in%20America.pdf.

132. Email from Larry Traylor, Dir. of Commc'ns, Va. Dep't of Corr., to author (Feb. 22, 2012, 1:22 PM) (on file with author).

133. *Id.* By comparison, the total prison population increased only from 30,506 to 37,503, an increase of 23%. *See id.*

Commonwealth of Virginia now houses ten times the number of LWOP inmates as the entire continent of Europe. When Walter Berns worried that the abolition of the death penalty hinted at a softness and tenderness in his countrymen,[134] he failed to foresee the enthusiastic embrace of a sentence nearly as horrible. Can any nation that banishes 40,000 citizens truly be said to be "soft and tender"?[135]

C. *The European Turn in American LWOP Jurisprudence*

As state after state sentenced more and more defendants to LWOP, some Americans expressed misgivings. For starters, Justice Stevens struck several discordant notes in his dissenting opinion in *Harmelin*.

> I remain convinced that . . . the penalty of death . . . [is] unique because of "its absolute renunciation of all that is embodied in our concept of humanity." Nevertheless, a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished "criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." Serious as this defendant's crime was, I believe it is irrational to conclude that every similar offender is wholly incorrigible.[136]

In the first sentence, Stevens preserves the distinction between the death penalty and LWOP, suggesting that only the former renounces entirely "the concept of humanity." The remainder of the passage, however, collapses the distinction between LWOP and the death penalty. Stevens even quotes from Justice Stewart's critique of the death penalty in *Furman*. Like the death penalty, LWOP is said to be a repudiation of the "rehabilitative function." Only for criminals who are "wholly incorrigible," Stevens argues, is such a sentence appropriate.

Although *Harmelin* seemed to close the door to Supreme Court review of LWOP sentences, advocacy groups adopted a skillful litigation strategy—identifying sympathetic (juvenile) defendants. The strategy proved successful in *Graham* and *Miller*. Having beaten the "death is different" drum for twenty years, and just

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134. *See* BERNS, *supra* note 3, at 152–54.

135. *See* NIETZSCHE, *supra* note 1, at 112–13.

136. Harmelin v. Michigan, 501 U.S. 957, 1028 (1991) (Stevens, J., dissenting) (citations omitted) (quoting Furman v. Georgia 408 U.S. 238, 306–307 (1972) (Stewart, J., concurring)).

twenty years after *Harmelin*, the Court in this recent pair of cases hinted that there was merit after all to Justice Stevens's critique of LWOP. *Graham* and *Miller* both turned on the constitutionality of LWOP when imposed on juveniles, but much of the language in these opinions is broader in its implications. The remainder of this Part will sketch the arguments of the two cases with respect to the nature of LWOP. The argument is more elaborate in *Graham*, but it is fully adopted by the *Miller* Court and thereby cemented as the Supreme Court's current understanding of LWOP. Although there are several difficulties with this understanding, I postpone my criticisms until Subpart IV.A.

In *Graham*, the issue was the constitutionality of LWOP imposed on a juvenile for any crime other than homicide.[137] Addressing the proportionality of crime to punishment, Justice Kennedy, writing for four other Justices, begins with the assertion that LWOP is the "second most severe punishment permitted by law."[138] Yet, in a move reminiscent of Justice Stevens's dissenting opinion in *Harmelin*, Kennedy then suggests similarities between LWOP and the death sentence, among which is their irrevocability. LWOP's irrevocability proves to be a theme in the *Graham* opinion. The first time Kennedy invokes the idea ("the sentence alters the offender's life by a forfeiture that is irrevocable"), he qualifies it with an acknowledgment of the possibility of "executive clemency," but he adds that this is a possibility so remote that it "does not mitigate the harshness of the sentence."[139] A few pages later, Kennedy skips over the possibility of executive clemency, as well as other mechanisms for release. LWOP is said to be "an irrevocable judgment about the person's value and place in society."[140] And soon thereafter, clemency is completely forgotten. "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, *no chance* for reconciliation with society, no hope."[141]

LWOP as a denial of hope proves to be another theme of the *Graham* opinion. Two questions arise: first, does LWOP really extinguish an inmate's hope?, and second, assuming it does, so what? With respect to the first question, the Court's answer—yes—is intuitively plausible, but the opinion offers no supporting sociological and criminological data. Do inmates in fact experience LWOP as a sentence without hope? Do inmates sentenced to fifty years in prison, for example, experience their sentences as markedly

137. Graham v. Florida, 130 S. Ct. 2011, 2017–18 (2010).
138. *Id.* at 2027.
139. *Id.*
140. *Id.* at 2030, *quoted in* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).
141. *Graham*, 130 S. Ct. at 2032 (emphasis added); *see also Miller*, 132 S. Ct. at 2469 (describing LWOP as "irrevocably sentencing [defendants] to a lifetime in prison").

different from those sentenced to LWOP? Approaching the issue from another angle, one might inquire whether LWOP, as structured by prison authorities, intends to deprive inmates of all hope or whether prison authorities do what is feasible to promote or at least prolong hope. The Court does offer some cursory observations on this score. Citing, and accepting as true, an amicus brief, Justice Kennedy asserts that "defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates."[142] He reiterates this point later in the opinion: "[I]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration."[143] This suggests that LWOP is designed as a sentence of peculiar cruelty, imposing special liabilities and emphatically denying inmates all hope of an improved lot.

This brings us to the second question: Must the state preserve every inmate's "hope"? Having stipulated that LWOP extinguishes hope, the Court then posits that such a hard punishment is appropriate only upon a clear showing of the offender's incorrigibility. Only in such cases is the state relieved of the duty to provide the offender with some meaningful "hope." The *Graham* Court focused on juveniles who had been sentenced for crimes other than homicide, and it held that for such defendants, LWOP is categorically inappropriate.[144] LWOP, as a sentence that denies hope, is permissible only when the state can confidently conclude that the defendant is "incorrigible," which is rarely possible for juvenile nonhomicide offenders.[145] The *Miller* Court extended this reasoning, overturning *all* juvenile LWOP sentences that had arisen from "mandatory" sentencing schemes—that is, schemes that had deprived the judge of any discretion in imposing the appropriate punishment. Such "mandatory" LWOP sentences precluded consideration of those qualities—"immaturity, impetuosity, and failure to appreciate risks and consequences"—that are said to undermine confidence about the incorrigibility of a juvenile criminal and necessitate more nuanced sentencing procedures.[146]

The most basic charge in *Graham* and *Miller* is that LWOP "forswears altogether the rehabilitative ideal."[147] This ideal proves

142. *Graham*, 130 S. Ct. at 2030.

143. *Id.*

144. *Id.* at 2034.

145. *Id.* at 2032 (discussing the difficulty in "distinguish[ing] the few incorrigible juvenile offenders from the many that have the capacity for change"); *see also Miller*, 132 S. Ct. at 2465 (stating that "incorrigibility is inconsistent with youth") (quoting *Graham*, 130 S. Ct. at 2032).

146. *Miller*, 132 S. Ct. at 2468.

147. *Graham*, 130 S. Ct. at 2030; *see also Miller*, 132 S. Ct. at 2365 ("[LWOP] 'forswears altogether the rehabilitative ideal.'" (quoting *Graham*, 130 S. Ct. at 2030)).

elusive; indeed, Justice Kennedy concedes that the "concept of rehabilitation is imprecise."[148] The etymology of *rehabilitation* is *re*, or "again," and *habilitare*, or "to make fit."[149] This raises the question, make fit for what? Rehabilitation can be understood in a narrow sense of making the inmate fit again *as a citizen* and therefore ready for return to civil society. Or rehabilitation can be understood in a broader sense of making the inmate fit again *as a human being* and therefore worthy of recognition as a morally responsible agent.[150] The opinion encompasses both senses. The Court uses the word in the narrow sense of refitting an inmate for life outside prison walls and in the broader sense of stimulating self-improvement and moral reformation.

Whichever meaning one adopts, LWOP denies the possibility of rehabilitation. If intended in the narrow sense, LWOP means "no chance for reconciliation with society." If intended in the broader sense, LWOP bars inmates from most educational and vocational programs likely to promote self-improvement. According to the Court, with an LWOP sentence, the community announces that "good behavior and character improvement [by the inmate] are immaterial."[151] This phrase seems to leave open the possibility that an inmate sentenced to LWOP will in fact reform, somewhat in tension with the claim that he is incorrigible. But even if an inmate does manifest "character improvement," it is of no interest. An LWOP sentence is the community's pronouncement that the defendant is dead to it.

Graham and *Miller* embrace a vision of LWOP dating back to Beccaria, who portrayed his alternative to the death penalty as "perpetual enslavement" at "forced labor." But does this vision of LWOP do justice to the experience of LWOP today? The next two Parts explore the practice of LWOP, attending to the rhetoric that surrounds the sentence and the lives of inmates so incarcerated. What emerges is that the *Graham* and *Miller* Courts capture only a *partial* truth.

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148. *Graham*, 130 S. Ct. at 2029.

149. *See* 2 ERNEST WEEKLEY, AN ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 1217 (1967) (setting forth the etymology of "rehabilitate" by reference to "habilitate"); *see also* 1 *id.* at 679 (setting forth the etymology of "habilitate" as "*habilitare*, to make fit").

150. Professor Stephanos Bibas suggests that there is a "fundamental difference between rehabilitation and moral reform," with the former regarding "defendants not as moral agents who must learn lessons, but as animals or robots to be fixed." Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1430 (2003). This may capture "rehabilitation" as practiced in the movie and novel *A Clockwork Orange*, ANTHONY BURGESS, A CLOCKWORK ORANGE (1962), or today when sexual offenders are "cured" by chemical castration, but "rehabilitation" in common usage typically contemplates the idea of moral reform.

151. *Graham*, 130 S. Ct. at 2027 (quoting Naovarath v. Nevada, 779 P.2d 944, 944 (Nev. 1989)).

II. LIFE WITHOUT PAROLE AS HARD PUNISHMENT

This Part sketches an understanding of life without parole that is rooted in the ancient punishment of banishment. Now regarded as unconstitutional, banishment was historically one of the punishments used to enforce the criminal law. LWOP may be said to recreate much of the cruelty of banishment in the modern world. The community dispatches the defendant forever; he is stripped of virtually all the privileges of citizenship and rights of humanity; and he is stamped indelibly not simply as a felon but as the worst of felons, for whom the community feels at best no concern and at worst active loathing. The rhetoric surrounding LWOP, in sentencing hearings and everyday discourse, is in many ways consistent with the *Graham/Miller* vision of LWOP as a punishment that "forswears altogether the rehabilitative ideal," presupposes incorrigibility in the offender, and is almost purely vindictive in motivation.

A. Internal Banishment

In the biblical tradition, the chronologically first punishment was not death but banishment. God expelled Cain from Eden, who groaned that the punishment was "greater than [he] c[ould] bear."[152] Used extensively in ancient and medieval times, banishment could be imposed for a term of years, or for life in cases of the greatest crimes; in the latter form, banishment was often regarded as a punishment worse than death.[153] This theme is explored in some of the greatest works of Western literature. Euripides's heroes and heroines lament the horrors of exile;[154] Socrates prefers hemlock to banishment from Athens;[155] and Romeo, having murdered Tybalt, is despondent when told that the prince has mercifully spared his life:

> Ha, banishment! be merciful, say *death*;
> For exile hath more terror in his look,
> Much more than death: do not say *banishment*.[156]

Friar Lawrence chides Romeo for his ingratitude, and we may dismiss his speech as the overwrought pining of an adolescent lover. Yet the dismissive "we" in the prior sentence best describes deracinated modern elites, who complacently assume that Romeo,

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152. *Genesis* 4:13 (King James).

153. *See* SARA FORSDYKE, EXILE, OSTRACISM, AND DEMOCRACY: THE POLITICS OF EXPULSION IN ANCIENT GREECE 57 (2005) (discussing the theme of exile and referencing a quote from the poet Theognis: "There is no dear and faithful companion for an exile").

154. *Id.* at 236 (quoting EURIPIDES, HERACLIDAE).

155. PLATO, PHAEDO 61–63 (F. J. Church trans., The Bobbs-Merrill Co. 1951).

156. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 3.

banished from Verona, could find a Starbucks in Mantua and make new friends and meet an equally engaging young woman.

What makes life banishment such a grievous sentence is not simply the reduced opportunities for self-fulfillment; it is the realization that one's community hates one with such a passion that it actively wishes one gone *forever*. Consider the punishment imposed on the young philosopher Baruch Spinoza.[157] Having found Spinoza guilty of apostasy, the community, through a chief rabbi, pronounced his sentence:

> By decree of the angels and by the command of the holy men, we excommunicate, expel, curse and damn Baruch de Espinoza . . . . Cursed be he by day and cursed be he by night; cursed be he when he lies down and cursed be he when he rises up. Cursed be he when he goes out and cursed be he when he comes in. The Lord will not spare him, but then the anger of the Lord and his jealousy shall smoke against that man, and all the curses that are written in this book shall lie upon him, and the Lord shall blot out his name from under heaven. And the Lord shall separate him unto evil out of all the tribes of Israel, according to all the curses of the covenant that are written in this book of the law.[158]

The rabbi expresses a degree of hatred one would hardly expect when sending a wretched soul to the gallows. At such moments, even the worst of criminals is treated with a measure of sympathy. Indeed, from a Kantian or a religious perspective, the death penalty can appear more humane than banishment, either because it respects the offender as a human being[159] or is more likely to stimulate a self-reckoning salutary for one's spiritual health.[160] By contrast, "[t]he device of thrusting out of the group those who have broken its code is very ancient and constitutes the most fearful fate which the primitive law could inflict. The offender was cut off from his ancestral cult and . . . driven forth into the wild."[161]

Although an early Supreme Court case suggested that banishment was a punishment that "must belong to every government,"[162] Congress in the early years of the republic rejected

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157. *See* NADLER *supra* note 17, at 120.

158. *Id.*

159. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102–03 (John Ladd trans., The Bobbs-Merrill Co. 2d ed. 1965) (1797).

160. *See* Avery Cardinal Dulles, The Death Penalty: A Right to Life Issue, Laurence J. McGinley Lecture (Oct. 17, 2000), *available at* http://features.pewforum.org/death-penalty/reader/17.html ("The sentence of death . . . can and sometimes does move the condemned person to repentance and conversion.").

161. Theodore Plucknett, *Outlawry*, 11 ENCYC. SOC. SCI. 505 (1933).

162. Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 20 (1800) (opinion of Cushing, J.).

bills that articulated grounds for involuntary expatriation.[163] Over time, both in the United States and England, misgivings about such a punishment mounted.[164] This trend culminated in *Trop v. Dulles*,[165] in which the Supreme Court held that stripping a World War II deserter of citizenship and banishing him from the country violated the Eighth Amendment.[166] Forced expulsion would be inconsistent with "the dignity of man," the Court held, because it entails "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture . . . ."[167] It was, however, undisputed that the government could have simply executed Trop as a military deserter. By implication, then, extinguishing his life by hanging, electrocution, or the firing squad would neither entail his "total destruction" nor be "more primitive than torture." If *Trop* is intelligible, it is an articulation of the principle that the state can execute a defendant, but if it does not do so, it cannot preserve his life under conditions that amount to physical or mental torture. This would include branding him with the mark of Cain and expelling him forever from our midst.

My suggestion, taking its cue from suggestions in *Solem* and more elaborate musings in *Graham* and *Miller*, is that LWOP recreates the horror of ancient banishment in a modern, civilized, and constitutional garb. The critique of American prisons as a "carceral state" within the larger state, out of sight and out of mind of the general citizenry, is a familiar one in academic circles and even bears the endorsement of a Supreme Court Justice.[168] Although, technically, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[169] as a practical matter, inmates, particularly long-term ones, are stripped of many of the fundamental rights that one possesses as an American and even as a human being. For example,

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163. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

164. *See* United States v. Ju Toy, 198 U.S. 253, 270 (1905) (Brewer, J., dissenting) (rejecting banishment as "a mark of infamy"); Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758, 759 (1963) ("By the mid-nineteenth century, however, the English lost interest in banishing citizens.").

165. 356 U.S. 86 (1958).

166. *Id.* at 101.

167. *Id.* at 100–01.

168. *See, e.g.*, Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 328 (2011); Anthony Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html ("Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in the United States.") (rev. Aug. 14, 2003).

