



School of Law

# **LIFE WITHOUT PAROLE AS A CONFLICTED PUNISHMENT**

**Craig S. Lerner,  
George Mason University School of Law**

***Wake Forest Law Review*, Vol. 48,  
Forthcoming, December 2013**

**George Mason University Law and  
Economics Research Paper Series**

**13-50**

## Life Without Parole as a Conflicted Punishment

DRAFT Sept 20, 2013: Please do not quote

48 Wake Forest Law Review \_\_\_ (forthcoming December 2013)

Craig S. Lerner\*

### *Abstract*

Life without parole (LWOP) has displaced the death penalty as the distinctive American punishment. Although the sentence scarcely exists in Europe, roughly 40,000 inmates are serving LWOP in America today. Despite its prevalence, the sentence has received little academic scrutiny. This has begun to change, a development sparked by a pair of Supreme Court cases, *Graham v. Florida* (2010) and *Miller v. Alabama* (2012), which express European-styled reservations with America's embrace of LWOP. Both opinions, like the nascent academic commentary, lament the irrevocability of the sentence and the expressive judgment purportedly conveyed—that a human being is so incorrigible that the community brands him with the mark of Cain and banishes him forever from our midst. In the tamer language of the *Graham* opinion, LWOP “forfeits altogether the rehabilitative ideal.”

This Article tests whether that phrase is a fair characterization of LWOP today, and concludes that the *Graham* Court's treatment of LWOP captures only a partial truth. Life without parole, the Article argues, is a conflicted punishment. The community indulges its thirst for revenge when imposing the sentence, but over time softer impulses insinuate themselves. LWOP is in part intended as a punishment of incalculable cruelty, more horrible than a prison term of many years, and on par with or worse than death itself. In practice, however, LWOP also emerges as a softer punishment, accommodating a concern for the inmate's humanity and a hope for his rehabilitation.

Keywords: life without parole, LWOP, death penalty, execution, *Graham v. Florida*, *Miller v. Alabama*, Eighth Amendment, punishment, sentencing, retribution, rehabilitation, banishment, clemency, juveniles, *Harmelin v. Michigan*, *Solem v. Helm*, Cesare Beccaria, John Stuart Mill, William Tallack, Walter Berns

---

\* Professor of Law and Associate Dean for Academic Affairs, George Mason University School of Law, 3301 North Fairfax Drive, Arlington, VA 22201. The author thanks Leslie Alden, Lloyd Cohen, Steven Eagle, Bruce Johnson, Renee Lerner, Nancy Tardy, Daniel Polsby, and participants at the George Mason Levy Workshop for helpful comments. He can be reached at [clerner@gmu.edu](mailto:clerner@gmu.edu).

Life Without Parole as a Conflicted Punishment

Craig S. Lerner

Table of Contents

Introduction.....1

I. LWOP and American Exceptionalism.....6

    A. The European Experience .....6

    B. The American Experience.....15

    C. The European Turn in American LWOP Jurisprudence.....24

II. Life Without Parole as Harsh Punishment .....28

    A. LWOP as Internal Banishment .....29

    B. The Rhetoric of LWOP: For The Monsters Among Us.....33

III. Life Without Parole as Soft Punishment.....41

    A. LWOP Compared to Death Penalty: Consistent with Rehabilitation .....42

    B. Educational and Vocational Opportunities .....45

    C. The Persistence of Hope .....50

        1. Appeals.....51

        2. Executive Clemency.....52

        3. Change in Laws.....55

IV. Making Sense of Life Without Parole .....57

    A. *Graham* and *Miller* Revisited .....58

    B. Synthesis of Retributivist and Rehabilitative Impulses .....64

Conclusion.....72

## Life Without Parole as a Conflicted Punishment

Craig S. Lerner

Professor of Law and Associate Dean for Academic Affairs  
George Mason University School of Law  
3301 North Fairfax Drive  
Arlington, VA 22201  
[clerner@gmu.edu](mailto:clerner@gmu.edu)

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.”

Friedrich Nietzsche, *Beyond Good and Evil*, paragraph 201.

A sentence of life imprisonment without parole, however, 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.

*Graham v. Florida*, 130 S.Ct. 2011, 2029-2030 (2010).

### **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.<sup>1</sup> Berns argued that only a squeamishness about, and even aversion to, punishing criminals could explain the direction of American attitudes to the death penalty. A little more than three decades later, this 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,<sup>2</sup> and formal abolition of the practice in a few states,<sup>3</sup> perhaps hinting that Berns’s

---

<sup>1</sup> WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 152 (1979).

<sup>2</sup> See *infra* at text accompanying note 89.

<sup>3</sup> See Samuel Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 190, 1922 n.95 (2012) (counting five states formally abolishing the death penalty since 2007).

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. Countless pixels are still spent in the study of capital punishment, but academics in this regard are characteristically out of touch with reality.<sup>4</sup> The death penalty, as an inflicted punishment, has receded over the past decade. 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.<sup>5</sup> 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 18<sup>th</sup> century Italian 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.<sup>6</sup> 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. Europeans today widely subscribe to Beccaria’s rejection of the death

---

<sup>4</sup> A search in the westlaw jlr database of “death penalty” and date (2012) generates 1287 hits. A search of (life /5 parole) and date (2012) generates 294. The first book-length treatment of LWOP was published in 2012. CHARLES J. OGLETREE, JR. AND AUSTIN SARAT (EDS.), *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* (2012). Prior to that, some of the most perceptive academic commentary was in the form of student notes. See Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1840 (2006) (“Harvard Note”); Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 548 (1990).

<sup>5</sup> See Retentionist Countries, Death Penalty Info. Ctr., [http:// www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries](http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries) (last visited February 18, 2012). India, the world’s second most populous country, still preserves the death penalty in its criminal law, although the sentence is rarely imposed.

<sup>6</sup> See *infra* at text accompanying notes 17 to 24.

penalty, but many nations regard LWOP as so cruel as to be inconsistent with human dignity; those nations that permit it limit its scope to the narrowest of cases.<sup>7</sup> In America, LWOP has soared in popularity precisely as the death penalty has waned. Elected officials regularly embrace LWOP, often as an alternative to the death penalty, emphasizing the sentence's profound harshness. This complicates the narrative proposed by Walter Berns, for any nation capable of employing a punishment so cruel as to be rejected by the "civilized world" would seem to be safe from the charge of "pathological softness."

A pair of recent Supreme Court cases, *Graham v. Florida*<sup>8</sup> and *Miller v. Alabama*,<sup>9</sup> arguably portends a trans-continental 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 are in effect funeral rites. Or in the legalistic language of the *Graham* opinion, LWOP "forswears altogether the rehabilitative ideal."<sup>10</sup>

This Article focuses on that phrase and tests whether, as much academic commentary assumes,<sup>11</sup> it is a fair and complete characterization of LWOP today. It argues that the Court's

---

<sup>7</sup> See *infra* at text accompanying notes to 40 to 59.

<sup>8</sup> 130 S.Ct. 2011 (2010).

<sup>9</sup> 132 S.Ct. 2455 (2012).

<sup>10</sup> 130 S.Ct. at 2029-2030.

<sup>11</sup> See, e.g., Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality and Sentencing Policy: Roper, Graham, Miller/Jackson and the Youth Discount*, 31 LAW & INEQUALITY 263, 301 (2013) ("a LWOP sentence effectively extinguishes the offender's life"); Ashley Nellis, *Tinkering With Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIA. L. REV. 439, 457 (2013) ("in both an execution and a life sentence without the possibility of parole there is no hope for redemption or reform"); Josh

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, 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?<sup>12</sup> LWOP, the 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 it as a reflection of our moral progress.