169. Turner v. Safley, 482 U.S. 78, 84 (1987).

incarcerated felons typically forfeit the right to vote and even procreate.[170] Moreover, American inmates are not counted for purposes of many "American" statistics, such as unemployment[171] and high school dropout rates,[172] and as victims, they are undercounted for certain crimes.[173]

Most of our incarcerated fellow citizens make their way back to America and are reintegrated, more or less, into civil society. For those sentenced to LWOP, however, the mark of Cain sets them apart. The law in some jurisdictions, through civil death statutes, is anachronistically explicit on this score. Such statutes pronounce the "death" of a defendant sentenced to life, stripping him as a matter of law of many basic rights as if he actually were dead.[174] The cruelty of such a gesture was recognized centuries ago. Blackstone wrote that civil death is appropriate only "when it is . . . clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society."[175] Statutes imposing "civil death," thus understood as pronouncing one a monster and a bane to human society, were gradually abolished,[176] but some remain, even surviving constitutional challenges.[177]

Consider Rhode Island's statute:

> Every person imprisoned in the adult correctional institutions for life shall, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations of any nature

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170. *See* Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003); Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2001).

171. *See* Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1216 (2012).

172. *See* Marie Gottschalk, *The Long Reach of the Carceral State: The Politics of Crime, Mass Imprisonment, and Penal Reform in the United States and Abroad*, 34 L. & SOC. INQUIRY 439, 444 (2009); CHRIS CHAPMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 1972–2008, at 2–3 (2010), *available at* http://nces.ed.gov/pubs2011/2011012.pdf.

173. JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 58 (7th ed. 2012) (asking "[d]oes incarceration actually reduce crime or merely redistribute it?").

174. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 79-a (McKinney 2009); R.I. GEN. LAWS § 13-6-1 (2002).

175. 4 WILLIAM BLACKSTONE, COMMENTARIES *373; *see also* Sarah C. Grady, Comment, *Civil Death Is Different: An Examination of a Post-*Graham *Challenge to Felon Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441, 444 (2012).

176. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1798 (2012).

177. Johnson v. Rockefeller, 365 F. Supp. 377, 381 (S.D.N.Y. 1973).

> whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of conviction.[178]

Although tamer than the rabbi's expulsion of Spinoza, this statute conveys, albeit in a legalistic and secular way, the same idea. The message to those sentenced to LWOP is: You are dead to us. Although few jurisdictions retain "civil death" statutes, Rhode Island law simply makes explicit what is implicit in LWOP wherever it exists. Rooted in the ancient practice of banishment, LWOP is a sentence that approximates and perhaps even exceeds the death penalty in its horror. It is, as Blackstone suggested, appropriate only for a "monster." As explored in the next Subpart, this captures one understanding of LWOP today, both in law and common rhetoric.

B. The Rhetoric of LWOP: For the Monsters Among Us

Along with a friend, Christopher Gribble snuck into the home of Kimberly Cates in a small town in New Hampshire, killed her with a machete for the thrill of it, and left her eleven-year-old daughter for dead, having stabbed her many times.[179] In sentencing Gribble, Judge Gillian Abramson said, "I believe the record will thoroughly support my belief that infinity is not enough jail time for you."[180] Owing to a quirk of New Hampshire law, which was later amended, Gribble was ineligible for the death penalty.[181] In lieu of death or infinity, Judge Abramson sentenced Gribble to LWOP.[182]

This Subpart will consider the rhetoric employed by judges, prosecutors, and victims (or their families) when holding or arguing that LWOP, as opposed to a determinate prison sentence, is appropriate. For our purposes, one can divide the cases in which LWOP arises as a potential sentence into two categories. In the first category of cases, LWOP is the maximum punishment allowable by law. This would be true in jurisdictions that do not authorize the death penalty or in other jurisdictions when the crime (a

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178. R.I. GEN. LAWS § 13-6-1 (2002). Even more terse is New York's statute, which provides that "a person sentenced to imprisonment for life is thereafter deemed civilly dead." N.Y. CIV. RIGHTS LAW § 79-a (McKinney 2009).

179. Joseph G. Cote, *Gribble Surprised Jaimie Had Black Belt*, TELEGRAPH (Mar. 24, 2011), http://www.nashuatelegraph.com/news/913397-196/gribble-surprised-jaimie-had-black-belt.html.

180. Joseph G. Cote, *Gribble Found Guilty, Sentenced to Life in Prison*, TELEGRAPH (Mar. 26, 2011), http://www.nashuatelegraph.com/news/913624-196/gribble-verdict-at-10-a.m..html. For a video of the entire sentencing, see WMUR-TV, Judge: "Infinity Not Enough Jail Time For You," YOUTUBE (Mar. 25, 2011), http://www.youtube.com/watch?v=fp6CO_o3yhE.

181. *See* N.H. REV. STAT. ANN. § 630:1 (LexisNexis 2007) (setting forth the limited circumstances under which a defendant can be found guilty of capital murder and subject to a possible death sentence).

182. Cote, *supra* note 179.

nonhomicide[183]) or the criminal (a minor or someone who is mentally retarded[184]) renders LWOP the most severe punishment consistent with the current understanding of the U.S. Constitution. In the second category of cases, LWOP is the second most severe possible punishment. This would be true in cases involving aggravated murders in those jurisdictions that retain the death penalty. In the first category of cases, the prosecutor may seek an LWOP sentence as the harshest possible sentence, while the defense attorney will urge the jury or judge to consider a lighter sentence, either life with the possibility of parole or a determinate prison term. In the second category of cases, the prosecutor may argue that the death penalty is appropriate, while the defense attorney will urge the jury to accept LWOP.

The *Graham* Court's claim that LWOP eschews the rehabilitative ideal is attentive to the rhetoric of the first category of cases, on which this Subpart focuses. Rhode Island provides a useful entry into such cases. There is no death penalty in Rhode Island, and by statute only certain homicides create the possibility of LWOP.[185] Trial judges are required to hold sentencing hearings in which aggravating and mitigating factors are weighed.[186] As a final check, the appeals court reviews LWOP sentences de novo.[187] Appellate opinions are, as a consequence, unusually detailed in their assessments of whether LWOP is warranted, with rich surveys of the penological justifications that support or undermine the sentence in individual cases.

What emerges from a review of judicial opinions is that, as the *Graham* Court's emphasis on incorrigibility would predict, trial and appellate judges link the imposition of LWOP to a conclusion that an offender is "beyond rehabilitation" and that, with respect to the possibility of character improvement, "there is no hope."[188] At times,

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183. *See* Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).

184. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005); Atkins v. Virginia, 536 U.S. 304, 321 (2002).

185. *See* R.I. GEN. LAWS §§ 11-23-2 to -3 (2002); State v. Tassone, 749 A.2d 1112, 1121 (R.I. 2000) (noting that "the imposition of a life sentence without the possibility of parole" is "the most severe sentence authorized by Rhode Island law").

186. R.I. GEN. LAWS §§ 12-19.2-1, 12-19.2-4 (2002).

187. *Id.* § 12-19.2-5; State v. Motyka, 893 A.2d 267, 281 (R.I. 2006) ("[T]he decision to impose a sentence of life imprisonment without the possibility of parole is . . . reviewed by this Court in a *de novo* manner.").

188. *Motyka*, 893 A.2d at 290; *see also* State v. Mlyniec, 15 A.3d 983, 1003 (R.I. 2011) ("The defendant's want of compunction, coupled with his troubling character and propensity for similar criminal activity, persuade this Court that it is unlikely he could ever be rehabilitated."); State v. Graham, 941 A.2d 848, 866–67 (R.I. 2008) ("[T]he trial justice's decision . . . appropriately was based on defendant's record, the circumstances of the crime, and the unlikelihood of defendant's rehabilitation."); State v. McManus, 941 A.2d 222, 238 (R.I. 2008) (determining that "the trial justice captured perfectly the defendant's bad

the ghastliness of a crime left a judge reeling from horror and grasping LWOP as the necessary sentence, given an offender's irredeemable character. In one case, for example, the judge observed that the crime "could have been accomplished only by a very vicious person who was so corrupted by evil as to be incapable of becoming a good and worthwhile citizen, and such a person should never be allowed to walk freely in our society."[189]

In assessing a defendant's character and amenability to rehabilitation, a trial judge often takes into account evidence of the defendant's character beyond the crime itself. Consider the case of Hamlet Lopez.[190] After terrorizing his ex-girlfriend for several months, he invaded her apartment, tortured her, and then stabbed her to death with a four-inch knife.[191] The trial judge recapitulated the bloody facts at the sentencing hearing and then ruminated on Lopez's "potential for rehabilitation."[192] His initial behavior after the crime (accusing the Providence police officers of committing the murder[193]) and his dishonest behavior at trial (lying about a medical issue[194]) were not encouraging. Surveying still more evidence, including testimony about his manipulative behavior and penchant for violence, the judge concluded that Lopez's "character flaw" was so profound that he would "never . . . [be] rehabilitated."[195] Reminiscent of Blackstone's caution about the use of civil death,[196] the trial judge concluded that Lopez was a "monster."[197]

As we broaden our scope beyond Rhode Island, statutorily designated crimes in many jurisdictions trigger mandatory or presumptive LWOP. Implicit in such laws is a legislative judgment that certain crimes are so infamous and bespeak such wanton characters that "rehabilitation is not a primary goal" in dispensing punishment.[198] Occasionally, even when bound by this legislative

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character and evil propensities" when the trial court, after surveying the defendant's twenty-year history of substance abuse and violence towards his wife, doubted whether there was any "possibility of meaningful rehabilitation").

189. State v. Brown, 898 A.2d 69, 86 (R.I. 2006).

190. State v. Lopez, 45 A.3d 1 (R.I. 2012).

191. *Id.* at 6, 8–9.

192. *Id.* at 24–25.

193. *Id.* at 25.

194. *Id.*

195. *Id.* at 25–26.

196. *See supra* note 175 and accompanying text (suggesting that civil death is only appropriate for "monsters").

197. *Lopez*, 45 A.3d at 26. The appeals court concurred, "The sheer brutality and depravity of defendant's crime, his want of remorse, coupled with his troubling character and propensity for similar criminal conduct, reinforce our conclusion that it is unlikely that defendant could ever be rehabilitated." *Id.* at 27; *cf.* State v. Sifuentes, 996 A.2d 1130, 1138 (R.I. 2010) ("The brutality and coldheartedness that must be present for one to carry out a murder in such a cruel manner are almost unfathomable.").

198. State v. Lebeau, 286 P.3d 1, 9 (Utah Ct. App. 2012).

judgment, a trial judge indulges in gratuitous reflections on a defendant's appalling character and heinous crimes. More commonly, when imposing LWOP as an exercise of discretion, a judge details the bases for the decision. In such cases, a defendant's plea that he is "not beyond rehabilitation" may be received with skepticism. In *People v. Jones*,[199] for example, the judge summarized the defendant's crimes in gruesome detail[200] and found that his appeals for mercy revealed "a total lack of remorse" and "a total lack of empathy for the feelings of the survivors."[201] Jones, the judge concluded, "really did not show rehabilitative potential."[202]

In canvassing sentencing hearings from many jurisdictions, one discerns certain themes. As already seen in Rhode Island, the monster metaphor and similarly heated rhetoric are commonplace:

- "[E]veryone in this room is afraid of monsters like you. People that come into their homes and rape their babies. . . . My world is not safe with you in it."[203]
- "[The defendant] [is] not a violent predator. He's a violent sexual predatory monster. That's what the [defendant] is, a monster. . . . He is a monster. There are no other words to describe him."[204]
- "To refer to [the defendant] as evil or disgusting was basically to articulate facts which were obvious or readily inferable from the evidence."[205]
- "You, sir, are clearly a monster."[206]

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199. 697 N.E.2d 457 (Ill. App. Ct. 1998).

200. *Id.* at 459. ("The [weapon] was 36 inches in length and 2 1/2 inches in diameter. It was only slightly larger in length and slightly smaller in its barrel than the Louisville Slugger employed by Mark McGwire. The trial court characterized it as a cudgel. Over the course of 8 1/2 hours it was applied with full force to various portions of Jeannie's body. At times, defendant would hold it with both hands like a baseball bat and swing for the fences with all the force he could muster. The defendant is six feet two inches in height and weighs 250 pounds. Of course, defendant did not swing at Jeannie continuously during the 8 1/2–hour 'disciplinary period.' Jeannie fell in and out of consciousness, a circumstance that on occasion brought a respite.").

201. *Id.* at 461; *cf.* Billips v. Commonwealth, 630 S.E.2d 340, 346 (Va. Ct. App. 2006) ("The trial judge further stated that he could 'see no expression by [Billips] of any type of true empathy or remorse or understanding of the consequences of [his] crimes.'" (alterations in original)).

202. *Jones*, 697 N.E.2d at 461.

203. Neloms v. State, 274 P.3d 161, 170–71 (Okla. Crim. App. 2012) (involving a defendant who had raped a four-year-old girl).

204. Vetter v. Ayers, No. CV 06-1728-R(RC), 2009 WL 3672829, at *13 (C.D. Cal. Nov. 3, 2009) (second alteration in original).

205. People v. Hayes, Nos. B171374, B171536, 2006 WL 2147614, at *8 (Cal. Ct. App. Aug. 2, 2006).

206. People v. Ball, No. 295851, 2011 WL 1086557, at *3 (Mich. Ct. App. Mar. 24, 2011) (summarizing the facts of the defendant's crime—an armed

- "Having tried this case and heard this case for four weeks, * * * having observed also the violent history and record of Mr. Long, it's clear to me that all three defendants, for whatever reason, don't value human life. I mean, the violence, the senseless, just indiscriminate violence absolutely, as everyone has said here, absolutely no remorse. It's chilling. It's chilling to see you three standing here, and I have no doubt in my mind that if you walked out the door of this courtroom, you would kill again, and it wouldn't bother you. And that's sad, but it's true."[207]
- "Evil of that magnitude must never be allowed to live in free society."[208]
- "You truly are an evil man."[209]

When not thus branding the criminal, a trial judge may focus on the crime, indulging in autobiographical reflections that it is the worst he or she has ever seen:

- "This is probably the most horrific case that I've been involved with in my entire career . . . ."[210]
- "[T]he judge indicated that this was the worst murder he had ever seen . . . ."[211]
- "The trial court specifically found that this was the most brutal case it had ever seen."[212]
- "This case is one of the worst I've ever seen. This lady was strangled, smothered, stabbed, beaten, and she had defensive wounds that literally almost cut her

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home invasion that culminated in the rape of a thirteen-year-old girl—as a prelude to imposing a prison term designed to approximate LWOP). For yet another "monster" sentenced to a term designed to put the defendant in "no different position than a defendant who has received a sentence of life without the possibility of parole," see People v. Foulk, No. B231469, 2012 WL 2336247, at *6 (Cal. Ct. App. June 20, 2012) ("Appellant was a monster and a manipulator.").

207. State v. Long, No. C-110160, 2012 WL 2550960, at *10 (Ohio Ct. App. July 3, 2012) (alteration in original).

208. Alaina Potrikus, *Oneida Native Chauncey "Champ" Winchell Sentenced to Life Without Parole for 2008 Murder of Mark Murray of Syracuse*, POST-STANDARD (Apr. 4, 2012, 1:52 PM), http://www.syracuse.com/news/index.ssf/2012/04/oneida_native_chauncey_champ_w.html (quoting the trial judge here).

209. Christina Hall, *Man Gets Life in Deaths of Mom, 3-Year-Old Boy*, DETROIT FREE PRESS, May 19, 2011, at A7 (quoting the trial judge here), *available at* https://advance.lexis.com/GoToContentView?requestid=ab4ab79-7701-ec0c-a8d2-44f3687ae63c&crid=6633dd14-beec-d69e-6391-9391a44ee.

210. People v. Carp, 828 N.W. 2d 685, 692 (Mich. Ct. App. 2012).

211. State v. Beach, No. H-11-005, 2012 WL 1900528, at *13–14 (Ohio Ct. App. May 25, 2012) (exercising discretion to sentence the defendant to LWOP, as opposed to a determinate term of years).

212. State v. Miler, 3d Dist. No. 11-10-10, 2011-Ohio-1304, at ¶ 5.

> hand off defending all that; and then she was put in a bathtub and drowned. I can't think of a much worse case that I've seen in at least ten years."[213]

- "This was the 'worst rape [the judge had] ever seen in all [her] career.'"[214]
- "The court thoroughly explained why it believed that this crime was one of the worst it had ever seen."[215]
- "[T]he trial judge stated that he could not imagine a more 'heinous offense' than that committed by [the defendant]."[216]

Also commonplace are references to medical testimony to the same effect:

- "Dr. Matthew Cox testified at trial that the child's neck injury was the worst he had ever seen in an infant . . . ."[217]
- "Dr. Head, who indicated that she has seen over a thousand children suspected of being maltreated, indicated that the traumatic genital and anal injuries she observed during [the victim's] examination were the worst she had ever seen."[218]
- "Jamie Fontenot, a nurse who assisted in removing [the victim] from [the defendant's] truck, testified that [the victim] 'was bruised from head to toe. Black eyes. Cuts everywhere. Just bruising I've never seen before, ever in my experience, my five years [. . .]. Just one of the worst things I've ever seen.'"[219]
- "The medical examiner who performed the autopsy on [the victim] described his injuries as being the 'worst she had ever seen.'"[220]

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213. Harrison v. Commonwealth, No. 1256-09-1, 2010 WL 5149356, at *3 (Va. Ct. App. Dec. 21, 2010).

214. People v. Cornelius, 94 Cal. Rptr. 2d 326, 328 (Ct. App. 2000) (alterations in original), *aff'd sub nom.* People v. Acosta, 52 P.3d 624 (Cal. 2002).

215. United States v. Singleton, 49 F.3d 129, 133 (5th Cir. 1995).

216. Billips v. Commonwealth, 630 S.E.2d 340, 346 (Va. Ct. App. 2006) (explaining that the trial judge rejected the jury's recommendation of fifty-five years and sentenced the defendant to life in prison), *rev'd on other grounds*, 652 S.E.2d 99 (Va. 2007).

217. Coronado v. State, 384 S.W.3d 919, 922 (Tex. Ct. App. 2012).

218. State v. Breaux, 2011-0015 (La. App. 1 Cir. 12/8/11); No. 2011 KA 0015, 2011 WL 6141636, at *2.

219. Garcia v. State, No. 09-10-00020-CR, 2011 WL 379117, at *7 (Tex. Ct. App. Feb. 2, 2011) (suspension points in original).

220. Page v. State, 995 A.2d 934, 950 (R.I. 2010).

- "[The six-month-old victim] . . . had massive retinal hemorrhaging which [the treating pediatrician] believed was the worst she had ever seen 'and that's including looking at them in textbooks and other places.'"[221]
- "The trial court specifically found that this was the most brutal case it had ever seen."[222]

And, of course, prosecutors, in urging the judge to impose LWOP, regularly cast defendants as the most evil they have ever seen.[223]

The brutal logic of LWOP emerges from this rhetoric. Given such defendants' incorrigibility, as evidenced by their atrocious crimes, evil character, and fraudulent professions of remorse, the community is justified in imposing a sentence that, as the *Graham* Court observed, "altogether forswears the rehabilitative ideal."[224] But even this justification fails to do justice to LWOP's punitive intent. What such a sentence conveys at a deeper level is the community's hatred and its desire that an inmate suffer a fate more horrible than the death penalty. The *Graham* Court's claim that inmates sentenced to LWOP are denied vocational and educational programs is a tame allusion to what is widely understood to be the expectation that an inmate sentenced to LWOP will suffer in prison:

- The sentencing judge told a convicted murderer, "You will awaken each day with nothing to look forward to, endless repetition, restriction, regimentation and isolation."[225]
- The sentencing hearing of one double murderer witnessed a parade of friends: "I hope he rots in hell the coward that he is when he hid in the basement waiting to shoot my sons. . . . I want him to suffer in prison for the rest of his (expletive) life."[226]
- A prosecutor explained why the state accepted an LWOP plea in a capital murder case: "Now the family

221. Dismuke v. State, No. 05-04-01856-CR, 2006 WL 3200113, at *3 (Tex. Ct. App. Nov. 7, 2006).

222. State v. Miler, 3d Dist. No. 11-10-10, 2011-Ohio-1304, at ¶ 5.

223. *See, e.g.*, Countryman v. Stokes, No. CV 06-1388 PSG (FFM), 2008 WL 1335934, at *5 (C.D. Cal. Apr. 8, 2008).

224. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010); *cf.* JAMES Q. WILSON, THINKING ABOUT CRIME 260 (rev. ed. 1975) ("Wicked people exist. Nothing avails except to set them apart from innocent people.").

225. Steve Fry, *Leftwich Gets Life Without Parole in Mogart Murder*, CJ ONLINE (Feb. 15, 2013, 10:07 AM), http://cjonline.com/news/2013-02-15/leftwich-gets-life-without-parole-morgart-murder.

226. *UPDATE: Witzel Sentenced for Murder*, NBC15, http://www.nbc15.com/home/headlines/33653284.html (last updated June 26, 2009).

knows that [the defendant] will rot in the state penitentiary."[227]

- The daughter of one murder victim told the court, "At first I wanted the death penalty, but I think it would be much better for [the defendant] to sit and rot in jail."[228]
- A murder victim's son told the sentencing judge, "I hope [the defendant] rots in jail the rest of his life."[229]
- A murder victim's father said, "Just putting them to death would be too easy for [the murderers], so I figure it would be more of a punishment to let them rot in jail for the rest of their lives."[230]
- A murder victim's brother said, "Now that this is over, [the victim] can rest in peace and we can move on and he can rot in jail . . . . He's a psychopath. I think he's getting what he deserved."[231]

It is not only friends and family of a victim who applaud the infliction of pain. A recurring reader comment after online articles about murderers and rapists sentenced to LWOP is that the defendant "rot in jail" for the remainder of his life and thereafter "burn in hell."[232]

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227. Griffin Pritchard, *Hawes Found Guilty in 2003 Murder*, PRATTVILLE PROGRESS, Apr. 2, 2008, *available at* http://alada19.com/inthenews2008/080319.htm.

228. *CA Woman Gets Life Term for Killing Ill Husband*, CBSNEWS (Mar. 23, 2012, 6:31 PM), http://www.cbsnews.com/8301-501363_162-57403725/ca-woman-gets-life-term-for-killing-ill-husband/.

229. Alaina Patrokus, *Killer Gets Life Without Parole*, POST-STANDARD (Syracuse), Apr. 5, 2012, at A3.

230. Gerry Smith, *Quinn Angers Some Families; Relatives of Some Victims Wanted Death Sentences to Be Carried out*, CHI. TRIB., Mar. 10, 2011, at C7.

231. Christina Hall, *Found Guilty a Second Time*, DETROIT FREE PRESS, Oct. 12, 2011, at A5.

232. *See, e.g.*, Celh, Comment to *Huckaby Gets Life Without Parole in Killing of Daughter's Playmate*, CNN (June 14, 2010, 4:43 PM), http://www.cnn.com/2010/CRIME/06/14/huckaby.sentenced/index.html?iref=allsearch ("Yeah, lets pay to get her counseling! When good honest people who are suffering from the abuse of people like this, 'can't' afford it. Lets help this piece of crap feel better while she rots in prison [. . .] Great logic." (suspension points in original)); Hyphenfinkle, Comment to *Mona Nelson Found Guilty in Murder of 12-Year-Old Jonathan Foster*, CLICK2HOUSTON (Aug. 27, 2013, 3:48 PM), http://www.click2houston.com/news/mona-nelson-found-guilty-in-murder-of-12yearold-jonathan-foster/-/1735978/21665494/-/ok2b4oz/-/index.html ("Hope she burns in Hell and on Earth. Crazy sicko."). The brother of Ariel Castro, the man recently convicted of holding three women hostage in Cleveland for nearly a decade, said, "I want him to suffer in that jail to the last extent." David K. Li, *Ariel Castro's Brothers: Rot in Jail Monster*, N.Y. POST (May 13, 2013, 2:25 PM), http://nypost.com/2013/05/13/ariel-castros-brothers-rot-in-jail-monster/. Consider also the statement of Israeli President Shimon Peres, who dismissed the possibility that he would grant clemency to the man who murdered Yitzak

This survey of the rhetoric in LWOP cases does not purport to be randomized and scientific; indeed, I will argue below that other cases present a different understanding of the sentence. This Subpart has focused on cases in which judges impose LWOP (or prison terms designed to approximate LWOP where that sentence is unavailable[233]) as opposed to determinate prison terms. Such cases involve judgments that a defendant and his crimes merit particularly severe punishment. Trial judges, prosecutors, and victims often embrace the idea, endorsed by the *Graham* and *Miller* opinions, that an LWOP sentence reflects a judgment that a defendant is "beyond rehabilitation" and merits the community's affirmative hatred. This hatred at times seems almost boundless. In this respect, the impulse to impose LWOP—that is, to proclaim a

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Rabin in 1995: "[Amir] should rot in jail." Michal Shmulovich, *Yitzak Rabin's Killer Should "Rot in Jail," Peres Says*, TIMES ISRAEL (Feb. 12, 2013, 5:39 PM), http://www.timesofisrael.com/yitzhak-rabins-killer-should-rot-in-jail-peres-says/.

233. One such case is *State v. Setagord*, 565 N.W.2d 506 (Wis. 1997), in which the trial judge sentenced the defendant, convicted of aggravated kidnapping, to LWOP. *Id.* at 508. The Court of Appeals reversed, holding that the relevant Wisconsin statute foreclosed the sentence. *Id.* Undeterred, the trial court sentenced the defendant to life with parole only possible after he had served 100 years in prison (i.e., at the age of 134). *Id.* at 509. In *Diamond v. State*, Nos. 09-11-00478-CR, 09-11-00479-CR, 2012 WL 1431232 (Tex. Ct. App. Apr. 25, 2012), the trial judge was foreclosed from sentencing the defendant, a minor, to LWOP, so instead imposed a ninety-nine-year sentence for aggravated robbery: "I believe in my heart that if you're given an opportunity to get back out on the street you're going to kill the next one." *Id.* at *4–5. In *State v. Bunch*, 7th Dist. No. 02 CA 196, 2005-Ohio-3309, the trial judge, foreclosed by law from imposing LWOP, sentenced a rapist to 115 years in prison. *Id.* at ¶ 35. His reasoning was cited in a sister case, *State v. Bundy*, 7th Dist. No. 02 CA 211, 2005-Ohio-3310:

> I want you to know that I've been here 27 years, first as a bailiff and then as a lawyer, doing the same thing these lawyers have done in this case, and now as a Judge. And I've seen and learned things that in criminal cases I pray my sons and my family never have to see and learn. But in all my time I've never seen a crime so vicious or so evil or so unforgivable. As I listened to this victim's testimony, I felt her fear. I felt her shame. I felt the terror that you reigned [sic] down upon her. I've never felt that in a case before. As you let her go after threatening to kill her and holding the gun to her face, I think I felt a relief, but it's not much relief because what you did will forever alter her life and the lives of all those close to her, and even the lives of every person in this community. You have imposed a life sentence of a very different sort upon this victim and upon her family.

Id. at ¶ 121 (DeGenaro, J., dissenting). Finally, in sentencing Jose Walle, a thirteen-year-old rapist who could not be sentenced to LWOP under *Graham*, to sixty-five years in prison, the trial judge mocked the Eighth Amendment argument made by defense counsel: "Is it not cruel and unusual punishment for the victims to have endured the rage, the brutality, the terror that your client exacted upon them?" Alexandra Zayas, *No Life Term? Then 65 Years*, ST. PETERSBURG TIMES, Nov. 18, 2010, at 1B.

human being vile and to banish him forever—converges in the intensity of its punitive intent, on the impulse to impose the death penalty.[234] Sending someone to an infinity in torment—the wish of the judge sentencing Christopher Gribble—is beyond human power, but to the extent that the community wishes to approximate such a hard and terrible sentence, LWOP is it.

III. LIFE WITHOUT PAROLE AS SOFT PUNISHMENT

When contrasted with a determinate prison sentence, life without parole appears harsh, but when the point of comparison is the death penalty, LWOP assumes a different character. The rhetoric in cases in which death and LWOP are the two possibilities reveals that the latter does not "forswear the rehabilitative ideal." LWOP is often embraced, or urged upon juries, precisely because it accommodates the possibility of reform and self-improvement. Furthermore, the *Graham* Court's claim that LWOP forecloses growth and maturation is grounded on a factual error: defendants sentenced to LWOP are generally *not* denied access to vocational and educational programs. And the characterization of LWOP as a sentence that crushes hope is also flawed. Inmates serving LWOP sentences can cherish hopes of material improvements and even release, and these hopes cannot be regarded as unrealistic.

A. LWOP Compared to the Death Penalty: A Sentence Consistent with Rehabilitation

Having been previously convicted of burglary and grand larceny, and while on bond for an armed bank robbery charge, Jason Lee Keller murdered Hat Nguyen, a convenience store owner and single mother of four children.[235] Tried and convicted of capital murder, the only issue at the sentencing hearing was LWOP or

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234. Other than concerns of political feasibility, it is unclear why a principled death penalty abolitionist would whole-heartedly embrace LWOP. Occasionally, death penalty abolitionists have been candid about their misgivings about LWOP. One said,

> [I]t's a real mistake to think that life-without-parole is the alternative to the death penalty, because what you're doing is buying into the psychology of the people that gave you the death penalty! You're saying that this person is basically worthless and needs to be dispensed with forever. . . . [Among] [t]hose of us who are [in contact with death row inmates], you're not [going to] find us willing to settle for this life-without-parole nonsense. Because I think that buys into this whole culture of death we have in this country, which is what we're trying to get away from!

David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 44–45 (1998) (quoting Reverend Joseph B. Ingle) (first and fourth alterations in original).

235. *See generally* Robin Fitzgerald, *Murderer Gets Death Penalty*, SUN HERALD (Biloxi), Oct. 9, 2009.

death.[236] Keller's lawyer pleaded with the jury that his client had shown remorse and that his behavior in prison demonstrated that he could "conform to rules."[237] Stipulating that "[Keller] is never getting out of prison—never," his counsel nonetheless asked, "Is he so far gone there's no hope for him in life?"[238]

Such impassioned argument points to what has long been understood to be the chasm separating a death sentence and all other punishments, including LWOP. In the decades that preceded *Graham* and *Miller*, the Court waxed eloquent on many occasions on how "death is different," for a death sentence is "*the* most irremediable and unfathomable of penalties."[239] As one district court explained, "Capital punishment is qualitatively different from any other form of criminal penalty we may impose. With *it*, we deny the convict any possibility of rehabilitation . . . ."[240]

The remainder of this Subpart focuses on the rhetoric of capital cases, in which LWOP is consistently depicted as a sentence that recognizes the possibility of hope, self-improvement, and rehabilitation. Indeed, a standard "mitigating factor" in capital sentencing, in which the stark issue is the death penalty or LWOP, is a defendant's "potential for rehabilitation."[241] Defense lawyers regularly claim that their clients possess this potential, with the necessary implication being that the potential will be realized *in prison*.[242] A defendant's actual rehabilitation while already

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236. *Id.*
237. *Id.*
238. *Id.*
239. Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion) (emphasis added).
240. United States v. Sampson, 335 F. Supp. 2d 166, 199 (D. Mass. 2004) (emphasis added) (quoting United States v. Pena-Gonzalez, 62 F. Supp. 2d 358, 360 (D.P.R. 1999)). The assumption that a death sentence is inconsistent with a desire for the defendant's rehabilitation is persuasively criticized in Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS. L. REV. 1231 (2013).
241. *See* Blanco v. Fla. Dep't of Corr., 688 F.3d 1211, 1220 & n.30 (11th Cir. 2012); *see also* State v. Dann, 207 P.3d 604, 628 (Ariz. 2009) ("A defendant's potential for rehabilitation may be considered a mitigating factor."); Rojem v. State, 207 P.3d 385, 397 n.41 (Okla. Crim. App. 2009) ("Jurors were instructed: [the defendant] showed a potential for rehabilitation . . . ."); State v. Robert, 820 N.W.2d 136, 143 (S.D. 2012) ("The [sentence] was based on appropriate considerations including . . . [the defendant's] ability to be rehabilitated . . . ."). The risk in raising an amenability-to-rehabilitation argument in a capital sentencing proceeding is that it opens the door to future dangerousness evidence. *See* Orme v. State, 25 So.3d 536, 549 (Fla. 2009). And airy claims of a defendant's "potential for rehabilitation" in prison are likely to be reviewed with skepticism, at least in the absence of any hard evidence. *See id.*; *see also* State v. Medrano, 914 P.2d 225, 227 (Ariz. 1996) ("Because of the obvious motive to fabricate, . . . self-serving testimony is subject to skepticism and may be deemed insufficient to establish mitigation.").
242. *See, e.g.*, State v. White, 982 P.2d 819, 826 (Ariz. 1999) (asserting, at a capital sentencing in favor of LWOP, the "capability of *rehabilitation within the limits of a life sentence in prison*" (emphasis added)); State v. Adams, 7th Dist.

incarcerated is said to be evidence of his ability to be a productive citizen while serving an LWOP sentence.[243] For example, in *Rojem v. State*,[244] the defendant argued that he had "grown spiritually while in prison by becoming a lay disciple of the Buddhist religion."[245] With his "potential for rehabilitation" thus realized, Rojem listed the manifold ways he could—while serving an LWOP sentence—benefit society: "contributing affirmatively to the lives of his family, friends, and fellow inmates, and . . . mak[ing] a contribution to society even in prison"; making it "possible for death row inmates to become organ donors"; and helping others by "knitting afghans that are then sold to help finance projects aiding other people."[246] Other cases are to the same effect, with defendants emphasizing the contributions they could make while serving an LWOP sentence.[247]

But will the jury wonder whether an inmate, if he succeeds in rehabilitating himself, will then be eligible for release? The question arose in *Commonwealth v. Cox*.[248] After a jury convicted the defendant of murder, a penalty phase followed in which counsel argued:

> I think a boy who is 18-years old should be given a chance to rehabilitate himself. The other alternative [to the death penalty] you have is life imprisonment. . . . Ladies and gentlemen, is that long enough to rehabilitate yourself? I ask you to give my client life imprisonment and not sentence him to die.[249]

No. 08 MA 246, 2011-Ohio-5361, at ¶ 100 ("[T]he defense raised the issue in the sentencing phase to show his rehabilitation while in prison . . . .").