A brief road map will suffice. Section I sketches the history of LWOP, from its philosophical origins centuries ago through its modern European rejection, enthusiastic

---

Bowers, *Mandatory Life and the Death of Equitable Discretion*, in OGLETREE & SARAT, *supra* note 4 (“once we scratch the surface, it becomes less clear that LWOP is definitively milder than [the death penalty]”); Jessica S. Henry, *Death in Prison Sentences: Overutilized and Underscrutinized* in OGLETREE & SARAT, *supra* note 4 (preferring the acronym “DIP” [“death in prison”] to LWOP and arguing that “DIP sentences deny the humanity of the offender”); Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1764 (2012) (likening LWOP to a “life with hopelessness”); William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Heightened Review Under the Eighth Amendment After Graham v. Florida*, 77 OHIO ST. L. J. 1109, 1127 (2010) (LWOP “extinguishes the opportunity for redemption and reform”); Michael M. O’Hear, *The Beginning of the End of Life Without Parole*, 23 FED. SENT. R. 1 (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 life”); Catherine Appleton and Brent Grever, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 611 (2007) (“LWOP removes any prospect for change and is therefore fundamentally inhumane.”). 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*, THE DAILY BEAST, April 12, 2012, at <http://www.thedailybeast.com/articles/2012/04/27/life-without-parole-is-a-terrible-idea.html>.

<sup>12</sup> 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 (quoting Blecker). Blecker’s work is considered *infra* at text accompany note 292.

American embrace, and recent judicial reservations. Sections II and III test the proposition, first articulated in Beccaria and now presumed in *Graham* and *Miller*, that LWOP expresses unmitigated revulsion. Section 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. Section III turns to the counter-evidence, and catalogs 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. Section IV draws upon the preceding sections to expose the simplistic assumptions that undergird the *Graham* and *Miller* opinions. Life without parole, the Article argues, is a conflicted punishment, imposed by a community that lacks 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 preserved as a possibility.

Before proceeding, two stylistic points: 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 that 97% of inmates serving LWOP are men.<sup>13</sup> Second, the 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 the crimes that culminate in LWOP of their horror.<sup>14</sup> It is, however, only by confronting that horror that one can make a plausible case for the moral intelligibility of life without parole.

---

<sup>13</sup> See Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole in United States*, [http://sentencingproject.org/doc/publications/inc\\_federalsentencingreporter.pdf](http://sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf) (as of 2008, 3% of the 41,095 inmates sentenced to LWOP are women).

<sup>14</sup> For the dissection 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).

## I. LWOP and American Exceptionalism

To what extent American and European cultures are distinct with respect to taxes, welfare policy, litigiousness, and moral attitudes can be debated.<sup>15</sup> 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.<sup>16</sup> 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 strictly limited in those countries that retain it as a possibility. In the United States, LWOP almost did not exist 40 years ago, but is today commonplace. Yet the starkness of this European/American divide has been thrown into question by *Graham* and *Miller*, which express European-styled reservations about LWOP.

### A. The European Experience

Few criminologists are as reflexively praised as Cesare Beccaria, author of *Of Crimes and Punishments* at age 27. Celebrated as the “boy genius of Enlightenment criminal law thought,”<sup>17</sup> Beccaria is renowned today for his rejection of torture and death penalty.<sup>18</sup> 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) was linked with 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

---

<sup>15</sup> Peter Baldwin, *THE NARCISSISM OF MINOR DIFFERENCES* (2009) makes the case for convergence. For an appreciative, albeit critical review, see Dennis Boyles, *Vive la Difference*, CLAREMONT REVIEW OF BOOKS, Spring 2010.

<sup>16</sup> See generally JAMES Q. WHITMAN, *HARSH JUSTICE; CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003). The broad statement needs clarification. Some nations in Europe, in particular England and Wales, are “harsher” than the nations on the continent; and in the United States, one jurisdiction, Alaska, which has rejected the death penalty and LWOP, might be called “softer” than others. 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 section.

<sup>17</sup> WHITMAN, *supra* note 16, at 50.

<sup>18</sup> See, e.g., John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 N.W. J. L. & SOC. POL’Y 195 (2009).

the death penalty. According to Beccaria, citizens behold with “salutary terror” the “continued suffering” of those whose lives have been reduced to “beast[s] of burden.”<sup>19</sup> Beccaria argued that a sentence of life imprisonment without any hope of release is a better—*harsher*—punishment than the death penalty.<sup>20</sup> Nearly four decades later, Beccaria served as one of several advisors in a project to reform the criminal law of Austrian Lombardy. The minority report he co-authored recapitulated his earlier arguments against the death penalty (adding, as a criticism, its irrevocability), and proposed instead “perpetual enslavement” and “forced labor.”<sup>21</sup>

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. For lesser offenses, the state deployed corporal punishment, fines, shaming penalties, and banishment to ensure law-abidingness. 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).<sup>22</sup> In recent years, alternative punishments, principally some form of probation, have become commonplace for nonviolent crimes. But for more serious offenses, the only civilized punishment is incarceration: it would be barbaric to cane criminals.<sup>23</sup> Whether the latter punishment might achieve equal or greater deterrence, and be more likely to promote rehabilitation, and for that matter 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.<sup>24</sup>

---

<sup>19</sup> CESARE BECCARIA, OF CRIMES AND PUNISHMENT (1764)

<sup>20</sup> *Id.* at 99-100.

<sup>21</sup> Quoted in Bessler, *supra* note 18, at 45.

<sup>22</sup> See J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 830, 837 (2002) (noting the maxim, *carcer enim ad continendos homines non ad puniendos haberi*, prisons exist only to keep men, not to punish them).

<sup>23</sup> Such punishments continued, albeit rarely, into the twentieth century. For example, the whipping point was used in Delaware as late as 1952.

[http://archives.delaware.gov/100/other\\_stories/Enforcing%20the%20Law.shtml#TopOfPage](http://archives.delaware.gov/100/other_stories/Enforcing%20the%20Law.shtml#TopOfPage).

<sup>24</sup> For doubts about the vaunted humanitarianism of modern careral punishment, the obligatory citation is MICHAEL FOUCALT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1975).

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?<sup>25</sup>

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 sophisticated thinker in suggesting doubts. Once the "memory of the crime is no longer fresh," Mill predicted that there will be "an insuperable difficulty in executing" a hard life sentence.<sup>26</sup> Mill was, in short, 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.<sup>27</sup> As Justice Holmes suggested decades later, 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 less punishment than death."<sup>28</sup> Mill thus hints at the possibility that life imprisonment, even if falls short of "perpetual slavery," is a

---

<sup>25</sup> John Stuart Mill, Speech in Favor of Capital Punishment, Apr. 21 1868, available at <http://ethics.sandiego.edu/Books/Mill/Punishment> ("Mill Speech"). The speech is quoted in Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1764 n.93 (2012).

<sup>26</sup> Mill Speech, *supra* note 25.

<sup>27</sup> *Id.* (arguing that life without parole, although a sentence more horrible than death, "would very probably not be" recognized as such).

<sup>28</sup> *Biddle v. Perovich*, 274 U.S. 480, 487 (1927).

harsher punishment than the death penalty, but one with less deterrent effect. Mill 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.”<sup>29</sup>

Mill’s views evolved, and by the end of his life he rejected both life imprisonment and the death penalty. This view is compellingly articulated by Mill’s older contemporary, the British Quaker William Tallack.<sup>30</sup> 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. 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.”<sup>31</sup> 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; this in turn “diminish[es] the fear of punishment amongst the criminally-disposed portion of the outside community.”<sup>32</sup>

Notwithstanding these qualifications (and here again following Mill) Tallack suggests that irrevocable life imprisonment is for, the majority of inmates, a cruel and barbaric punishment. Sweden provides a test case for this proposition, for her prisons were even a

---

<sup>29</sup> Mill Speech, *supra* note 25.

<sup>30</sup> WILLIAM TALLACK, *PENOLOGICAL AND PREVENTIVE PRINCIPLES* (1888). 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, 712-13 (1998).

<sup>31</sup> TALLACK, *supra* note 30, at 152.