243. *See* State v. Banks, No. W2005-02213-CCA-R3-DD, 2007 WL 1966039, at *7 (Tenn. Crim. App. July 6, 2007); *see also* Lott v. Trammell, 705 F.3d 1167, 1202–03 (10th Cir. 2013) (referring to defendant's improved behavior while on death row for over a decade as an indicator of future behavior); Franqui v. State, 804 So.2d 1185, 1190 (Fla. 2001) (referring to "self-improvement and faith since being incarcerated"). In *Wilkerson v. State*, 881 S.W.2d 321 (Tex. Crim. App. 1994), one judge dissented from an affirmance of a death penalty, arguing that that the majority had neglected evidence that the defendant was "rehabilitatable in prison." *Id.* at 328–30 (Baird, J., dissenting).

244. 207 P.3d 385 (Okla. Crim. App. 2009).

245. *Id.* at 397 n.41.

246. *Id.*

247. *See, e.g.*, Belmontes v. Brown, 414 F.3d 1094, 1140 (9th Cir. 2005) ("One of Belmontes' most important witnesses was Reverend Miller, who testified that Belmontes had been good at counseling young inmates not to repeat the mistakes that he had made and that he 'definitely would be used in the prison system for this kind of activity' if granted life without parole."); State v. Thomas, No. W2001-02701-CCA-R3-DD, 2004 WL 370297, at *39 (Tenn. Crim. App. Feb. 27, 2004) ("The Defendant's family indicated a belief that the Defendant could contribute to their lives, even if incarcerated.").

248. 863 A.2d 536, 551–52 (Pa. 2004).

249. *Id.* at 551.

This plea for the defendant's capacity for rehabilitation was ingeniously framed on appeal as ineffective assistance of counsel. The argument was that the trial lawyer's reference to "rehabilitation" would lead the jury to fear that the defendant, if not sentenced to death, could rehabilitate himself and then be released.[250] The Pennsylvania Supreme Court denied the appeal: "While making his closing argument, trial counsel highlighted the young age of [the defendant] and stressed that *he could be rehabilitated while in prison*."[251]

Finally, in voir dire questioning during capital cases, some prospective jurors observe that their hesitation in sentencing a defendant to death arises from a belief that all human beings are capable of being rehabilitated.[252] But if LWOP meant a foreswearing of the possibility of rehabilitation, as the *Graham* and *Miller* Courts argued, then such jurors should be ineligible in any case in which LWOP is a possible punishment. How could such jurors be expected to apply the law, and sentence deserving inmates to LWOP, if such a sentence forswore the possibility of rehabilitation? There is, however, no such thing as an LWOP-qualified jury, analogous to a death-qualified jury,[253] underscoring the difference between the punishments and the fact that in ordinary understanding, a life *in prison* allows for the possibility of reform *and rehabilitation*.

B. Educational and Vocational Opportunities

Americans no longer regard prisons in the Quaker tradition as houses of reformation.[254] In response to a perceived public clamor, as well as academic studies questioning the efficacy of rehabilitative programs, politicians since the 1990s have promoted a "no-frills" approach to prisons. Inmates have been, with much fanfare, stripped of amenities and privileges, such as television, weightlifting equipment, aerobics and theater classes, Pell Grants toward college

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250. *Id.* at 551–52.

251. *Id.* at 552 (emphasis added).

252. *See, e.g.*, Flippen v. Polk, No. 1:01CV00674, 2004 WL 1348220, at *13 (M.D.N.C. June 8, 2004) (questioning a prospective juror about her fitness to serve on a capital jury, to which she answered, "I can't imagine a case that I wouldn't vote for life imprisonment because I believe in the opportunity for rehabilitation for the involved party"); People v. Williams, 299 P.3d 1185, 1251 (Cal. 2013) ("[A prospective juror] said the death penalty would be inappropriate in cases where the defendant could be rehabilitated . . . ."); People v. Booker, 245 P.3d 366, 388 (Cal. 2011) (quoting a prospective juror, who wrote in questionnaire that "the death penalty should only be used in instances where there can be no rehabilitating").

253. *See* Lockhart v. McCree, 476 U.S. 162, 166–67 (1986).

254. *See, e.g.*, Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 PUNISHMENT & SOC'Y 161, 161 (2001).

tuition, and conjugal visits.[255] Americans, it is said, have abandoned the quixotic goal of rehabilitating inmates. Prisons exist to punish offenders and separate criminals from society.[256]

Against this backdrop, the *Graham* Court's claim that an LWOP sentence "forswears altogether the rehabilitative ideal" begs for clarification. Every prison sentence in America could be said to forswear the rehabilitative ideal. Is there something special about an LWOP sentence? Is the Court's point in *Graham* that the community *really* rejects the rehabilitative ideal when sentencing a defendant to LWOP? Recall, moreover, that LWOP is only a possible outcome in any given case when a serious crime was committed. The alternative to LWOP is thus likely a prison term denominated in decades. How much more does the community forswear the rehabilitative ideal when sentencing a defendant to LWOP as opposed to forty or fifty years in prison?

In addressing this question, we need further clarification on the reality of prison life. Notwithstanding the tough rhetoric generated by the "no-frills" prison movement, the claim that Americans have repudiated the rehabilitative ideal is belied, to some extent, by actual data. A recent comprehensive survey comparing prison programs in 1979 and 2005 found offerings to be roughly constant.[257] So the issue is at last identified: are inmates sentenced to LWOP treated differently in access to such prison programs when compared to other inmates, and in particular when compared to those inmates sentenced to long prison terms?

The *Graham* Court's answer is as follows: "A State's rejection of rehabilitation, moreover, goes beyond a mere expressive judgment. As one *amicus* notes, defendants serving LWOP sentences are often denied access to vocational training and other rehabilitative services

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255. *See* W. Wesley Johnson et al., *Getting Tough on Prisoners: Results from the National Corrections Executive Survey, 1995*, 43 CRIME & DELINQ. 24, 27–28 (1997); Adam Nossiter, *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, at 1.

256. *See generally* Graham Hughes, *Allen: The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, 73 J. CRIM. L. & CRIMINOLOGY 1322 (1982) (book review) (discussing prison as a means to ensure that criminals receive the punishment they deserve and cannot further harm the public). The California Criminal Code, amended in 1998, begins: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." CAL. PENAL CODE § 1170(a)(1) (Deering 2008).

257. Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 55–56 (2011). A study focused on Rhode Island revealed that during the 1950s, which was the supposed heyday of the rehabilitative ideal, prisons were in many respects worse than prisons of the 1990s. *See* LEO CARROLL, LAWFUL ORDER: A CASE STUDY OF CORRECTIONAL CRISIS AND REFORM 126 (1998).

that are available to other inmates."[258] The Court thus adopts as a factual finding an assertion made in an amicus brief written by an organization that has advocated the elimination of all LWOP sentences.[259] That brief, in turn, relies upon a six-page treatment in a policy paper.[260]

None of the claims was ever peer reviewed or subject to cross-examination, prompting my own survey of prison officials in forty-eight states (omitting New Mexico and Alaska, which have no inmates serving LWOP). Four states (Alabama, New York, Pennsylvania, and West Virginia) declined to respond to requests for information. Of the remaining forty-four, only four jurisdictions attach substantial disabilities to LWOP sentences—that is, such inmates are excluded from certain educational and vocational programs.[261] The remaining jurisdictions were roughly evenly divided.[262] In half, LWOP inmates incur minor disabilities, as other inmates may enjoy priority in program assignments.[263] In the other

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258. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (citing Brief for Sentencing Project as Amicus Curiae, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412)).

259. *See* NELLIS & KING, *supra* note 131, at 40 ("Life without parole sentences are costly, shortsighted, and ignore the potential for transformative personal growth.").

260. HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 67–72 (2005), *available at* www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf.

261. These jurisdictions are Florida, Idaho, Oregon, and Vermont. Records of all telephone interviews and e-mails are on file with the author: Telephone Interview with Allen Overstreet, Library Servs. Admin., Dep't of Corr. (June 29, 2012) (Florida); Telephone Interview with Renee James, Quality Control Coordinator, Dep't of Corr. (June 27, 2012) (Idaho); E-mail from Elizabeth Craig, Media Contact, Dep't of Corr. (Aug. 2, 2012, 2:14 PM) (Oregon); Telephone Interview with Kim Bushey, Program Servs. Dir., Dep't of Corr. (July 19, 2012) (Vermont).

262. Coding the states in these three categories (substantial, minor, and no disability) defied scientific precision. For example, Idaho was placed in the category of "substantial disability," although the Quality Control Coordinator reported that LWOP-sentenced inmates were *not* specifically denied access to programs. *See* Telephone Interview with Renee James, *supra* note 261. She went on, however, to identify four categories of programs (cognitive self-change, moral recognition therapy, therapeutic community, and sex offender treatment) to which such inmates were denied access. *See id.* On balance, it seemed appropriate to code Idaho as "substantial disability." Some states likewise straddled the line between minor and no disability, and my research assistants and I endeavored to sort them conscientiously.

263. These jurisdictions are Arizona, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, Washington, Wisconsin, and Wyoming. Records of all telephone interviews and e-mails are on file with the author: E-mail from Amy Funari, Admin. Assistant, Dep't of Corr. (July 3, 2012, 6:56 PM) (Arizona); Telephone Interview with Stacey Solano, Chief Pub. Info. Officer, Dep't of Corr. (July 3, 2012) (Illinois); Telephone Interview with Lettie Prell, Dir. of Research, Dep't of Corr. (July 6,

half, inmates serving LWOP sentences incur no disabilities compared to inmates serving determinate sentences, other than in access to reentry programs.[264] For example, Katherine Sanguinetti,

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2012) (Iowa); Telephone Interview with Margie Phelps, Dep't of Reentry Dir., Dep't of Corr. (July 12, 2012) (Kansas); Telephone Interview with Judy Plummer, Dir. of Special Projects & Commc'ns, Dep't of Corr. (July 18, 2012) (Maine); Telephone Interview with Sandy Brannan, Exec. Assistant for the Deputy Comm'r of Classification Programs & Reentry, Dep't of Corr. (July 9, 2012) (Massachusetts); Telephone Interview with Angela Mamelka, Departmental Analyst, Office of Offender Reentry (Summer 2012) (Michigan); Telephone Interview with Pat Owen, Dir. of Educ., Dep't of Corr. (July 13, 2012) (Mississippi); E-mail from Bob Anez, Commc'ns Dir., Dep't of Corr. (June 22, 2012, 4:45 PM) (Montana); Telephone Interview with Ginger Shurter, Cent. Records Office, Dep't of Corr. (Aug. 6, 2012) (Nebraska); E-mail from Brian Kolbert, Program Officer, Dep't of Corr. (July 9, 2012, 4:14 PM) (Nevada); E-mail from Jeff Lyons, Pub. Info. Officer, Dep't of Corr. (June 28, 2012, 7:57 AM) (New Hampshire); Telephone Interview with Doug Gerardi, Dir. of Office of Policy & Planning, Dep't of Corr. (Aug. 6, 2012) (New Jersey); E-mail from Steve Van Dine, Research Dir., Dep't of Rehab. & Corr. (July 25, 2012, 12:55 PM) (Ohio); Telephone Interview with Sharon Neumann, Offender Info. Servs., Dep't of Corr. (Aug. 6, 2012) (Oklahoma); Telephone Interview with Charles Bradberry, Dep't of Planning & Research, Dep't of Corr. (July 21, 2012) (South Carolina); E-mail from TDOC Webmaster, Dep't of Corr. (Sept. 4, 2012, 4:03 PM) (Tennessee); E-mail from D. Wayne Bennett, Dir. of Educ., Dep't of Corr. (July 23, 2012, 12:43 PM) (Virginia); E-mail from Tam Snell, Offender Programs & Classification, Dep't of Corr. (July 24, 2012, 1:10 PM) (Washington); E-mail from DOC WEB, Webmaster, Dep't of Corr. (July 24, 2012, 3:25 PM) (Wisconsin); Telephone Interview with Christy Hahn, Prison Reentry Program Manager, Dep't of Corr. (July 19, 2012) (Wyoming).

264. These jurisdictions are Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Minnesota, Missouri, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, and Utah. Records of all telephone interviews and e-mails are on file with the author: E-mail from Tiffanye Compton, Research & Planning Admin., Dep't of Corr. (Sept. 28, 2012, 5:31 PM) (Arkansas); Telephone Interview with Bill Sessa, Spokesman, Dep't of Corr. & Rehab. (July 25, 2012) (California); E-mail from Katherine Sanguinetti, Pub. Info. Officer, Dep't of Corr., (July 9, 2012, 3:01 PM) (Colorado); E-mail from DOC PIO, Pub. Info. Office, Dep't of Corr. (June 21, 2012, 7:15 AM) (Connecticut); Telephone Interview with Gail Stallings Minor, Chief Cmty. Relations, Dep't of Corr. (Aug. 7, 2012) (Delaware); Telephone Interview with Lynn McCoy, Operations Manager, Dep't of Corr. (July 11, 2012) (Georgia); E-mail from Frank Lopez, Adm'r, Dep't of Pub. Safety (Aug. 7, 2012, 2:44 PM) (Hawaii); Telephone Interview with Jerry Vance, Exec. Dir. of Programs, Dep't of Corr. (July 3, 2012) (Indiana); Telephone Interview with Chris Cropp, Educ. Research Assistant, Dep't of Corr. (July 13, 2012) (Kentucky); Telephone Interview with Mary Godfrey, Program Adm'r for Adult Insts., Dep't of Corr. (July 27, 2012) (Kentucky); Letter from James M. Le Blanc, Sec'y, Dep't of Pub. Safety & Corr. (July 31, 2012) (Louisiana); E-mail from Erin Julius, Pub. Info. Officer, Dep't of Pub. Safety & Corr. Servs. (July 5, 2012, 2:37 PM) (Maryland); E-mail from Grant Duwe, Dir. of Research & Evaluation, Dep't of Corr. (Aug. 8, 2012, 10:13 AM) (Minnesota); E-mail from Chris Cline, Dir. of Commc'ns, Dep't of Corr. (July 31, 2012, 4:38 PM) (Missouri); E-mail from Fay Lassiter, Assistant Chief of Program Servs., Dep't of Pub. Safety-Prisons (June 27, 2012, 3:18 PM) (North Carolina); E-mail from Tim Tausend, Pub. Info. Officer, Dep't of Corr. & Rehab.

the Public Information Officer for Colorado, reported that "[LWOP inmates] would not have access to pre-release courses. Other than that, they have the same access to programs as any other offenders."[265] James M. Le Blanc of the Louisiana Department of Public Safety and Corrections wrote that LWOP-sentenced inmates incur no disability in access to prison offerings: "In fact, it is important for us to continue to provide lifers with educational, vocational and rehabilitative programs . . . . We attribute our successes in part to providing purpose-driven, productive work to our lifers."[266]

Inmates sentenced to LWOP, even if originally housed in supermax prisons and thereby deprived of many of the amenities that make life worth living,[267] are seldom fated to spend the remainder of their days there. Almost every jurisdiction reported that inmates sentenced to LWOP are assigned to a facility with a security level in accordance with their behavior. In Arizona, for example, those sentenced to LWOP are first housed in maximum custody facilities but are eligible for transfer to more lenient "close custody" prisons after two years and to medium-security prisons after another three years.[268] Three of the four jurisdictions that attach a substantial disability to LWOP-sentenced inmates in terms of access to educational and vocational programs are fluid in the housing assignment of such inmates.[269]

(Aug. 10, 2012, 2:09 PM) (North Dakota); Telephone Interview with Jeffery Renzi, Assoc. Dir. of Planning & Research, Dep't of Corr. (July 19, 2012) (Rhode Island); Telephone Interview with Gen. Info., Corr. Dep't (July 21, 2012) (South Dakota); E-mail from Jennifer Jeffcoat, Rehab. Programs Div., Dep't of Corr. (July 9, 2012, 5:13 PM) (Texas); Telephone Interview with Stephen Gehrke, Research Assistant, Dep't of Corr. (July 19, 2012) (Utah).