<sup>32</sup> *Id.* at 153

century ago renowned for their relative comforts.<sup>33</sup> If irrevocable life imprisonment could ever be bearable, it was here. Yet Tallack reports 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.<sup>34</sup>

Deprived of any “hope of ultimate restoration to the friendships and pleasures of free life,” inmates were sunk in a “darkness of despair.”<sup>35</sup> Consistent, furthermore, with the Quaker emphasis on moral and spiritual regeneration (which he calls “matters of still higher importance”), Tallack raised doubts about life imprisonment as a mechanism for encouraging inmates to “prepar[e] for a happy eternity.”<sup>36</sup> Tallack wrote that “the unavoidable conditions of life-imprisonment [and] the perpetual association with other criminals, under a hopeless prolongation of the worst influences, renders spiritual conversion probable.”<sup>37</sup> 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 20-year term of imprisonment. Such a sentence, he argued, provided sufficient deterrence. Furthermore, society could rest assured that most offenders, by the time of their release, would be tamed by advanced age; and the “element of hope” would mitigate the harshness of the sentence and spur the offender in his rehabilitative efforts.<sup>38</sup>

---

<sup>33</sup> Swedish prisons today could be profiled in Ikea catalogs. *See*

<http://www.buzzfeed.com/sludgepunkslimeharpy/scandinavian-prison-or-american-office-82dk>.

<sup>34</sup> TALLACK, *supra* note 30, at 154. One cannot help wondering if Tallack employed authorial license in paraphrasing the inmates’ complaints.

<sup>35</sup> *Id.* at 154.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 155.

Yet why should society have any interest in promoting hope and mitigating the sentence's harshness? From Beccaria to Tallack the attitude toward life imprisonment has shifted dramatically. Tallack assumed that one (among several) goals 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—that is, when considering criminals who have committed the gravest offenses that merit the most severe punishment allowable by law—Beccaria displayed 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 enslavement.” Tallack rejected this approach, and assumed that even the worst offenders are capable of reform and that society has a duty to promote this happy result: even the worst of criminals should be encouraged to “prepar[e] themselves for a happy eternity.” 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. Beccaria's treatment of “perpetual imprisonment” regarded this as a matter of no concern.

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.<sup>39</sup> 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 possible release.”<sup>40</sup> 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 court,” foreclosed any life sentence for which the only possibility of commutation was executive clemency.<sup>41</sup> The following year, Spain amended her constitution to prohibit any sentence that foreclosed “reeducation and social rehabilitation.”<sup>42</sup>

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 and degrading” punishment. In 2008, the issue divided the 17-judge European Court on Human Rights in *Kafkaris v. Cyprus*, with five judges arguing that life sentences that have no judicial mechanism for release violate Article 3, because they include no “real and tangible prospect for release.”<sup>43</sup> In the 2012 case *Vinter v. United Kingdom*, a panel of 7 judges on the ECHR revisited the issue

---

<sup>39</sup> Cf. JACQUES MONOD, CHANCE AND NECESSITY (1970) (“For their moral bases the ‘liberal’ societies of the West still teach – or pay lip-service to- a farrago of Judeo-Christian religiosity, scientific progressivism, belief in the “natural” rights of man, and utilitarian pragmatism.”).

<sup>40</sup> General Report on the Treatment of Long-Term Prisoners by the Sub Committee No. XXV of the European Committee on Crime Problems 1975, paragraph 77, quoted in NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW 320 (2002).

<sup>41</sup> Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences*, 23 FED. SENT’G REP. 19 (2010). See Appleton and Grever, *supra* note 11, at 612 (“To lock up a prisoner and remove all 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 (2008).

<sup>42</sup> C.E., B.O.E. n. 311, Dec. 29, 1978, § 25(2) (Spain), translated in Senado de España, Spanish Constitution, available at [http://www.senado.es/constitu\\_i/indices/consti\\_ing.pdf](http://www.senado.es/constitu_i/indices/consti_ing.pdf). For a discussion of the amendment, see Amanda Ploch, *Why Dignity Matters: Dignity and the Right (or Not) To Rehabilitation From National and International Perspectives*, 44 N.Y.U. J. INT’L L. & POL. 887, 916 (2012).

<sup>43</sup> *Kafkaris v. Cyprus*, App. No. 21906/04, Eur. Ct. H.R. (2008). *Kafkaris* is discussed in Smit, *supra* note 41.

and narrowly upheld life sentences imposed on three British nationals.<sup>44</sup> 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. The dissenting justices in *Vinter* emphasized that their objection was not to a life sentence *per se*, but to the absence of what they call a “suitable release mechanism.”<sup>45</sup> Because there was no possibility of release except by politically accountable officials acting upon narrowly defined grounds, the dissenting justices complained the sentence failed to “afford a measure of hope to the convicted person” or to “remove the hopelessness inherent in a sentence of life.”<sup>46</sup>

As a practical matter, these concerns seldom arise: It is likely that in the entire European continent, there are fewer than 100 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 (37 inmates), England and Wales (36 inmates), and France (3 inmates).<sup>47</sup> 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.<sup>48</sup>

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: Austria, Belgium, the Czech Republic, Estonia, Germany, Lithuania,

---

<sup>44</sup> The text of the opinion can be found at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108610>.

<sup>45</sup> *See id.* (Joint Partly Dissenting Opinion of Judges Garlicki, Bjorgvinsson and Nicolau).

<sup>46</sup> *Id.* 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*, THE TELEGRAPH, July 9, 2013, at <http://www.telegraph.co.uk/news/uknews/law-and-order/10168351/Jeremy-Bamber-wins-human-rights-victory-over-life-means-life-sentences.html>.

<sup>47</sup> *Smit*, *supra* note 41.

<sup>48</sup> *Id.*; Marek Szydło, *Vinter v. United Kingdom*, 106 AM. J. INT’L LAW 624 (2012).

Luxembourg, Poland, Romania, Russia, Slovakia, Slovenia, and (possibly) Switzerland.<sup>49</sup> In a few of these countries, such as Austria,<sup>50</sup> and Germany,<sup>51</sup> those sentenced to life must be considered for parole after as little as 15 years, and the norm seems to be that even inmates convicted of the most serious crimes are promptly released once they are eligible.<sup>52</sup> Finally, at least three nations—Norway,<sup>53</sup> Spain,<sup>54</sup> and Portugal<sup>55</sup>—have adopted Tallack’s approach *in toto*, and prohibit all life sentences. Many Americans were amazed to discover,<sup>56</sup> for example, that Anders Breivik, the Norwegian convicted of killing 77 people, faced a maximum punishment of 21 years in prison.<sup>57</sup> Likewise, the mastermind of the Madrid train bombings, which killed 191 people, can expect to be released from prison in 40 years.<sup>58</sup> In sum, European nations have generally adopted Tallack’s vision of LWOP as a sentence of such barbarity that it

---

<sup>49</sup> This list is drawn from Szydlo, *supra* note 48 at 626 (2012). 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. *But see* Smit, *supra* note 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.*

<sup>50</sup> For example, Johan Unterweger raped and murdered an 18-year-old woman in 1974, for which he was sentenced to life imprisonment. Released in 1990, Unterweger was hailed as the “poster child for the rehabilitative model” and traveled to Los Angeles, where he murdered 6 more people in the span of a year. *See* JOHN LEAKE, *ENTERING HADES: THE DOUBLE LIFE OF A SERIAL KILLER* 39-42 (2009).

<sup>51</sup> Although parole is routinely granted to most inmates, an exception was made in the case of war criminal Josef Schwammberger, who died in prison. *See Josef Schwammberger, 92, Nazi War Camp Commander Dies*, N. Y. TIMES, Dec. 4, 2004.

<sup>52</sup> In Belgium, an inmate is eligible for parole after 10 years. *See* Smit, *supra* note 41.

<sup>53</sup> Norwegian law imposed a maximum prison term of 21 years, even in the case of multiple homicides. *See* Mark Lewis and Sarah Lyall, *Norway Killer Gets the Mximum: 21 Years*, N.Y. TIMES, Aug. 12, 2012.

<sup>54</sup> Spanish law forecloses life imprisonment, and the maximum sentence for murder is 20 years, or 30 years if the crime involved an act of terrorism.

<sup>55</sup> The Portuguese constitution was amended in 1976 to foreclose life imprisonment. *See* art. 30, § 1. In 1997, the Constitution was further amended to prohibit extradition to any country where a suspect might face life imprisonment. The Penal Code prohibits a sentence of more than 25 years for any crime. Art. 41. <http://www.portolegal.com/CPENAL.htm>.

<sup>56</sup> The leniency of the European criminal justice system 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 Weilaard & Don Melvin, *Michelle Martin, Belgium Pedophile Marc Dutroux’s Ex-Wife, To Be Released From Prison*, Associated Press, August 1, 2012.

<sup>57</sup> *See supra* note 53.

<sup>58</sup> Unlike Norwegian law, the sentences can be run consecutively. 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. Yet Spanish law additionally provides that the maximum punishment, regardless of the number of crimes, is 40 years in prison. *See* Michelle Tsai, *40,000 Years in Spanish Prison?*, [http://www.slate.com/articles/news\\_and\\_politics/explainer/2007/11/40000\\_years\\_in\\_spanish\\_prison.html](http://www.slate.com/articles/news_and_politics/explainer/2007/11/40000_years_in_spanish_prison.html).

is never, or almost never, appropriate. In the words of two English criminologists, urging their own nation to embrace the approach on the continent: “To 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.”<sup>59</sup>

## 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.<sup>60</sup> An official report described “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.”<sup>61</sup> 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.”<sup>62</sup>

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 15 years;<sup>63</sup> sixty years later, Congress reduced the minimum term for parole eligibility to 10 years.<sup>64</sup> In his concurring opinion in *Furman v. Georgia* in 1972, Justice Stewart noted that what is called “life

---

<sup>59</sup> Catherine Appleton and Brent Grever, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 612 (2007).

<sup>60</sup> The report is quoted in TALLACK, *supra* note 30.

<sup>61</sup> *Id.*

<sup>62</sup> *State v. Esser*, 115 N.W.2d 505, 517 (Wis. 1962).

<sup>63</sup> Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910-1972)*, 61 FED. PROBATION 23, 25 (1997).

<sup>64</sup> Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1840 (2006) (“Harvard Note”).

imprisonment” was really “a misnomer today.” He added that “[r]arely, if ever, do crimes carry a mandatory life sentence without possibility of parole.”<sup>65</sup>

*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.<sup>66</sup> The motivation was partly a perception of rising crime rates, but the Supreme Court’s apparent foreclosing of the death penalty also galvanized support for a sentence that held out the promise of meaningful deterrence while also satisfying the retributivist demand for proportionate punishment.<sup>67</sup>

In 1976, the Supreme Court lifted the moratorium on the death penalty and returned the issue to the political realm.<sup>68</sup> 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.<sup>69</sup> The latter reasoned that the electorate would be more willing to abolish the death penalty if LWOP was firmly established in the law. 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. 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 CourtTV and American Lawyer, wrote in 1987:

---

<sup>65</sup> *Furman v. Georgia*, 408 U.S. 238, 302 (1972).

<sup>66</sup> Ala. Code § 13A-5-9.

<sup>67</sup> Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 548 (1990).

<sup>68</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>69</sup> See Harvard Note, *supra* note 64, at 1854; Carol S. Steiker and 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, 175 (2008).

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.<sup>70</sup>

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. On one such furlough, Bush's ads reported, Horton kidnapped and raped a woman. Politicians learned their lesson from the Horton fiasco, as evidenced by an editorial by Governor Mario Cuomo. Explaining his repeated vetoes of legislation to reintroduce the death penalty in New York, Cuomo wrote:

That alternative is life imprisonment without the possibility of parole. No "minimums" or "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.<sup>71</sup>

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."<sup>72</sup> When the Governor of Connecticut signed a law abolishing the death penalty, he boasted that Connecticut was joining "every other civilized nation," perhaps forgetting about Japan.<sup>73</sup> 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 want to experience. Let's throw away the key and have them spend the rest of their natural lives in jail."<sup>74</sup> For American politicians, any suggestion that the death penalty should be abolished is typically counterbalanced with stern talk about punishing

---

<sup>70</sup> Steven Brill, *Throw Away the Key*, Am. L. 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).

<sup>71</sup> Governor Mario M. Cuomo, *New York State Should Not Kill People*, N.Y. TIMES, June 17, 1989.

<sup>72</sup> See Mike Bloomberg on Crime, at [http://www.ontheissues.org/2008/Mike\\_Bloomberg\\_Crime.htm](http://www.ontheissues.org/2008/Mike_Bloomberg_Crime.htm).

<sup>73</sup> Peter Applebome, *Death Penalty Repeal Goes to Connecticut Governor*, N. Y. TIMES, April 11, 2012

<sup>74</sup> *Id.*

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 soft-headed 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.<sup>75</sup> In *Solem v. Helm*,<sup>76</sup> the beneficiary of the Court's attention was a defendant sentenced to LWOP under a South Dakota habitual offender statute.<sup>77</sup> The trial judge had told Helm that his long record demonstrated that he was "beyond rehabilitation."<sup>78</sup> In rejecting this conclusion, the Supreme Court explained:

[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.<sup>79</sup>

Helm was not a "professional" criminal if by this the Court intends 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."<sup>80</sup> Yet as the detective Sam Spade

---

<sup>75</sup> 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. Although the Court upheld this constitutionality of this condition, Schick was nonetheless released a few years later.

<sup>76</sup> *Solem v. Helm*, 463 U.S. 277 (1983).

<sup>77</sup> S.D. Codified Laws § 24-15-4 (1979) ("A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.").

<sup>78</sup> *Solem v. Helm*, 463 U.S. 277, 282-283 (1983).

<sup>79</sup> *Id.* at 297.

<sup>80</sup> Helm had been varied in his crimes, and at least one could arguably be categorized as violent *Id.* at 280 n.1 (noting that he had been convicted of burglary, albeit of the third degree).

noted in a different context, one must be impressed by the sheer number—7—of felony convictions Helm had accumulated, not a small accomplishment given that he was in prison for most of his adult life.<sup>81</sup> At some point, as the dissenting Justice asks, is it reasonable to ask whether even a nonviolent offender is “incorrigible”?<sup>82</sup>

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*,<sup>83</sup> 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 comparable in the severity of his crimes to those of Jerry Helm. As South Dakota argued, both inmates *could* be released before they died: Rummel could be paroled, and Helm could receive executive clemency. 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,

---

<sup>81</sup> 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 HAMETT, *THE MALTESE FALCON* (1930).

<sup>82</sup> *Solem v. Helm*, 463 U.S. at 317 (1983) (Burger, C.J., dissenting) (“Surely seven felony convictions warrant the conclusion that respondent is incorrigible.”).

<sup>83</sup> 445 U.S. 263 (1980).

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.<sup>84</sup>

Such language foreshadowed concerns raised in the *Kafkaris* and *Vinter* cases.<sup>85</sup> In this view, which now informs much of the European law on the matter, LWOP is cruel and inhumane if the inmate is not provided with some “hope,” that is, a release mechanism apart from the whim of an elected official.

Yet if *Solem* intimated a possible movement in a European direction, fraught with qualms and equivocations about the harshness of LWOP, *Harmelin v. Michigan*,<sup>86</sup> 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. 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.”<sup>87</sup> Justice Kennedy, in his concurring opinion, distinguished *Helm* on the basis of the severity of the crime, thus suggesting that the Court would continue to apply some meaningful scrutiny to LWOP sentences imposed on nonviolent offenders.<sup>88</sup> This guidepost proved easy to negotiate, as states passed recidivism statutes that reserved LWOP for violent offenses; repeat nonviolent offenders were dispatched to prison for long determinate sentences.

---

<sup>84</sup> *Solem*, 463 U.S. at 317.