265. E-mail from Katherine Sanguinetti, *supra* note 264.

266. Letter from James M. Le Blanc, *supra* note 264.

267. *See* Wilkinson v. Austin, 545 U.S. 209, 223–24 (2005).

268. *See* ARIZ. DEP'T OF CORRS., DEPARTMENT ORDER MANUAL 801.03-1.3 (2010), *available at* www.azcorrections.gov/Policies/800/0801.pdf; *see also* Telephone Interview with Bill Sessa, *supra* note 264 (reporting that in California, security level is based on behavior displayed within the institution rather than on the crime committed); E-mail from Katherine Sanguinetti, *supra* note 264 (reporting that in Colorado, LWOP inmates "are able to move through the system via our classification system either progressively or regressively based on their behavior"); Telephone Interview with Lynn McCoy, *supra* note 264 (reporting that in Georgia, security level is based on behavior over time); E-mail from Fay Lassiter, supra note 264 ("The LWOP inmates [in North Carolina] would start out in a higher level security facility, and based on good behavior and time served they can progress to a lower security facility.").

269. *See* Telephone Interview with Allen Overstreet, *supra* note 261 (reporting that in Florida, LWOP inmates are assigned to facilities with some level of security fencing and continuous staff supervision but, with this qualification, any facility); Telephone Interview with Renee James, *supra* note 261 (reporting that in Idaho, LWOP inmates spend the first six months in a high-security facility, but with good behavior can eventually move to medium security); E-mail from Elizabeth Craig, *supra* note 261 (reporting that in

My own findings are broadly supported by the work of others. In 2011, doctoral student Glenn Abraham surveyed inmates sentenced to LWOP in Ohio prisons as well as the wardens overseeing them, and his findings contradict the assertions of the *Graham* Court.[270] He found no evidence that inmates serving LWOP are denied access to any programs available to long-term inmates.[271] To the contrary, here is one inmate in his own words:

> I got the piano really for winter because rec's (the outdoor recreation area) pretty much closed. I wanted stuff to occupy my time that I enjoy . . . . It's stuff to kill time but obviously to enjoy the time.[272]

Other inmates reported writing poetry, watching news and sports, and cultivating an interest in current affairs.[273] Most inmates reported being in "Merit Status" or "Super Merit Status," entitling them to better housing assignments.[274] Abraham's research suggests, moreover, that the majority of prison wardens regarded it as their goal to help those serving LWOP "make a positive adjustment."[275] To be sure, the reasons included "the pragmatic consideration that those who do adjust well are easier to manage," but wardens also claimed a "concern for the welfare of [the inmates as] individuals."[276] Wardens reported that they try to "assimilate [LWOP inmates] into the positive aspects" of prison; "ensure [that] they too have access to work assignments, school assignments, self-help programs, etc."; strive to make inmates feel that their lives are "meaningful"; and aim to make them be "productive citizens within the prison community."[277]

Oregon, LWOP inmates are automatically sentenced to maximum security, but can be transferred to medium security if they are well behaved). *But see* Telephone Interview with Kim Bushey, *supra* note 261 (reporting that in Vermont, LWOP inmates are incarcerated in maximum-security prisons).

270. *See generally* Glenn J. Abraham, Prisoners Serving Sentences of Life Without Parole: A Qualitative Study and Survey (July 15, 2011) (unpublished Ph.D. dissertation, University of Kentucky) (available at http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1817&context=gradschool_diss) (examining how male prisoners serving sentences of LWOP adapt to the probability that they will be in prison for the duration of their lives).

271. *Id.* at 118–37 (discussing LWOP prisoners' access to employment opportunities, single-cell rooms, and numerous recreational activities).

272. *Id.* at 132.

273. *Id.* at 131–32.

274. *See id.* at 123–24.

275. *Id.* at 174.

276. *Id.*

277. *Id.* at 175; *see also* People v. Hamilton, 200 P.3d 898, 958–59 (Cal. 2009) ("James Park, a retired associate warden with the California Department of Corrections and Rehabilitation, testified [that] . . . . if defendant were given a sentence of life without the possibility of parole he could be reclassified and placed in a facility where he would have the opportunity to continue producing

Another more informal survey was conducted by Professor Robert Blecker, who has traveled widely to prisons and interviewed many inmates and wardens.[278] At least by their own accounts, wardens across the country disclaim any interest in actively punishing inmates, even those who have committed the most heinous of crimes.[279] Blecker describes the comforts enjoyed by inmates sentenced to LWOP: "My video camera has recorded LWOPers playing softball—in uniforms, baseball uniforms—on baseball fields with chalked base paths, swinging for the fences (albeit topped with barbed wire), and rounding the bases to the cheers and high-fives of teammates and buddies."[280] Yet another scholar who has studied the issue, Professor David McCord, writes that, "lifers are not usually segregated in a special unit, but are mixed in with the general prison population."[281] Even when LWOP-sentenced inmates are housed in high-security facilities, McCord observes, they are often able to secure positions entitling them to preferential treatment.[282] To be clear, no one would claim that inmates serving LWOP have access to offerings as varied and well funded as students attending Phillips Exeter Academy or Princeton University. Far from it. But the question is whether LWOP-sentenced inmates are relatively disadvantaged compared to inmates serving long prison terms. And the answer to that question is overwhelmingly negative.

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works of art and could lead a useful, productive life."). An older study of twenty-two inmates serving LWOP in Utah State Prison reached many of the same conclusions. Doctoral student Sandra McGunigall-Smith quotes one "typical" officer, "I'm as comfortable with [inmates serving LWOP] as with any inmate. An inmate is an inmate to me. I view them all as the same level." Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America's Other Death Penalty*, 88 PRISON J. 328, 330 (2008) (citing work that culminated in Sandra McGunigall-Smith, Men of a Thousand Days: Death-Sentenced Inmates at Utah State Prison (2004) (unpublished doctoral dissertation, University of Wales, Bangor) (on file with author)). Another officer reports that inmates serving LWOP "cope probably better" than other inmates. *Id.* at 331. "[T]hey learn how to work the system. They have the best jobs and they know how to get what they want. Their disciplinary records are smaller." *Id.* McGunigall-Smith's study does go on to explore the emotional difficulties encountered by inmates serving LWOP, *id.* at 336–44, but her study undercuts claims that an LWOP sentence operates to deprive inmates of educational or vocational opportunities.

278. Robert Blecker, *Less Than We Might: Meditations on Life in Prison Without Parole*, 23 FED. SENT'G REP. 10, 10 (2010).

279. *Id.* at 13 ("The judge says this guy's doing life without [parole]," one warden, for example, told Blecker. "Our job is to make sure he does it. Our job is not to punish.").

280. *Id.* at 15.

281. McCord, *supra* note 234, at 54.

282. *See id.* at 55.

As a final check, consider Louisiana's Angola prison, where 70% of the roughly 5,000 inmates are serving life without parole.[283] All of Angola's inmates, excluding those on death row, are eligible to participate in an annual rodeo.[284] Angola's warden, perhaps the most famous American to hold that position, is Burl Cain.[285] Somewhat controversially, Cain aims to promote "moral rehabilitation" through religious inspiration. Those unsympathetic to his avowedly Christian focus may criticize his methods, but the mere fact that he employs them reflects a paternalistic concern for the inmates in his charge. And any such concern is inconsistent with the view that those sentenced to LWOP should be written off and left to "rot in jail" or "burn in hell."

C. *The Persistence of Hope*

A motif decorating the *Graham* opinion, as well as much academic commentary, is that LWOP extinguishes "hope."[286] Consider, then, two twenty-five-year-old murderers, one sentenced to LWOP and the other sentenced to fifty years, which in a typical American jurisdiction might entail the possibility of release in four decades. The Court in *Graham* assumes that hope is either present or not, but reality here, as is often the case, defies binary categorization. Perhaps the inmate sentenced to fifty years is more hopeful of release than the inmate sentenced to LWOP, but quantifying "hope" would require a nuanced metric. On the one hand, the inmate looking ahead to the prospect of four decades in prison is probably not radiant with hope. On the other hand, even the inmate sentenced to LWOP, plunged in the darkest despondency, may discern rays of light.

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283. *See* DEP'T OF PUB. SAFETY & CORR., LOUISIANA PUBLIC SAFETY & CORRECTIONS BRIEFING BOOK 32, 42 (2013), *available at* http://www.doc.la.gov/wp-content/uploads/2009/10/Complete-Briefing-Book-January-2013.pdf; *West Florida Parishes Region*, LA. DEP'T OF CORR., www.doc.la.goc/regional-general-population-information/ (last visited Sept. 18, 2013).

284. *See* Molly Hennessy-Fiske, *Prison Rodeo Offers Hope Where It Is Lacking*, L.A. TIMES (Nov. 27, 2012), http://articles.latimes.com/2012/nov/27/nation/la-na-adv-prison-rodeo-20121128.

285. *See* James Ridgeway, *The Overseer*, MOTHER JONES, July–Aug. 2011, at 44, 44.

286. *See* Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (finding that LWOP "deprives the convict of the most basic liberties without giving hope of restoration"); *id.* (writing that LWOP means "denial of hope"); *id.* at 2032 (noting that LWOP means "no chance for reconciliation with society, no hope"); Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 75 (2010) ("Life imprisonment without parole review is a distinctively severe sentence in that it denies the prisoner both liberty and all hope for future release.").

1. Appeals

For starters, there is the possibility of a successful appeal. Such a result is uncommon and even rare. But rare is not never. Spin a roulette wheel enough times, and you are guaranteed to see the ball bounce into one of the two green numbers. Alternatively put, given the law of large numbers, some inmates are certain to prevail on appeal.[287] Why not me, the inmate wonders—and why not indeed? The prospect of a successful appeal, however small the odds, can nourish hope.[288] How else are we to account for the many inmates serving LWOP sentences tirelessly laboring in the prison law library?

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287. Consider five examples:

1. Marie LaPinta. Convicted of murdering her husband in 1983, her LWOP sentence was overturned when a court found her trial lawyers had been ineffective. *N.Y. Woman Released After 2 Decades in Prison*, NBC NEWS (May 25, 2005), http://www.nbcnews.com/id/7984243/#.UnudNpTwJgI.
2. Sheila Deverux. Convicted of drug trafficking in 2005, her LWOP sentence was overturned and she was released in 2011, when it emerged that police officers who had participated in her prosecution were named in connection with a federal corruption investigation, even though there was no apparent connection between that corruption and her conviction. Ziva Branstetter, *Judge Throws out Tulsa's Woman's Life Without Parole Sentence*, TULSA WORLD (June 16, 2011, 5:12 PM), http://www.tulsaworld.com/article.aspx/Judge_throws_out_Tulsa_womans_life_without_parole_sentence/20110616_14_0_hrimgs184731.
3. Terry Harrington and Curtis McGhee, Jr. Convicted of murder in 1977, their LWOP sentences were overturned in 2003 in light of evidence that the state's key witness was a "liar and perjurer." Nina Totenberg, *Can Prosecutors Be Sued by People They Framed?*, NPR (Nov. 4, 2009, 12:01 AM), http://www.npr.org/templates/story/story.php?storyId=120069519.
4. Richard Lloyd Anderson. Convicted of murder in 2004, his LWOP sentence was overturned and a resentencing ordered in light of the state's truth-in-sentencing law. Anderson v. State, 130 P.3d 273, 278 (Okla. Crim. App. 2006).
5. Peter Limone, Enrico Tameleo, Louis Greco, and Joseph Salvati. Convicted of murder in 1968, they were sentenced to death, soon reduced to life, but were released thirty years later in light of police misconduct. Limone v. United States, 497 F. Supp. 2d 143, 151 (D. Mass. 2007).

288. *See* Lloyd R. Cohen, *The Lure of the Lottery*, 36 WAKE FOREST L. REV. 705, 716 (2001) ("In the world of hopes, dreams, and possibilities, as the probability of the hoped-for liberating event grows vanishingly small, it becomes all the more important that it be undisputedly real and not simply rest on the metaphysical proposition that anything is possible.").

2. Executive Clemency

Although electorally accountable officials are loath to deploy political capital on criminals, executive clemency does occur, sometimes to the benefit of unsympathetic defendants. For example, Sergeant Maurice Schick, convicted of raping an eight-year-old girl,[289] was not once but twice the recipient of executive clemency. Schick was sentenced to death in 1956, but President Eisenhower commuted the sentence to life in prison, attaching the condition that Schick be forever ineligible for parole.[290] The Supreme Court in *Schick v. Reed*[291] rejected his challenge to the "no parole" condition and in passing upheld the constitutionality of an LWOP sentence.[292] *Schick* was apparently the first time the Supreme Court opined on an LWOP sentence, and it is cited today as a foundational case.[293] Virtually never remarked upon, however, is that just two years after his unsuccessful appeal, President Ford mooted the case: he exercised his clemency power to commute Schick's sentence, making him eligible for release.[294]

In the *Graham* and *Miller* opinions, as well as in academic commentary,[295] the odds of executive clemency are treated as an asymptotic approximation of zero. Yet the foundational case of the Court's LWOP jurisprudence undercuts this claim. Presidents and governors exercise clemency for a variety of reasons, such as an offender's youth,[296] difficult upbringing,[297] minor role in a crime,[298]

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289. Schick v. Reed, 419 U.S. 256, 257 (1974); Wright, *supra* note 7, at 534–35.

290. *Schick*, 419 U.S. at 256; Wright, *supra* note 7, at 534–35.

291. *Schick*, 419 U.S. at 256.

292. *Id.* at 267.

293. *See* Wright, *supra* note 7, at 535 (noting that "an imposing amount of precedent has developed based upon *Schick*").

294. *See* Presidential Pardon by President Gerald Ford (Jan. 17, 1976) (on file with author) ("Maurice Leroy Schick is hereby granted the rights, privileges, claims or benefits of parole."). It seems that Schick was released. *See* Richard Serrano, *Pvt. John Bennett Is the Only U.S. Soldier Executed for Rape in Peacetime*, L.A. TIMES (Sept. 10, 2000), http://articles.latimes.com/2000/sep/10/magazine/tm-18406/3 (noting that Schick "was freed"). An online death certificate for a Maurice L. Schick, whose age matches that of Sergeant Schick, reveals that when he died, he was a resident of Palm Beach County, Florida, where there are no federal prisons. *Maurice L Schick*, ANCIENT FACES, http://www.ancientfaces.com/person/maurice-l-schick/24063123 (last visited Oct. 21, 2013).

295. Nellis, *supra* note 19, at 451.

296. Convicted of a murder committed when she was 16, Sarah Kruzan had her sentence commuted by California Governor Schwarzenegger to twenty-five years, which was subsequently further reduced, noting her youth at the time of the crime. Amita Sharma, *New Deal Allows Sara Kruzan to Seek Parole in 1995 Murder Case*, KPBS (Jan. 18, 2013), http://www.kpbs.org/news/2013/jan/18/new-deal-allows-sara-kruzan-seek-parole-1995-murde/.

297. Convicted of murdering her father, Stacey Lannert's LWOP sentence was commuted to twenty years by Missouri Governor Blunt, citing the sexual

or advanced age.[299] In Nevada, for example, between 1975 and 1989, seventeen inmates sentenced to LWOP were released, and another five had their sentences commuted to life with the possibility of parole.[300] Some governors, moved by "religious and moral convictions," have been notably receptive to clemency pleas.[301] Massachusetts Governor Michael Dukakis made fifty-five inmates serving LWOP sentences eligible for work release programs,[302] and Arkansas Governor Mike Huckabee commuted dozens of sentences, including some that approximated LWOP.[303] Not all recipients of clemency seized the opportunity to reform their lives,[304] which complicated the presidential ambitions of Dukakis and Huckabee and will likely make current and future governors warier of showing leniency.[305]

Yet inmates indulging hope of executive release need not rely upon the kindness of governors: purely financial consideration may drive executive clemency decisions. As inmates age, the cost of their incarceration evolves. Young inmates, brimming with energy, can be troublesome and costly; those of middle age adjust and prove manageable; and the old ones, accumulating physical ailments, then

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abuse she had suffered. *See* Jennie Yabroff, *Why She Killed Her Father*, DAILY BEAST (Mar. 13, 2011, 10:00 AM), http://www.thedailybeast.com/newsweek/2011/03/13/why-she-killed-her-father.html.

298. Convicted of murders in the 1970s, Keith O. Smith, William Fultz, and Tyrone A. Werts had their sentences commuted by Pennsylvania Governor Rendell, citing their ancillary roles in the crimes. Mark Scolforo, *Rendell Commutes Life Sentences of 3 Pa. Murderers*, DEL. COUNTY DAILY TIMES (Pennsylvania), Dec. 30, 2010, *available at* http://www.delcotimes.com/articles/2010/12/30/news/doc4d1cbb6b3e962106706333.txt.

299. Convicted of murdering a toddler when she was twenty years old, Betty Smithey was sentenced to LWOP, but Arizona Governor Jan Bewer commuted her sentence to forty-nine years to life, citing Smithey's advanced age. Bob Ortega, *Woman Walks Free After 49 Years in Arizona Prison*, AZCENTRAL (Aug. 13, 2012, 11:18 PM), http://www.azcentral.com/news/articles/20120813woman-walks-free-after-49-years-arizona-prison.html.

300. *See* Sumner v. Shuman, 483 U.S. 66, 83–84 n.11 (1987).

301. *See* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 327 (2012).

302. *See* Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641, 1670 n.117 (2004) (reviewing BANNER, *supra* note 88.

303. *See* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009).

304. Eleven of the fifty-five defendants Dukakis allowed on work release programs escaped, and five of those committed serious crimes. *See* Cottrol, *supra* note 302. One of the recipients of Huckabee's clemency murdered four police officers. *See* Sadie Bass, *Why Was Suspected Cop Shooter NOT in Jail?*, ABC NEWS (Nov. 30, 2009, 12:26 PM), http://abcnews.go.com/blogs/headlines/2009/11/why-was-suspected-cop-shooter-not-in-jail/.

305. *See* Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. C.L. & C.R. 191, 194 (2003).

pose a financial burden as medical costs soar.[306] Significantly, Medicare and Medicaid do not cover incarcerated persons.[307] If, however, a state releases a prisoner, it displaces some of the cost of medical treatment onto the federal government. It would hardly be surprising if governors, responding to such incentives, found it in their hearts to release elderly inmates, even those sentenced to LWOP.[308] Many states already have mechanisms that provide for geriatric release,[309] and it seems reasonable to expect—and hope, if one were an inmate[310]—that such mechanisms will expand, as states opportunistically shed burdens onto the federal government.[311]

3. Change in Laws

Apart from executive clemency, geriatric relief, or vindication in an appeal that corrects legal error in an individual case, there is the possibility of a change in the law that sweeps in a category of inmates. That change can arise from a legislative amendment, applied retroactively, when the community recalibrates its opinion on the appropriate punishment for certain crimes.[312] Or systematic

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306. *See generally* Timothy Curtin, *The Continuing Problem of America's Aging Prison Population and the Search for a Cost-effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473 (2007) (discussing issues facing America's aging prison population). Consider, for example, the case of one eighty-two-year-old female inmate in California whose medical treatment for renal dialysis is $436,000 each year. *See* Nicole M. Murphy, Comment, *Dying To Be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1693 (2012).

307. *See* Murphy, *supra* note 306.

308. Illustrative is the case of Steven Martinez, who was sentenced to 157 years in prison in 1997 (effectively LWOP, given California parole law). *See* Stacy-Ann Facey, *Quadriplegic Rapist to Be Freed from Prison*, EXAMINER (Nov. 16, 2012), http://www.examiner.com/article/quadriplegic-rapist-to-be-freed-from-prison?cid=taboola_inbound. As the result of a prison attack a decade ago, Martinez was costing California $625,000 per year. *Id.* The State released Martinez in 2012, thereby displacing some of that burden onto the federal government. *Id.*

309. *See* TINA CHIU, CTR. ON SENTENCING & CORR., IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 7 (2010), *available at* http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf.

310. *See* Abraham, *supra* note 270, at 138 (noting that inmates serving LWOP in Ohio speculated that financial considerations might result in the abolition of LWOP).

311. Also possible are judicial decisions holding prison conditions in violation of the Eighth Amendment, which might spur governors to release many inmates, including those sentenced long ago to LWOP. In response to a Supreme Court decision, California was compelled in 2011 to release 11,000 inmates prior to their expected release dates. *See* Jennifer Medina, *California Begins Moving Prisoners*, N.Y. TIMES, Oct. 9, 2011, at A14.

312. For example, the Michigan legislature enacted a "650 lifer" statute in 1981, imposing mandatory LWOP on any defendant convicted of distributing

relief could come from the judicial branch. The Supreme Court's decisions in *Graham* and *Miller* overturned perhaps more than 2,000 LWOP sentences.[313] It is reasonable to expect the U.S. Supreme Court (and state courts applying the Eighth Amendment or the state constitutional analog) to continue this trend.

Indeed, the logic and dicta of *Graham* and *Miller* anticipate further Eighth Amendment encroachments on LWOP sentences. *Graham* held that LWOP is appropriate only in the case of juveniles who had the intent to kill.[314] As a concurring Justice Breyer observed in *Miller*, this suggests limitations on LWOP when juveniles are convicted of felony or accomplice murder.[315] And although the *Miller* majority foreclosed LWOP only when juveniles are sentenced in a mandatory scheme that deprives the judge of any discretion, the Court gratuitously added that in *any* sentencing scheme, juvenile LWOP "will be uncommon."[316] What this nebulous dicta portends is anyone's guess,[317] but all juveniles serving LWOP, including those sentenced in a discretionary scheme, will likely find inspiration in these three words. Furthermore, the Court in both *Graham* and *Miller* invoked the idea of an "adolescent brain" in invalidating juvenile LWOP sentences.[318] If neuro-abnormalities

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more than 650 grams of heroin or cocaine. *See* MICH. COMP. LAWS § 333.7401(4) (2012); *see also* Sharon Cohen, *'Lifer' Relishes Unexpected Freedom*, L.A. TIMES (Mar. 7, 1999), http://articles.latimes.com/1999/mar/07/news/mn-14692. In 1998, the legislature amended the law and applied it retroactively. *See* MICH. COMP. LAWS § 333.7401(4); *see also* Cohen, *supra*. As a consequence, one inmate sentenced in 1978 to LWOP ended up serving twenty years in prison and subsequently received parole after the statute was amended. *See id.*

313. Given the rarity of the juveniles sentenced to LWOP for nonhomicides, *Graham* invalidated only 123 sentences. *See* Graham v. Florida, 130 S. Ct. 2011, 2024 (2010). *Miller*'s effect is less clear. Roughly 2,000 juveniles had been sentenced to LWOP for homicides as part of a mandatory sentencing scheme, but still unresolved is whether *Miller* was intended to apply retroactively. *See* Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 25 & n.2 (2012). *Compare* People v. Morfin, 981 N.E.2d 1010, 1022 (Ill. App. Ct. 2012) (applying *Miller* retroactively), *and* State v. Ragland, 812 N.W.2d 654, 658 (Iowa 2012) (same), *and* Hye v. State, No. 2010-KA-07180-COA, 2013 WL 2303518, at *5 (Miss. Ct. App. May 28, 2013) (same), *with* Gonzalez v. State, 101 So.3d 886, 887 (Fla. Dist. Ct. App. 2012) (not applying *Miller* retroactively), *and* Geter v. State, 115 So.3d 375, 377 (Fla. Dist. Ct. App. 2012) (same), *and* People v. Carp, 828 N.W.2d 685, 723 (Mich. Ct. App. 2012) (same).

314. *See Graham*, 130 S. Ct. at 2027.

315. *See* Miller v. Alabama, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring) (suggesting that LWOP would be inappropriate when the death was accidental or caused by an accomplice).

316. *Id.* at 2469.

317. Untethered from text and history, the Court's Eighth Amendment jurisprudence is an evolving mystery. *See, e.g.*, Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1153–60 (2006).

318. *Miller*, 132 S. Ct. at 2464–65 & n.5; *Graham*, 130 S. Ct. at 2026.

raise doubts about LWOP, then mentally retarded, brain-injured, and even elderly criminals are plausibly entitled to relief.[319] At a minimum, the Court as currently composed would be receptive to claims that LWOP is unconstitutional in the case of mentally retarded defendants convicted of nonhomicides (applying *Graham*) or when imposed on such defendants as part of a mandatory sentencing scheme (applying *Miller*).[320]

Finally, the Court's assertion that inmates sentenced to LWOP have no hope is called into question by Glenn Abraham's survey of inmates sentenced to LWOP in Ohio.[321] According to Abraham, a "majority [of LWOP inmates] reported varying degrees of hope or belief that they would be legally released from prison at some point."[322] An older study of inmates sentenced to LWOP in Utah State Prison paints a more emotionally wrenching picture of the lives of inmates sentenced to LWOP.[323] Yet even in the deepest despair, there is often the hope of release, however remote. More realistically and immediately, the hope for incremental improvements—in access to programs or in housing—can motivate LWOP-sentenced inmates. If an LWOP sentence extinguished all incentives for self-improvement, how could we explain the many inmates sentenced to LWOP who have credibly claimed moral development?[324] Either such professions are fraudulent but made in the hope of clemency, in which case the inmates have not lost hope of release, or such professions reflect genuine rehabilitation, in

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319. *See* Lerner, *supra* note 313, at 36 (noting that old people are as likely as adolescents to have brains that fall short of peak performance).

320. For other possible ways in which the Court can extend *Graham* and *Miller* and apply strict scrutiny to LWOP sentences, see Berry, *supra* note 19, at 1143–46.

321. Abraham, *supra* note 270, at 138–39.

322. *Id.* at 138. To be sure, some inmates have taken Dante's advice and abandoned all hope. *See id.* at 117 (quoting one inmate, "I don't want to go out there [in the visiting room] and be reminded of what I'm never going to have again"). And yet even in such cases, miracles occur. Gerald Hankerson, who was sentenced to LWOP in 1988 but then released from prison in 2009, said that he once envied the inmates on death row: "I was the unlucky one, they got to die." *See* Damon Agnos, *In an About-Face, Gregoire Commutes Sentence*, SEATTLE WKLY. NEWS (Apr. 14, 2009, 12:00 AM), http://www.seattleweekly.com/2009-04-15/news/in-an-about-face-gregoire-commutes-sentence/.

323. *See* Johnson & McGunigall-Smith, *supra* note 277, at 336–44.

324. *See, e.g.*, Cindy Chang, *Angola Inmates Are Taught Life Skills, Then Spend Their Lives Behind Bars*, TIMES-PICAYUNE (May 15, 2012, 5:00 AM), http://www.nola.com/crime/index.ssf/2012/05/angola_inmates_are_taught_life.html (discussing Johna Hayes); Richard Lindstrom & Peter Neumer, *Criminal Law and Criminology: A Survey of Recent Books*, 95 J. CRIM. L. & CRIMINOLOGY 1423, 1425–26 (2005) (reviewing JAMES. A. PALUCH, JR., A LIFE FOR A LIFE: LIFE IMPRISONMENT: AMERICA'S OTHER DEATH PENALTY (2004)) (discussing Paluch's time spent in prison).

which case the LWOP sentence did not have the crushing effect on their souls that the *Graham* and *Miller* Courts presume.

IV. EXPLAINING LIFE WITHOUT PAROLE

This Part is divided into a negative Subpart, laying out the errors in the *Graham* and *Miller* opinions, and then a positive Subpart, proposing a more accurate understanding of LWOP. In the *Graham* and *Miller* opinions, the first Subpart argues, melodramatic language obscures the complicated reality of LWOP. Life without parole is, of course, a bad lot. But the claim that LWOP "forswears altogether the rehabilitative ideal" is rhetoric divorced from reality. LWOP indeed conveys an "expressive judgment," but the Court fails to appreciate the complexity of that judgment. To make sense of LWOP, the second Subpart begins with a pair of crimes that, when laid out in detail, inspire horror. In confronting such cases, LWOP becomes intelligible as a sentence that both satisfies the community's thirst for vengeance and represents a bond with the crime's victims. Yet LWOP is not simply an expression of the retributivist impulse. The community does not forswear gentler impulses but incorporates them into the sentence as it is implemented.

A. Graham *and* Miller *Revisited*

The central premise of the *Graham* and *Miller* opinions is that LWOP "forswears altogether the rehabilitative ideal." As already noted and as Justice Kennedy concedes in *Graham*, the term "rehabilitation" is imprecise, and the opinion fails to clarify what is intended. Immediately after stating that LWOP "forswears altogether the rehabilitative ideal," the Court observes that the sentence reflects an "irrevocable judgment" that "den[ies] the defendant the right to reenter the community."[325] This suggests that rehabilitation is to be understood as the process of making the defendant fit to return to civil society. Yet, as already explained, LWOP is not quite the "irrevocable judgment" it is advertised to be. Even if LWOP, when imposed, is intended as unalterable, over time, many sentences are modified. Possibly thousands of people sentenced to LWOP either have been released or had their sentences reconfigured over the past few decades.[326] The term "irrevocable judgment" illustrates the Court's penchant for exaggerated rhetoric concealing more nuanced realities.

Elsewhere in the *Graham* opinion, the Court uses "rehabilitation" in the broader sense of expressing remorse and achieving maturity and self-improvement—that is, achieving (or

325. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).
326. *See supra* Subpart III.C.

reachieving) fitness as a morally responsible human being.[327] The claim that LWOP forswears "rehabilitation" in this broad sense is also flawed. At least here, however, the Court offers factual support: the testimony of an amicus brief, citing a position paper, that an LWOP sentence often "denies access" to the educational and vocational programs that could stimulate moral reform. Subpart III.B tests this claim and reveals it to be incorrect. In most states, LWOP-sentenced inmates incur no or only minor disabilities in access to such programs.

Perhaps the best way to appreciate the logical gaps of the *Graham* opinion is by a line-by-line study of an emblematic paragraph:

> [1] Finally, a categorical rule [against LWOP for juveniles convicted of nonhomicide offenses] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform. [2] The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. [3] In *Roper*, that deprivation resulted from an execution that brought life to its end. [4] Here, though by a different dynamic, the same concerns apply. [5] Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. [6] Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. [7] A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. [8] In some prisons, moreover, the system itself becomes complicit in the lack of development. [9] As noted above, it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration. [10] A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term.[328]

For starters, it is worth noting the parallelism between the first sentence of this paragraph and a sentence that appears earlier in the opinion: "What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[329] This sentence would suggest that Justice Kennedy simply intends "rehabilitation" as a synonym for "reform." Elsewhere, however, "rehabilitation" is linked to a "return to society." The opinion never grapples with the

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327. *See Graham*, 130 S. Ct. at 2030.
328. *Id.* at 2032–33 (citation omitted).
329. *Id.* at 2030.

fact that it uses "rehabilitation" in both senses. The paragraph's second sentence lapses into the passive voice but otherwise restates the first sentence in flowery language. "A chance to demonstrate maturity and reform/rehabilitation" evolves into "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."