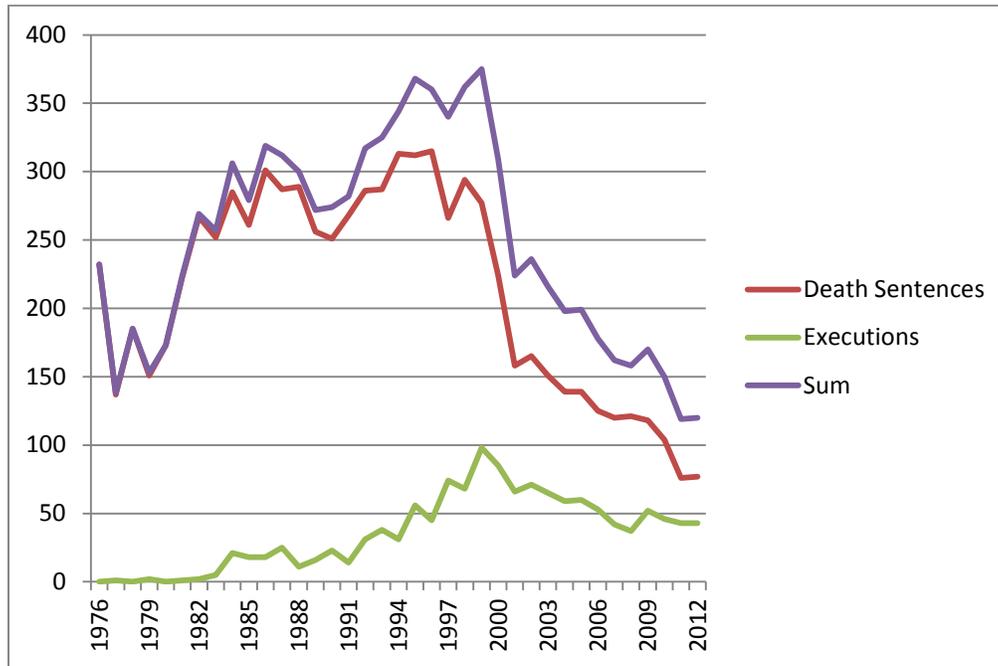
<sup>85</sup> See *supra* at text accompanying notes 43 to 45.

<sup>86</sup> 501 U.S. 957 (1991).

<sup>87</sup> *Id.* at 995-996.

<sup>88</sup> *Id.* at 1002 (Kennedy, J., concurring).

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<sup>89</sup>:

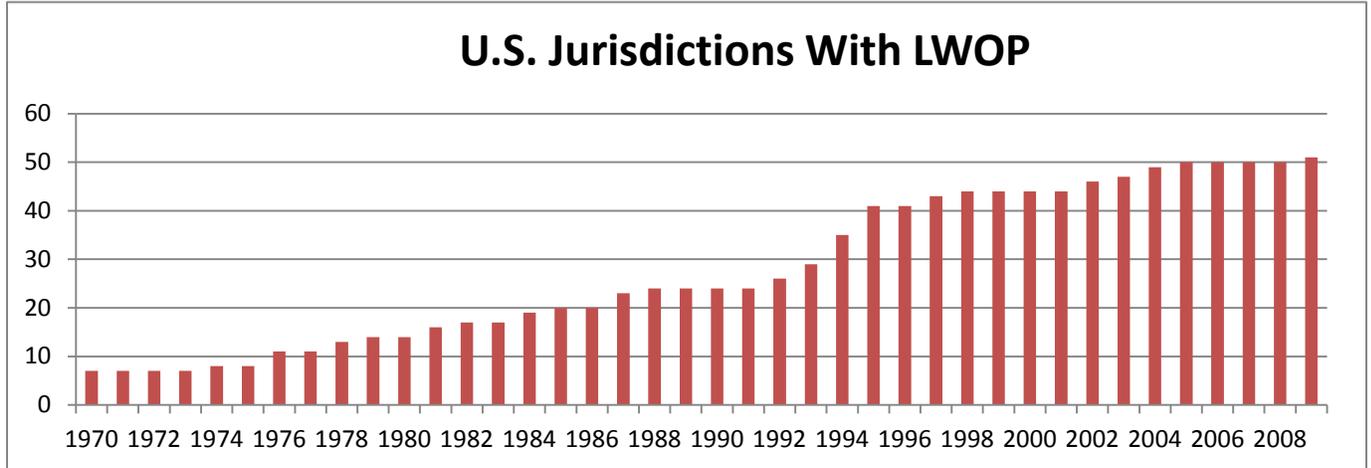


The number of executions in 2012, half its peak in 1998, still exceeds annual totals in the 1980s. But if one adds the number of executions and death penalty sentences, the sum has plummeted, and now is less than what it was in 1976.<sup>90</sup> While the death penalty beats a retreat, legislatures in the United States have, with the Supreme Court’s endorsement, signed onto LWOP in growing

<sup>89</sup> Data is taken from Death Penalty Information, 1976 to present, at <http://www.deathpenaltyinfo.org/executions-year>.

<sup>90</sup> One could argue that the “sum” double counts executions, as those individuals at one point received a death sentence. This is of course true, although several years separate the events. My point in summing here is to give a sense, each year, of the prominence of the death penalty, which could be said to reflect the number of trials that issued in a death sentence plus the number of executions that actually occur.

numbers<sup>91</sup>:

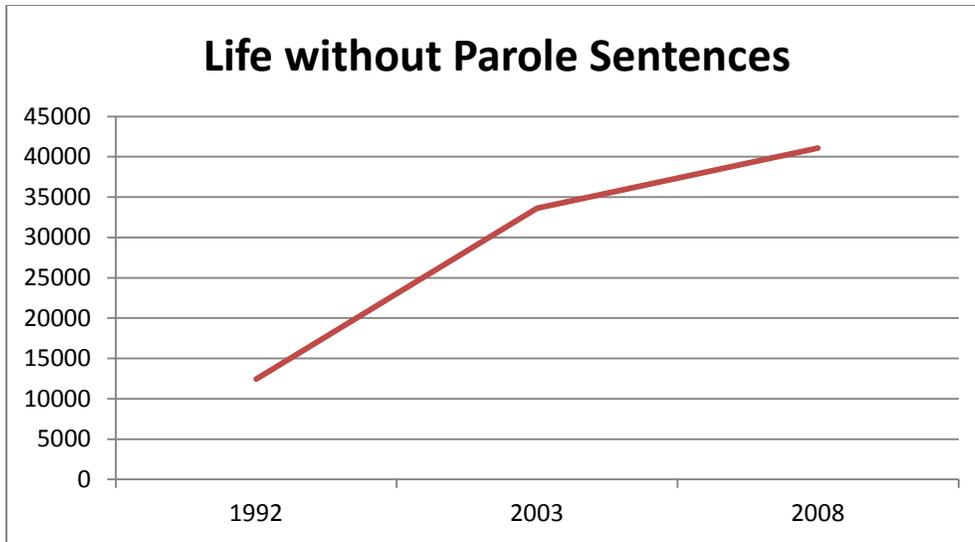


This graph understates the developments in the past 40 years, as it is likely that the 7 jurisdictions in which LWOP was technically a possibility in 1970 seldom imposed such a sentence. In any event, at this point, of the 52 jurisdictions in the United States (the 50 states, plus the District of Columbia and the federal government), only one (Alaska) does not impose such a sentence.<sup>92</sup> Nationwide data on the total number of inmates serving LWOP sentences are difficult to compile, but using three points we may infer a dramatic escalation over the past 20 years:<sup>93</sup>

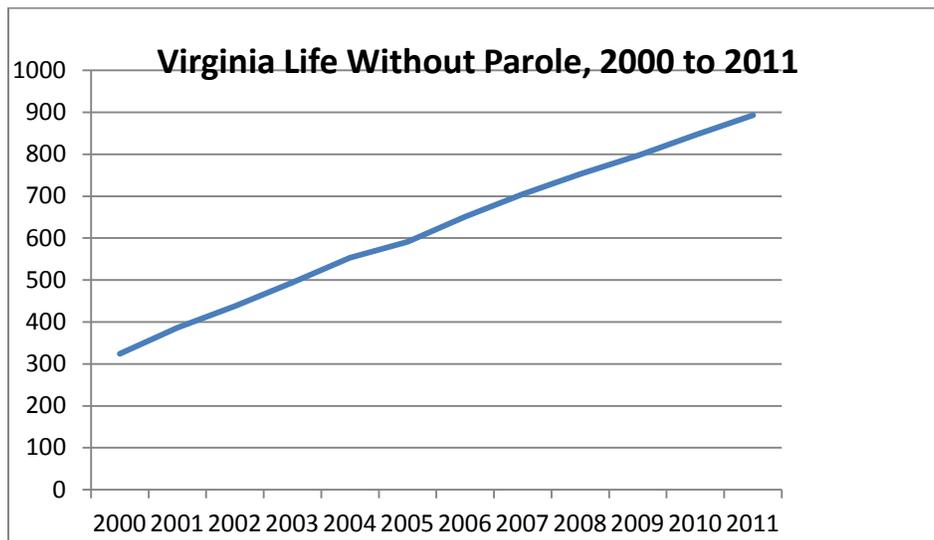
<sup>91</sup> Data is taken from Death Penalty Information, Years That States Adopted LWOP Sentencing, at <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing>.