The third sentence announces that the death penalty deprives a defendant of this opportunity, and here the puzzle begins. We all die, and unless "maturity of judgment" and "self-recognition of human worth and potential," whatever that might mean, are only available to those who live to an old age, it is unclear why an executed individual is deprived of the "opportunity" to attain these presumably laudable goals. Perhaps the chance is reduced if the executed individual has fewer years to achieve them, but it is also possible that he is *more* likely to recognize the error of his ways and make amends, spurred to self-knowledge by the awful fate that awaits him.[330] Oddly, Justice Kennedy himself recognized this possibility just three years earlier: "[C]apital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime . . . ."[331]

Sentences four and five transition to life without parole, which is supposedly a "different dynamic" that raises the "same concerns." If the referenced concerns include LWOP's failure to promote "maturity of judgment," the claim is contradicted by yet another Justice Kennedy opinion. Rejecting the death penalty in a case of child rape, where the alternative was LWOP, Justice Kennedy wrote that in most cases, "justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense."[332] Implicit in this statement is that "maturity of judgment" might be promoted by confining the child rapist in prison for the duration of his life. It could be argued that any punishment less severe will fail to promote such moral reflection; only an LWOP or death sentence impresses upon a criminal the wretchedness of his acts and the imperative to repent. Rehabilitation in this, the deepest and most important

330. *See* 2 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 849 (Dell Publishing 1960) (1791) ("Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."). On the merits of this argument, compare Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1196–97 (2009) (finding it unpersuasive), with Ryan, *supra* note 240, at 1247, 1282 (invoking Johnson's argument and arguing that death row inmates should be provided with "true opportunities to reform themselves").

331. Panetti v. Quarterman, 551 U.S. 930, 958 (2007).

332. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008).

sense, can occur only when those who have committed the greatest of crimes experience proportionate punishment.[333]

But perhaps the suggestion of sentences four and five is that "maturity of judgment" and "self-recognition of human worth and potential" are only available outside prison walls. Only there does one have access to "fulfillment," "reconciliation with society," and "hope." To be sure, our chance of a "fulfill[ed]" life is lower if serving an LWOP sentence in a supermax prison than in a comfortable home, with a life partner and children, surrounded by culturally vibrant and diverse neighbors, and employed in a job that gives meaningful outlet to one's natural talents. But these are not the alternatives. Anyone sentenced to LWOP committed a very serious crime; the likely alternative to LWOP is a long prison sentence. Of course, if this is the choice, one would prefer the latter, but the difference in "hope" and opportunities for "fulfillment" are markedly less stark than the *Graham* and *Miller* Courts lead the reader to believe.

The sixth sentence provides an interlude from what one might call the logical flow of the argument. "Maturity" is said to promote "considered reflection," which in turn is said to be "the foundation for remorse, renewal, and rehabilitation." Some semantic questions arise: What exactly is being *re*newed as one matures? And is "rehabilitation" just a fancier way of saying "reform"? In any event, the claim that LWOP-sentenced inmates are deprived of these opportunities is worthy of close examination. Consider the testimony of one such inmate, embarking on a harrowing journey of self-discovery:

> Like it or not, you are being exposed to who you really are way down deep inside. It becomes increasingly difficult to hide from yourself. Often you find yourself lost in the darkest crevices of your being and are not too happy with what you are finding. You are hesitant to continue but you do, hoping for the best, finding the worst. Constantly you are thinking, thinking, and thinking. It happens while you are working, pacing your cell floor, waiting for a letter or a visit, while you are mopping floors or performing some other robot work you've been assigned, or as you lie awake at night wishing for the escape of sleep. The layers of your character are being peeled

333. *See* Joseph L. Falvey, Jr., *Crime and Punishment: A Catholic Perspective*, 43 CATHOLIC LAW. 149, 163 (2004) ("[P]unishment must always strive for the criminal's rehabilitation by restoring the order within his own soul. When a criminal commits a voluntary evil, restoration of the order within his soul is achieved by inflicting upon him a proportionate evil contrary to his will. In this manner, the offender becomes aware of his crime by suffering an evil of the same magnitude.").

> away like the skin of an onion, and don't expect flower buds to be hidden at the core.[334]

Whatever else one might say about this passage, its author seems to have undertaken that "considered reflection which is the foundation for remorse, renewal, and rehabilitation." Indeed, the inmate seems to have achieved more acute, albeit painful, "maturity of judgment" than many people outside prison walls.

Nonetheless, sentence seven claims that a person sentenced to LWOP has "little incentive to become a responsible individual." Again, clarity about the margin on which we are operating would be useful. If an offender is not serving an LWOP sentence, the alternative is likely decades in prison. It may be that the *possibility* of parole some decades in the future creates an "incentive" to become responsible, but the possibility of obtaining recreational privileges *right now* is surely at least as ample an incentive. This point would seem all the more valid when we recall that criminals as a class are prone to hyperbolic discounting of the future.[335] It is, consequently, unclear how much the prospect of release decades hence influences their decision making, certainly compared to the prospect of real benefits tomorrow.

In sentences eight and nine, Justice Kennedy references his earlier citation to an amicus brief and observes that those sentenced to LWOP have few educational and vocational opportunities. As extravagantly documented earlier,[336] this statement is incorrect. Sentence ten, with its embedded double negative, needs to be unraveled, but the conclusion is that LWOP has the "perverse consequence" of "reinforcing" an offender's "lack of maturity." Why is the Court so sure that a juvenile (or anyone) who commits a crime resulting in an LWOP sentence is immature? Is it possible that in some instances, the ability and willingness to commit murder or armed robbery suggest not less but more maturity than the typical seventeen-year-old?[337] In any event, the Court claims that an LWOP sentence reinforces an inmate's immaturity by denying him opportunities and incentives for bettering himself. Yet again, the opinion obscures the relative margins. Those sentenced to LWOP are not, by virtue of that sentence, seriously disadvantaged compared to other inmates serving long determinate prison sentences, which is the appropriate comparison point. Any

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334. Johnson & McGunigall-Smith, *supra* note 277, at 343.

335. *See, e.g.*, Manuel A. Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct*, 44 HOUS. L. REV. 609, 612 (2007).

336. *See supra* Subpart III.B.

337. *See* Lerner, *supra* note 22, at 361–64. All criminals may be said to be "immature," in the sense that they make bad decisions and lack a sense of responsibility. My point is that some juveniles who commit the most serious crimes may be more mature (physically and emotionally) than peers of their age.

seventeen-year-old who is convicted of aggravated murder is serving a long prison term. Converting that long prison term into an LWOP sentence may marginally reduce the incentive to improve, but what is that margin? The Court never addresses this question.

In the *Graham* opinion, the Court observes that an LWOP sentence conveys an "expressive judgment."[338] It would even be fair to say that by imposing an LWOP sentence the community expresses greater abhorrence than it does with a long prison term.[339] Where the *Graham* Court goes astray is in its suggestion that the community, by an LWOP sentence, conveys unmitigated revulsion, regards any reform by the offender as "immaterial," and "forswears altogether the rehabilitative ideal." At bottom, the Court fails to grapple with the complexity of LWOP.

B. LWOP as Synthesis of Retributivist and Rehabilitative Impulses

What accounts for the rise of life without parole? Consider two cases: Seandell Jackson and Charles Witzel. Jackson murdered University of Wisconsin student Nathan Potter in the course of what is euphemistically referred to nowadays as a "botched robbery"—that is, after mugging Potter at gunpoint, Jackson shot him in the stomach for no apparent reason.[340] Jackson's half-hearted plea for a prison term of determinate years rather than LWOP consisted of: "[I feel] sorry for the Potters. I feel sorry for myself. Sorry."[341] Even this hint of remorse was belied by a videotape played by the prosecution of Jackson's behavior at trial, which included him smiling, tauntingly, at the Potter family as the jury returned its

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338. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

339. Consider *State v. Chase in Winter*, 534 N.W.2d 350 (S.D. 1995), in which the trial judge chose not to sentence a twenty-one-year-old defendant to LWOP, instead ordering a 200-year prison term. *Id.* at 353. Although he regarded the crime as appalling and the defendant as virtually beyond hope of reform, the judge could not bring himself to impose LWOP. *Id.* He wrote the parole board as follows:

> I have just recently sentenced Mr. Chase in Winter to 200 years in the South Dakota State Penitentiary. It was a difficult sentence in light of Mr. Chase in Winter's age. I harbor a belief that all of us have the opportunity to redeem ourselves in this world, if not in the next. Mr. Chase in Winter is however, a man for who I hold out little hope. I came very close to imposing a life sentence on him. My reservation was that he was only 21 years of age with a psychiatric problem and I felt there should be some small window of opportunity available for him in the event that some extraordinary circumstances should occur and he should truly understand the gravity of his crime and appropriately deal with his anger and depression, not to mention his psychiatric problems.

Id.

340. Susan Bischoff, *Emotions Erupt at Potter Case Sentencing*, MEDIA MILWAUKEE (Apr. 18, 2010), http://www4.uwm.edu/mediamilwaukee/news/sentence.cfm.

341. *Id.* (alteration in original).

verdict.[342] Witzel was an even less attractive candidate for leniency. It is not simply that he murdered two people and seriously wounded two others (to get revenge on an ex-girlfriend);[343] it is that he refused to offer any of the usual excuses. Here is Witzel in his own words:

> It felt so good to kill him the way I did, sitting in his house. He turned white, scared to death. He sat up on the edge of his couch with his kid, a 1 year old child, on his lap and threatened to call 911. He moved his kid to his right knee leaving his chest exposed. With no hesitation I pulled and fired five times . . . . His kid crawled in his blood on his first birthday.[344]

The sentencing hearings for both Jackson and Witzel witnessed a parade of friends and family of the victims. Nathan Potter's uncle told the judge, "I will never see my nephew's face again in this lifetime. I would ask that we never see Mr. Jackson's again either," adding that he is the "type of person who life sentences were designed for."[345] The families of Witzel's victims were more emphatic: "I hope [Witzel] rots in hell the coward that he is when he hid in that basement waiting to shoot my sons"; "I want him to suffer in prison for the rest of his (expletive) life."[346]

To understand why LWOP has soared in usage and popularity over the past few decades, at least in America, cases such as these provide a ready answer: revenge and retribution.[347] Arguments that sound in general deterrence should, of course, not be discounted. If anything is likely to impress criminals (other than the prospect of death), perhaps it is a life sentence that is truly and irrevocably a life sentence.[348] And simple incapacitation is another plausible justification for LWOP; yet given that the alternative to LWOP is likely decades in prison, it is fair to ask whether a sixty- or seventy-

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342. *Id.*

343. *UPDATE: Witzel Sentenced for Murder*, *supra* note 226.

344. *Id.*

345. Bischoff, *supra* note 340.

346. *UPDATE: Witzel Sentenced for Murder*, *supra* note 226 (alteration in original).

347. "Revenge and retribution" might be regarded as redundant, but there is literature drawing a distinction between the two concepts. *Compare* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 437 (2005) (arguing that a "nobler image of retributi[on]" should be "contrasted with revenge"), *with* WILLIAM IAN MILLER, EYE FOR AN EYE 206 n.6 (2006) (arguing that retribution is rooted in the desire for revenge).

348. *See* United States v. Jackson, 835 F.2d 1195, 1198–99 (7th Cir. 1987) (Posner, J., concurring) (suggesting that a possible justification for the "savage sentence" of LWOP in the case of a recidivist bank robber was "*pour encourager les autres*"). Posner nonetheless concluded in that case that general deterrence failed to support such an extreme sentence. *Id.* at 1199.

year-old inmate poses a meaningful threat to the general public if he is released.[349] In accounting for the visceral appeal of LWOP, one must adopt the perspective of the victims of the crime, either those directly affected or the broader public whose sense of security has been shattered.

This explanation would seem not to account for LWOP sentences that arise from crimes either without easily identifiable victims or for which the direct victims do not demand revenge. But nonviolent crimes describe only a small minority of LWOP cases.[350] The crimes that culminate in LWOP (predominantly murder and to a lesser extent rape, aggravated kidnapping, and armed robbery) leave real victims.[351] To be sure, even the relatives of some homicide victims find it in their hearts to forgive those responsible and embrace a lesser punishment.[352] But other victims are not as

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349. *See id.* ("[I]t is extremely unlikely that if he were released 25 or 30 years from now . . . he would resume his career as a bank robber. . . . Crimes that involve a risk of physical injury . . . are especially a young man's game."); *see also* Paul Robinson, *Life Without Parole Under Modern Theories of Punishment*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 7, at 140–45 (raising doubts that arguments from general deterrence or incapacitation support LWOP sentences in many cases).

350. As this Article was in the final stages of publication, the American Civil Liberties Union ("ACLU") released a 240-page report on the topic. *See* AMERICAN CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES (2013). A detailed review of the report is not possible here, but in brief, the ACLU study discovered, as of 2012, 3,278 nonviolent offenders out of a total LWOP population of 49,081. *Id.* at 2, 11. If we accept these numbers, only 6.7% of LWOP-sentenced inmates committed nonviolent offenses. The report suggests that there might be other nonviolent offenders sentenced to LWOP, but it is noteworthy that the report defines as "nonviolent" such crimes as illegal sale of firearms and burglary, even armed burglary, provided that there was no "use or threat of physical force against a person." *Id.* at 18–19. The rationale for LWOP explored in this Article might suggest limitations on the appropriate use of LWOP, or it might fail to account for the small minority of truly nonviolent offenders sentenced to LWOP. In many such cases, the community may, rightly or wrongly, regard the final crime as the culmination of a life's work dedicated to undermining the social order. It is that body of work that is being assessed when the community announces, with finality, that it never wishes to see the criminal again.

351. To take Arkansas as a perhaps extreme example, my research assistants and I reviewed a list of all inmates serving LWOP in that state. *See* E-mail from Shea Wilson, Dep't of Corr. (Mar. 13, 2012) (on file with author). That list provided names of all 578 inmates serving LWOP, which we searched in the Arkansas inmate locator website to determine the crimes they had committed. *Id.* Over 99% were convicted of murder. *Id.* Preliminary data from other states suggests that over half of inmates serving LWOP committed murder, and the overwhelming majority of the remainder committed crimes such as rape, kidnapping, or armed robbery.

352. *See, e.g.*, Jessica Cejnar, *Despite Brother's Murder, HSU Student Supports Second Chance for Teen Offenders; Oya Sherrills: "I Know My Brother Would Support a Bill Like This"*, TIMES-STANDARD (Sept. 12, 2011), http://www.times-standard.com/ci_18876467#.

merciful. And in addition to a victim's demand for revenge, the wider community can experience an empathetic thirst for vengeance. By imposing an LWOP sentence, the community affirms its solidarity with those most directly harmed. Nothing will bring Jackson's or Witzel's victims back to life, and the offenders' incarceration long after they cease to pose any threat to society, if such a day comes, lacks any narrowly financial justification. But the proclamation that they will suffer and will *never* be released provides satisfaction to the victims and perhaps comfort to members of the community, insofar as they identify with the victims.[353] Unlike a prison term denominated in years, LWOP is society's pledge to the victims that they will never be compelled to relive the crime in an agonizing parole hearing because in no circumstances will the criminal be released.[354]

Yet an LWOP sentence does not quite deliver on the full extent of its promised punishment.[355] As several family victims have

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353. The family of Laurie Troup, murdered by Kuntrell Jackson, reports both the satisfaction of the LWOP sentence and then the dismay at the Supreme Court's overturning of that sentence in *Jackson v. State*, 194 S.W.3d 757 (Ark. 2004), *aff'd sub nom.* Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011), *rev'd sub nom.* Jackson v. Hobbs, 132 S. Ct. 2455 (2012), the companion case of *Miller v. Alabama*: "We thought it was all behind us and done where you could move on . . . . Now it's all being relived again." Michael Daly, *Families Decry Supreme Court Decision on Juvenile Life Without Parole*, DAILY BEAST (June 26, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/06/26/families-decry-supreme-court-decision-on-juvenile-life-without-parole.html#sthash.ju9NRjMm.dpuf (internal quotation marks omitted). A blog entry of a family member of another juvenile lifer, whose LWOP sentence was overturned, reports similar emotions:

> In the end, after several weeks in court, he was found guilty, and subsequently sentenced to Life without Parole. We all walked away with the relief that the justice system had provided the best they could for us to move on. We believed that we would never have to revisit the judicial process for her case. We thought we could try to find our way out of the emotional abyss this had created. We accepted the word of the justice system that he would never be free.