<sup>92</sup> It is often reported that New Mexico does not have the death penalty, but when the state abolished the death penalty in 2009, it 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. 9/10/13 Telephone Conversation with Alex Tomlin, Public Affairs Director, New Mexico Corrections Department; 9/11/13 Email from Jim Brewster, General Counsel, New Mexico Corrections Department.

<sup>93</sup> 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 and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (2009) at <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/No%20Exit-%20The%20Expanding%20Use%20of%20Life%20Sentences%20in%20America.pdf>.



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:<sup>94</sup>



In 2000, there were 324 LWOP inmates; in 2011, that figure had surged 170%, and stood at 893.<sup>95</sup> It is likely that the Commonwealth of Virginia now houses 10 times the number of LWOP inmates as the entire continent of Europe. When Walter Berns worried that the abolition of the

<sup>94</sup> Data taken from 2/12/2012 email from Larry Traylor, Virginia Department of Corrections (on file with author).

<sup>95</sup> By comparison, the total prison population increased only 30,506 to 37,503, or an increase of 23%. *See id.*

death penalty hinted at a despicable softness and tenderness in his countrymen,<sup>96</sup> 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?”<sup>97</sup>

### C. The European Turn in American LWOP Jurisprudence

As state after state sentenced more and more defendants to LWOP, there were some Americans who questioned the project. For starters, there were the discordant notes struck by Justice Stevens 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.” [quoting *Furman*] Serious as this defendant's crime was, I believe it is irrational to conclude that every similar offender is wholly incorrigible.<sup>98</sup>

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*, as a repudiation of the “rehabilitative function,” in his characterization of LWOP. Only for criminals who are “wholly incorrigible” 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

---

<sup>96</sup> See BERNs, *supra* note 1, at 152-54.

<sup>97</sup> FREDERICK NIETZSCHE, *BEYOND GOOD AND EVIL*, paragraph 201.

<sup>98</sup> *Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J. dissenting).

“death is different” drum for twenty years, and just 20 years after *Harmelin*, these cases hinted that there was merit after all to Justice Stevens’ critique of LWOP. Although *Graham* and *Miller* both turned on the constitutionality of life without parole when imposed on juveniles, 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 life without parole. The argument is more elaborate in *Graham*, but the *Miller* Court adopted its reasoning on all points and thereby cemented it as the Supreme Court’s current understanding of LWOP. Although there are several difficulties with this approach, I postpone my criticisms until Section IV.A.

In *Graham*, the issue was the constitutionality of LWOP imposed on a juvenile for any crime other than homicide. Addressing the proportionality of crime to punishment, Justice Kennedy, writing for 4 other Justices, begins with the assertion that LWOP is the “second most severe punishment permitted by law.”<sup>99</sup> 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* decision. 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.”<sup>100</sup> A few pages later, Kennedy treats the possibility of executive clemency, as well as other mechanisms for release, as so remote that they can be dispensed with altogether. LWOP is as “an irrevocable judgment about the person’s value and place in society.”<sup>101</sup> And soon thereafter, clemency is completely forgotten. “Life in prison

---

<sup>99</sup> *Graham*, 130 S.Ct. at 2027.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2030. *See also* *Miller*, 132 S.Ct. at 2465 (LWOP reflects “an irrevocable judgment about the offender”) (quoting *Graham*).

without the possibility of parole gives no chance for fulfillment outside prison walls, *no chance* for reconciliation with society, no hope.”<sup>102</sup>

LWOP as a denial of hope proves to be another theme of the *Graham* decision. 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 50 years in prison, for example, experience their sentences as markedly 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 are often denied access to vocational training and other rehabilitative services that are available to other inmates.”<sup>103</sup> 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.”<sup>104</sup> 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,” however culpable the criminal and heinous his crimes? The *Graham* Court focuses on juveniles who had been sentenced for crimes other than homicide, and concludes that for such defendants

---

<sup>102</sup> *Graham*, 130 S.Ct. at 2032 (emphasis added). See also *Miller*, 132 S.Ct. at 2469 (LWOP “irrevocably sentence[es] [defendants] to a lifetime in prison).

<sup>103</sup> *Graham*, 130 S.Ct. at 2030.

<sup>104</sup> *Id.* at 2029.

LWOP is categorically inappropriate. Such a sentence is permissible only when the state can confidently conclude the defendant is “incorrigible,” which is rarely possible for juveniles.<sup>105</sup>

The Court’s emphasis on incorrigibility is reasonable given its understanding that LWOP denies inmates virtually all opportunities for self-improvement. After all, why waste resources on those incapable of benefitting from them?

The most basic charge of the *Graham* and *Miller* Courts is that LWOP “forfeits altogether the rehabilitative ideal.”<sup>106</sup> The etymology of “rehabilitation” is “re,” or “again,” and “habitare,” or “to make fit.” This raises the question—make fit for what? Indeed, Justice Kennedy concedes that the “concept of rehabilitation is imprecise.”<sup>107</sup> Rehabilitation can be understood in the narrow sense of making the inmate fit again, *as a citizen*, and therefore ready for return to civil society. Or it 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. The opinion encompasses both senses. The Court uses the word in the narrower 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

---

<sup>105</sup> *Id.* at 2032 (“few incorrigible juvenile offenders exist”). See also *Miller*, 132 S.Ct. at 2465 (“incorrigibility is inconsistent with youth”) (quoting *Graham*).

<sup>106</sup> *Graham*, 130 S.Ct. at 2030. See also *Miller*, 132 S.Ct. at 2465 (LWOP “forfeits altogether the rehabilitative ideal” (quoting *Graham*)).

<sup>107</sup> *Graham*, 130 S.Ct. at 2029.

immaterial.”<sup>108</sup> 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 us.

*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 sections 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.

## II. Life Without Parole as Harsh Punishment

This section 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 defendant sentenced to LWOP is dispatched forever to a cage, out of sight and out of mind; 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.

---

<sup>108</sup> *Id.* at 2027.

## A. LWOP as 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] could bear.”<sup>109</sup> 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, it was often regarded as a punishment worse than death.<sup>110</sup> This theme is explored in some of the greatest works of Western literature. Euripides’s heroes and heroines lament the horrors of exile;<sup>111</sup> Socrates preferred hemlock to banishment from Athens;<sup>112</sup> 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.'<sup>113</sup>

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, 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

---

<sup>109</sup> Genesis 4:13.

<sup>110</sup> See generally SARA FORSDYKE, EXILE, OSTRACISM, AND DEMOCRACY: THE POLITICS OF EXPULSION IN ANCIENT GREECE (2005). For example, Forsdyke quotes the poet Theognis: “There is no dear and faithful companion for an exile.” *Id.* at 57

<sup>111</sup> *Id.* at 236 (quoting Euripides, *Heraclidae*).

<sup>112</sup> PLATO, PHAEDO 61c-63c.

<sup>113</sup> Romeo and Juliet, Act III, sc. 3.

philosopher Baruch Spinoza. Having found Spinoza guilty of apostasy, the Chief Rabbi of Amsterdam, on behalf of the community, 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.<sup>114</sup>

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<sup>115</sup> or is more likely to stimulate a self-reckoning salutary for one's spiritual health.<sup>116</sup> 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."<sup>117</sup>

Although an early Supreme Court case suggested that banishment was a punishment that "must belong to every government,"<sup>118</sup> Congresses in the early years of the republic rejected bills that articulated grounds for involuntary expatriation.<sup>119</sup> Over time, both in the United

---

<sup>114</sup> STEVEN NADLER, *SPINOZA: A LIFE* 120 (2001).