SteveCrosbyFan, *Kristina Grill*, A VOICE FOR VICTIMS OF JUVENILES SENTENCED TO LIFE WITHOUT PAROLE (Oct. 29, 2009, 5:10 AM), http://victimsofjlwop.blogspot.com/2009/10/kristina-grill.html.

354. *See* Blecker, *supra* note 278 (describing LWOP as a "binding covenant with the past").

355. That the state should play a role in modulating the vengeful emotions harbored by the victims of crime is, of course, defensible. *See* Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 138 (2005) ("[W]e should ask whether the government ought to be complicit in endorsing retributive notions, however universal they may be, given their proximity to the coarse emotions of vengeance and hatred."). Internal mechanisms may also assist in this process. *See* JEFFREY C. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 107 (1988) (suggesting that a person's "inherent moral decency" can play a check on his or her "retributive hatred"); *see also* Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1461 (1990).

discovered, to their bitter disappointment, inmates sentenced to LWOP *are* released.[356] Nor are their lives in prison necessarily as painful as many victims imagined. The mother of one seven-year-old girl, who was raped and murdered, expressed her dismay:

> She pictures Joseph McGowan—who is serving a life sentence in a state prison for the crime—well-fed, warm, watching television, phoning acquaintances, and puttering about a prison library while studying to become a paralegal. "He's doing less work than you and me . . . . It's very leisurely. It's not fair at all. In his mind, he still sees that he has hope. . . . And my daughter, forget about it. She has no hope. Her hope was taken away with her life."[357]

McGowan's conditions in prison are almost certainly not as pleasant as this distraught mother imagines. But if retribution and a desire for finality account for the appeal of LWOP, surely there is, at least in theory, a more attractive sentence—the death penalty.[358] Even if we concede many of the arguments against the ultimate punishment, Jackson and Witzel provide compelling arguments for it. No other sentence so powerfully expresses society's anger towards the defendants and sympathy for their victims while also proclaiming the terror and majesty of the law. The death penalty is, of course, a truly irrevocable sentence. The community displays confidence in its judgment—that the defendants committed the crime, that they were provided fair process in reaching that judgment, and that morality commands the imposition of so terrible a punishment.[359]

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356. *See supra* Subpart III.C (detailing the various ways inmates sentenced to LWOP can be released). Some cases may be illustrative of the pain caused by overturned LWOP sentences. Learning by e-mail that his brother's murderer, sentenced to life over four decades ago, was about to be released, one man reacted, "It was like a dagger." Jameson Cook, *Victim's Family Protests Killer's Release*, MACOMB DAILY NEWS (May 4, 2012), http://www.macombdaily.com/article/MD/20081127/NEWS/311279975. Other cases, involving LWOP sentences overturned by *Graham*, are recounted *supra* note 353; *see also* Richard Serrano, *Ruling on Juvenile Killers Reopens Wounds for Victims' Families*, L.A. TIMES (Aug. 16, 2012), http://articles.latimes.com/2012/aug/16/nation/la-na-lifers-20120817.

357. Hugh R. Morley, *Privileged Prisoners: Is Justice Served by TV Sets and Stereos?*, RECORD (N.J.), Nov. 13, 1994, *quoted in* McCord, *supra* note 234, at 80.

358. In practice, the death penalty today seldom provides "closure" because only a fraction of condemned offenders are executed. And the decades that precede an execution are filled with agonizing litigation. Prosecutors thus often urge victims to forego the death penalty to avoid the pain of prolonged hearings and appeals. *See, e.g.*, Pritchard, *supra* note 227 (quoting a prosecutor: "I think this was a wise decision by the family to agree to life in prison . . . . Now the family knows that [the murderer] will rot in the state penitentiary.").

359. For classic summaries of such arguments, see Ernest van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, *in* THE DEATH

By abstaining from the death penalty and instead imposing life without parole, the community saddles itself, at least potentially, with the following nettlesome problem: Fast-forward four decades. The year is 2053. Jackson is a seventy-year-old diabetic who discovered a talent for carpentry. Witzel, an octogenarian, received a college degree long ago. Both have found religious faith. Witzel even married a woman with whom he corresponded for years. The ceremony was attended by the warden himself, who pronounced Witzel "totally reformed." This may all seem far-fetched, but stranger things have happened and indeed happen all the time.[360] There may have been compelling reasons to execute Jackson and Witzel when their crimes were fresh in memory, and punishment might have satisfied the victims' families and indulged the community's righteous anger. But what, in the year 2053, is the reason for their continued incarceration?

When contrasted with the death penalty on the one hand, and a long prison term with a clear mechanism for release on the other, LWOP appears to be an incoherent sentence. Perhaps it makes sense to execute the criminal whose crimes evoke outrage, but if not, why permanently disqualify him from release into society? The reason given by Beccaria—that life without parole is a harsher sentence ("perpetual slavery" of "beast[s] of bur[d]en")[361] with greater deterrence and more retributive effect—fails. As implemented in America today, LWOP is not, at least for most inmates, more painful than death. And the reason was alluded to by John Stuart Mill, who proved himself more prescient than Beccaria in this respect. Mill predicted that once the "memory of the crime is no longer fresh," there is an "insuperable difficulty in executing" a harsh life sentence.[362] In a crime's immediate aftermath, the community can harden its hearts to the humanity of the offender and sentence him to a lifetime of suffering. But anger is difficult to sustain; even people who have endured the most staggering atrocities can make their peace and move on.[363] Over time, as the "memory of the crime" fades, the hatred of the offender likewise dissipates.

PENALTY IN AMERICA 323, 332–33 (Hugo Adam Bedau ed., 3d ed. 1982), and BERNS, *supra* note 3, at 154, 175–76.

360. Many inmates, even those sentenced for the most serious crimes, truly reform in prison. *See, e.g.*, sources cited *supra* note 324 (discussing cases of James Palucah and Johna Hayes).

361. *See supra* notes 25–39 and accompanying text.

362. Mill, *supra* note 40, at 272.

363. *See* JEAN HATZFELD, THE STRATEGY OF ANTELOPES: LIVING IN RWANDA AFTER THE GENOCIDE 13–14 (Linda Coverdale trans., Farrar, Straus & Giroux, LLC 2009) (2007) (discussing how the Hutus and Tutsis reconciled in the aftermath of genocidal war). Hatzfeld's book is appreciatively reviewed in Anthony Daniels, *Fear of Regress*, 26 NEW CRITERION 64 (2008), *available at* http://www.newcriterion.com/articles.cfm/fear-of-regress-3767.

For Nietzsche, the "ability and obligation to exercise prolonged . . . revenge" is the "morality of the ruling class."[364] But this viewpoint seems deranged to many today, and the community prefers to regard its compassion as evidence of its humanity. When the once-twenty-year-old murderer is a reformed senior citizen, it seems (to many) cruel to continue to incarcerate him. And notwithstanding all the severe talk about letting inmates "rot in jail," the community does not really mean it—it wants the defendant to reform. In perhaps all but the most incorrigible cases,[365] the community provides opportunities for his improvement and, yes, even his rehabilitation.

Death penalty advocate Professor Robert Blecker engages in a thought experiment, spinning out what LWOP would look like if we were committed to *hard* punishment.[366] Blecker suggests that in such a world, LWOP would take the form of "permanent punitive segregation":

> Those condemned to PPS [Permanent Punitive Segregation] would be housed in a separate prison. They would be permanently subjected to the harshest conditions the Constitution allows. Specifically, their food would be nutraloaf—a tasteless patty, nutritious enough not to foreshorten their lives. Visits would be kept to the minimum and none would be *contact* visits, ever. These aggravated murderers would never touch another human being again. They would labor daily and purposelessly—digging holes to fill them up. Other exercise would be Spartan—running in circles. They would be provided no radios or TV and, of course, no Internet. They would get one brief, lukewarm shower a week. Photos of their victims would adorn their cells—in their faces, but out of reach, reminding these condemned killers daily of their crimes.[367]

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364. NIETZSCHE, *supra* note 1, at 128.

365. Some notable defendants sentenced to LWOP are dispatched to supermax prisons, with meager prospects for promotion to less secure facilities. *See, e.g.*, Alan Prendergast, *The Caged Life: Is Thomas Silverstein a Prisoner of His Own Deadly Past—or the First in a New Wave of Locked-Down Lifers?*, DENVER WESTWORD (Aug. 16, 2007), http://www.westword.com/2007-08-16/news/the-caged-life/.

366. Blecker, *supra* note 278, at 15–16.

367. *Id.* Other scholars have also proposed enhancements to LWOP as now implemented. Most notably, David McCord made a proposal similar to Blecker's a decade earlier, which McCord styled as "sensory deprivation punishment." McCord, *supra* note 234, at 123. Those sentenced to "sensory deprivation punishment" are doomed to spend the entirety of their sentences, or a fixed term within it, in "modified solitary confinement," which dramatically limits human contact and removes all but a constitutional minimum of opportunities for recreation. *See id.* at 124. To impress upon the offender the gravity of his deeds, furthermore, a photograph of his victim is continuously displayed in his prison cell, and annually—on the birthdate and date of death of

Here, we have LWOP as the actualization of Beccaria's vision: perpetual enslavement of inmates as beasts of burden. If the *Graham* Court were correct that LWOP altogether foreswore the rehabilitative ideal and focused exclusively on the penological goals of retribution and deterrence, inmates sentenced to LWOP would suffer such conditions.[368]

As a community, we are apt to regard our reluctance to impose such conditions as evidence of our moral progress. A skeptic might cast it, rather, as moral squeamishness, born of indifference to the suffering of victims, an inability to confront evil, and a narcissism in which we admire ourselves for showering criminals with compassion.[369] Such a skeptic might even argue that the failure to impose the death penalty or at a minimum "permanent punitive segregation" on the worst of criminals is evidence of what Nietzsche termed the "morality of timidity," widespread in much of Europe today.[370] Such a view is, one must say, .grotesque oversimplification. But if inclined to spin out this narrative, one must further note that the "morality of timidity" has not penetrated America; timidity is bounded by harshness.

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the victim—the inmate is subject to "complete solitary confinement." *Id.* at 123–30. Less creatively, three other scholars have proposed a sentence called "LWOP+," although the "+" consists simply of requiring restitution to the victim. *See* Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 372 (2001). Yet another scholar has proposed "death-in-prison," but this sentence, which would be imposed only after solemn procedures, seems functionally identical to LWOP, albeit with a more menacing moniker. *See* Russell Covey, *Death in Prison: The Right Death Penalty Compromise*, 28 GA. ST. U. L. REV. 1085, 1101 (2012).

368. For yet another imagined alternative to LWOP that truly forswears the rehabilitative ideal, consider the "punitive coma" explored in Philip Kerr's brilliant, dystopian novel, PHILIP KERR, A PHILOSOPHICAL INVESTIGATION 197–98 (1992), and in J.C. Oleson's Swiftian proposal, *The Punitive Coma*, Oleson, *supra* note 34, at 832–33. Convicted defendants are sentenced to comas and—in the case of serious crimes—are sentenced to such for the duration of their lives. *Id.* at 872–74. However ghastly the idea of an "irrevocable punitive coma," it is still inadequate from the perspective of the principled retributivist, such as Blecker, for it fails to actively cause pain. *See* KERR, *supra*, at 198 (noting that punitive coma was "kinder than depriving a conscious man of an equivalent period of liberty, with all its attendant discomforts and indignities"). And so even a punitive coma can be regarded as a compromise of sorts:

> A half-existence between life and death. Awful. . . . As punishments went it was worse than a long term of imprisonment and almost worse than death itself. But this was what happened when society had become morally squeamish about capital punishment and when prisons had become too overcrowded and expensive to be practical for any but minor offenders.

Id. at 197.

369. *Cf.* MICHAEL MOORE, PLACING BLAME 142 (1997) ("Lack of anger at criminals, if it does not represent simple indifference to the sufferings of others, may represent our self-deception about the potential for evil in humanity.").

370. Nietzsche, *supra* note 1, at 142.

LWOP is best understood as a compromise punishment, and like many compromises, its principled opponents may regard it as incoherent. For crimes such as those of Jackson or Witzel, a retributivist committed to vengeance would advocate either the death penalty or "permanent punitive segregation." Those open to the possibility of repentance and rehabilitation would advocate a prison term of determinate years or at most a life term that included a legal mechanism for release in the event of genuine reform—that is, the dominant European practice today. LWOP, as actually implemented in America, embraces both ideologies.

One might, finally, analogize LWOP to the establishment of a constitutional rule. As several scholars have observed, by adopting a constitution, a political body acts with the foresight of Odysseus when his ship skirts the Sirens' island.[371] Having been warned that the Sirens' music is irresistibly enchanting, Odysseus compels his men to bind him "hard and fast, so that [he] cannot stir."[372] A constitution is said to constrain future generations from succumbing to temptation. Discussions of the Homeric passage, however, often fail to note that there was a simpler way to stifle the lure of the Sirens: put wax in one's ears, which is precisely what Odysseus commanded of his crew. If a community recognizes that it will later be prone to weakness and error, it could adopt the Hobbessian solution—that is, extinguish law, so to speak, and delegate all power to a Leviathan. A constitution rejects such a solution. It preserves the political freedom of future generations but takes steps to protect them from themselves by introducing structural obstacles.

An LWOP sentence is, likewise, a rejection of the extreme and truly irrevocable solution of the death penalty. An LWOP sentence binds future generations through something like a constitutional rule. The lure of compassion is powerful, and the present generation, fired with indignation and a sense of vengeance and confident in its judgment, seeks to protect future generations from their own weakness.[373] If there were a simple legal mechanism for release, it would be difficult to resist the temptation to indulge in mercy. In that sense, LWOP in its harshness is nonetheless an

371. *See, e.g.*, JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36–111 (1988); Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1642–44 (2009); Adam Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 656–66 (2008). Skepticism about the analogy is raised in JEREMY WALDRON, LAW AND DISAGREEMENT 268 (1999). The connection to LWOP is made in Robert Blecker, *If I Implore You and Order You to Set Me Free*, 49 N.Y.L. SCH. L. REV. 561, 572–73 (2004–05).

372. HOMER, THE ODYSSEY OF HOMER bk. XII, ll. 39–54 (Richard Lattimore trans., 1965).

373. *See* Blecker, *supra* note 278 (explaining that LWOP, as a covenant with the past, promises that "[w]e will never let our rage and disgust . . . deteriorate").

acknowledgement of the softness of the men and women who will be compelled to administer it, legally constrained against tender human inclinations to imprison a human being until his death.

CONCLUSION

The American criminal justice system has for many years dispensed harsher punishments than its European counterparts, and the defining piece of evidence in this regard has traditionally been the durability of the death penalty on this side of the Atlantic. Although the death penalty's decline in recent years might suggest a convergence of criminal justice systems, the most dramatic difference between Europe and America today is not the death penalty but the sentence of life without parole.

Graham and *Miller* intimate a move towards European attitudes on sentencing, but both opinions are premised on a caricature of LWOP. First, in cases of murder, LWOP often emerges as the compromise punishment between the alternatives of the death penalty and a prison term of many years. The Court's assertion that LWOP "forswears altogether the rehabilitative ideal" fails to recognize that LWOP is a repudiation of the death penalty and reflects the conscious choice to adopt a sentence that accommodates the possibility of rehabilitation, albeit in prison.

Second, in jurisdictions that forbid the death penalty or in the case of crimes other than murder, LWOP is indeed the ultimate punishment now recognized by the Supreme Court as consistent with the Constitution. The Court is, furthermore, correct that an LWOP sentence conveys an "expressive judgment," more condemnatory than a prison term of many years. But the *Graham* Court mistakenly argues that the expressive judgment is one of unmitigated revulsion. At the time of sentencing, LWOP purports to brand a defendant with the mark of Cain, but as administered, the sentence neither withholds the possibility of reform nor denies hope to the convicted defendant. LWOP as implemented today is a conflicted sentence, imposed by a community that is on the one hand driven to vengeance but, on the other hand, aware of the humanity of an offender. The impulse to punish and the impulse to forgive both motivate the sentence of life without parole.

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