<sup>115</sup> Immanuel Kant, *The Metaphysical Elements of Justice* 102-07 (John Ladd trans., 1965).

<sup>116</sup> See Avery Cardinal Dulles, *The Death Penalty: A Right to Life Issue*, 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.")

<sup>117</sup> Theodore Plucknett, *Outlawry*, 11 *ENCYC. SOC. SCI.* 505 (1933).

<sup>118</sup> *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18 (1800) (Cushing, J.).

<sup>119</sup> See *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

States and England, misgivings about such a punishment mounted.<sup>120</sup> This trend culminated in *Trop v. Dulles*,<sup>121</sup> 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. 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.”<sup>122</sup> It was undisputed that the government could have simply executed Trop as a military deserter, so by implication extinguishing his life by hanging, electrocution, or the firing squad would not entail his “total destruction,” nor would such a punishment have been “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.<sup>123</sup> Although technically “[p]rison walls do not form a barrier separating prison inmates from the protections of the

---

<sup>120</sup> See *United States v. Ju Toy*, 198 U.S. 253, 270 (1905) (Brewer, J., dissenting) (rejecting “[b]anishment as ‘the 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 had lost interest in banishing citizens.”).

<sup>121</sup> 356 U.S. 86 (1958).

<sup>122</sup> *Id.* at 101.

<sup>123</sup> See, e.g., Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 315 (2011); Anthony Kennedy, *Speech Before the American Bar Association Annual Meeting* (Aug. 9, 2003) (revised Aug. 14, 2003) (transcript available at <http://www.supremecourt.gov/publicinfo/speeches>.) (“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.”)

Constitution,”<sup>124</sup> as a practical matter inmates, particularly long-term ones, are stripped of many of the fundamental rights that one possesses as an Americans and even as a human being. To take two examples, incarcerated felons typically forfeit the right to vote and even procreate.<sup>125</sup> Moreover, American inmates are not counted for purposes of many “American” statistics, such as unemployment,<sup>126</sup> and high school dropout rates,<sup>127</sup> and as victims, they are undercounted for certain crimes.<sup>128</sup>

Most of our incarcerated fellow citizens make their way back to America and are re-integrated, 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. The cruelty of such a gesture was recognized centuries ago. Blackstone wrote that civil death was 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.”<sup>129</sup> Statutes imposing “civil death,” thus understood as pronouncing one a monster and a bane to human society, were gradually abolished,<sup>130</sup> but some remain, even surviving constitutional challenges.<sup>131</sup>

Consider Rhode Island’s statute:

---

<sup>124</sup> *Turner v. Safley*, 482 U.S. 78, 84 (1987).

<sup>125</sup> *See Gerber v. Hickman*, 264 F.3d 882 (9<sup>th</sup> Cir. 2001).

<sup>126</sup> *See* Robert Weisberg, *Reality-Challenged Theories of Punishment*, 95 MARQ. L. REV. 1203, 1216 (2012).

<sup>127</sup> *See* Howard Erlanger, *The Long Reach of the Carceral State*, 34 LAW & SOC. INQUIRY 439, 444 (2009).

<sup>128</sup> JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 57 (6th ed. 2008)

<sup>129</sup> 4 William Blackstone, *Commentaries* \*373. *See* Sarah C. Grady, *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).

<sup>130</sup> *See* Gabriel H. Chin, *The New Civil Death: Rethinking Punishment in an Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

<sup>131</sup> *Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973).

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 whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of conviction.<sup>132</sup>

Although tamer than the Chief 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 "monster[s]." As explored in the next part, 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 11-year old daughter, Jaime, for dead, having stabbed her many times. 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."<sup>133</sup> Owing to a quirk of New Hampshire law, which was later amended, Gribble was ineligible for the death penalty. In lieu of death or infinity, Judge Abramson sentenced Gribble to LWOP.

This part will consider the rhetoric employed by judges, prosecutors, and victims (or their families) when arguing or holding 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

---

<sup>132</sup> R.I. Gen. Laws §13-6-1 (2002). Even more terse is New York's: New York's statute provides that "[a] person sentenced to life imprisonment is civilly dead." New York Code § 79-a.

<sup>133</sup> Joseph G. Cote, *Gribble Found Guilty, Sentenced to Life in Prison*, March 26, 2011, at <http://www.nashuatelegraph.com/print/?sid=2636765> (visited Feb 28, 2013). For a video of the entire sentencing see [http://www.youtube.com/watch?v=fp6CO\\_o3yhE](http://www.youtube.com/watch?v=fp6CO_o3yhE).

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 nonhomicide<sup>134</sup>) or the criminal (a minor or someone who is mentally retarded<sup>135</sup>) 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, the prosecutor may seek an LWOP sentence as the harshest possible sentence, while the defense attorney will urge the judge or judge to consider a lighter sentence, either life with the possibility of parole or a determinate prison term. In the second category, 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, which we focus on in this part. 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. The trial judge is required to hold a sentencing hearing in which aggravating and mitigating factors are weighed.<sup>136</sup> As a final check, the appeals court reviews LWOP sentences de novo.<sup>137</sup> Appellate opinions are, as a consequence, unusually detailed in their assessment of whether LWOP is warranted, with a rich survey 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 their

---

<sup>134</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>135</sup> *See Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>136</sup> General Laws § 12-19.2.

<sup>137</sup> *Id.*

conclusion that the offender is “beyond rehabilitation” and that, with respect to the possibility of character improvement, “there is no hope.”<sup>138</sup> At times, the ghastliness of the crime left the judge reeling from horror and grasping LWOP as the necessary sentence, given the 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.”<sup>139</sup>

In assessing a defendant’s character and amenability to rehabilitation, the trial judge often considered evidence of the defendant’s character beyond the crime itself. Consider the case of Hamlet Lopez.<sup>140</sup> After terrorizing his ex-girlfriend for several months, he invaded her apartment, tortured her, and then stabbed her to death with a 4-inch knife. The trial judge recapitulated the bloody facts at the sentencing hearing, and then ruminated on Lopez’s “potential for rehabilitation.” His initial behavior after the crime (accusing the Providence police officers of committing the murder) and his dishonest behavior at trial (lying about a medical issue) 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.” Reminiscent of Blackstone’s caution about the use of civil death,<sup>141</sup> the trial judge concluded that Lopez was a “monster.”<sup>142</sup>

---

<sup>138</sup> *State v. Motyka*, 893 A.2d 267, 290 (R.I. 2006). 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. Mcmanus*, 94 A.2d 222, 238 R.I. 2008) (after surveying defendant’s twenty-year history of substance abuse and violence towards his wife, the trial judge doubted whether there is any “possibility of meaningful rehabilitation”; the appellate court concurred: “the trial judge captured perfectly the defendant’s bad character and evil propensities”); *State v. Graham*, 941 A.2d 848, 866-67 (R.I. 2008) (“unlikely that he could be rehabilitated”).

<sup>139</sup> *State v. Brown*, 898 A.2d 69, 86 (R.I. 2006).

<sup>140</sup> *State v. Lopez*, 45 A.3d 1 (R.I. 2012).

<sup>141</sup> See *supra* at text accompanying note 129 (only appropriate for “monsters”).

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.<sup>143</sup> Occasionally, even when bound by this legislative judgment, a trial judge indulges in gratuitous reflections on the defendant’s appalling character and heinous crimes. More commonly, when imposing LWOP as an exercise of discretion judges detail the bases for their decision. In such cases, defendants’ pleas that they are “not beyond rehabilitation” may be received with skepticism. In *People v. Jones*,<sup>144</sup> for example, the judge recapitulated the defendant’s crimes in gruesome detail,<sup>145</sup> and found that his appeals for mercy reveal “a total lack of remorse” and “a total lack of empathy for the feelings of the survivors.”<sup>146</sup> Jones, the judge concluded, “really did not show rehabilitative potential.”<sup>147</sup>

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

---

<sup>142</sup> 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 25-27. See also *State v. Sifuentes*, 996 A.2d 1130, 1138 (R.I. 2010) (“The brutality and cold-heartedness that must be present for one to carry out a murder in such a cruel manner are almost unfathomable.”).

<sup>143</sup> *State v. Lebeau*, 286 P.3d 1, 9 (Utah App. 2012).

<sup>144</sup> *People v. Jones*, 697 N.E.2d 457, 459 (Ill. App. 1998).

<sup>145</sup> *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.”).

<sup>146</sup> *Id.* See also *Billips v. Commonwealth*, 630 S.E.2d 340 (Va. 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.”).

<sup>147</sup> *Jones*, 697 N.E.2d at 460.

- In sentencing the defendant (who had raped a 4-year-old girl), trial judge said: “everyone in this room is afraid of monsters like you. People that come into their homes and rape their babies. . . [M]y world is not safe with you in it.”<sup>148</sup>
- “[The defendant] is not a violent predator. He’s a violent sexual predatory monster. That’s what [he] is, a monster. . . . He is a monster. There are no other words to describe him.”<sup>149</sup>
- “To refer to [the defendant] as evil or disgusting was basically to articulate facts which were obvious or readily inferable from the evidence.”<sup>150</sup>
- After summarizing the facts of one crime (an armed home invasion that culminated in the rape of a 13-year-old), one judge informed a defendant, “You, sir, are clearly a monster,” as a prelude to imposing a prison term designed to approximate LWOP.<sup>151</sup>
- “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.”<sup>152</sup>
- “Evil of that magnitude must never be allowed to live in free society.”<sup>153</sup>
- “You are truly an evil man.”<sup>154</sup>

When not thus branding the criminal, the 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.”<sup>155</sup>

<sup>148</sup> *Neloms v. State*, 274 P.3d 161, 170 (Okla.Crim.App. 2012).

<sup>149</sup> *Vetter v. Ayers*, 2009 WL 3672829, at \*13 (C.D. Cal. Nov. 3., 2009).

<sup>150</sup> *People v. Hayes*, 2006 WL 2147614, at \*8 (Cal. Ct. App. Aug. 2, 2006).

<sup>151</sup> *People v. Ball*, 2011 WL 1086557 (Mich. Ct. App. Mar. 24, 2011). 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,” consider *People v. Foulk*, 2012 WL 2336247, 6 (Cal.App. 2 Dist.2012) (“Appellant was a monster and a manipulator.”).

<sup>152</sup> *State v. Long*, 2012 WL 2550960, 10 (Ohio App. 1 Dist.) (Ohio App. 1 Dist.,2012).

<sup>153</sup> Alaina Patrokus, *Killer Gets Life Without Parole*, SYRACUSE NEWSPAPERS, April 5, 2012, at A3.

<sup>154</sup> *Man Gets Life in Death of Mom and 3-Year-Old Son*, DETROIT FREE PRESS, May 19, 2011, at A7.

<sup>155</sup> *People v. Carp*, 2012 WL 5846553, at \*3 (Mich. Ct. App. Nov. 15, 2012).

- In exercising discretion to sentence the defendant to LWOP, as opposed to a determinate term of years, “the judge indicated that this was the worst murder he had ever seen.”<sup>156</sup>
- “The trial court specifically found that this was the most brutal case it had ever seen.”<sup>157</sup>
- “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 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.”<sup>158</sup>
- The trial judge observed this was the “worst rape [she] had ever seen in all [her] career.”<sup>159</sup>
- “The court thoroughly explained why it believed that this crime was one of the worst it had ever seen.”<sup>160</sup>
- “[T]he trial judge stated that he could not imagine a more “heinous offense” than that committed by Billips.”<sup>161</sup>

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.”<sup>162</sup>
- “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 P.L.’s examination were the worst she had ever seen.”<sup>163</sup>
- “Jamie Fontenot, a nurse who assisted in removing Silva from Garcia’s truck, testified that Silva ‘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.’”<sup>164</sup>

---

<sup>156</sup> *State v. Beach*, 2012 WL 1900528 at \*3 (Ohio App. Dist. Ct. May 25, 2012).

<sup>157</sup> *State v. Miller*, 2011 WL 947070, at \*2 (Ohio App. Dist. Ct. 2011).

<sup>158</sup> *Harrison v. Com.*, 2010 WL 5149356, at \* 3 (Va. App. 2010).

<sup>159</sup> *People v. Cornelius*, 94 Cal.Rptr.2d 326, 328 (2000).

<sup>160</sup> *U.S. v. Singleton*, 49 F.3d 129, 133 (5<sup>th</sup> Cir. 1995).

<sup>161</sup> *Billips v. Commonwealth*, 630 S.E.2d 340, 346 (Va. App. 2006) (rejecting jury’s recommendation of 55 years, trial judge sentenced defendant to life), *rev’d on other grounds*, 274 Va. 805 (2007).

<sup>162</sup> *Coronado v. State*, 384 S.W.3d 919, 922 (Tex.App.–Dallas, 2012).

<sup>163</sup> *State v. Breaux*, 2011 WL 6141636, at \*2 (La.App. 1 Cir., 2011).

<sup>164</sup> *Garcia v. State*, 2011 WL 379117, at \*7 (Tex.App.-Beaumont 2011).

- “The medical examiner who performed the autopsy on Mr. Gardiner described his injuries as being the ‘worst she had ever seen.’”<sup>165</sup>
- “[The 6-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.’”<sup>166</sup>
- “The trial court specifically found that this was the most brutal case it had ever seen.”<sup>167</sup>

Other cases recount the brutality of the crimes culminating in LWOP in such elaborate detail that any commentary on the horror would be unnecessary.<sup>168</sup> And, of course, prosecutors, in urging the judge to impose LWOP, regularly cast defendants as the most evil they have ever seen.<sup>169</sup>

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.”<sup>170</sup> But even this fails to do justice to LWOP’s punitive intent. What such a sentence conveys at deeper level is the community’s hatred, and its desire that the 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:

- The sentencing judge told a convicted murderer, “you will awaken each day with nothing to look forward to, endless repetition, restriction, regimentation and isolation.”<sup>171</sup>

---

<sup>165</sup> *Page v. State*, 995 A.2d 934, 950 (R.I. 2010).

<sup>166</sup> *Dismuke v. State*, 2006 WL 3200113, at \*3 (Tex.App.-Dallas 2006).

<sup>167</sup> *State v. Miler*, 2011 WL 947070, at \*2 (Ohio App. Dist. Ct. 2011).

<sup>168</sup> *State v. Lovett*, 286 P.3d 265, 270-72 (N.M. 2012).

<sup>169</sup> See, e.g., *Countryman v. Stokes*, 2008 WL 1335534 (C.D. Cal. 2008).

<sup>170</sup> Cf. JAMES Q WILSON, *THINKING ABOUT CRIME* 260 (1975) (“Wicked people exist. Nothing avails except to set them apart from innocent people.”).

<sup>171</sup> Steve Fry, *Leftwich Gets Life Without Parole in Mogart Murder*, cjonline, Feb. 13, 2013.

- 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”; and “I want him to suffer in prison for the rest of his [expletive] life.”<sup>172</sup>
- The prosecutor explained why the state accepted an LWOP plea in a capital murder case: “Now the family knows that [the defendant] will rot in the state penitentiary.”<sup>173</sup>
- “‘At first I wanted the death penalty, but I think it would be much better for her to sit and rot in jail,’ [one of the victim's daughters] told the court.”<sup>174</sup>
- The murder victim’s son told the sentencing judge, “I hope he rots in jail the rest of his life.”<sup>175</sup>
- “‘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,’” said the victim’s father.”<sup>176</sup>
- “‘Now that this is over, [the victim] can rest in peace and we can move on and he can rot in jail,’” [the murder victim’s brother] said. ‘He's a psychopath. I think he's getting what he deserved.’”<sup>177</sup>

It is not only friends and family of the 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.”

This survey of the rhetoric in LWOP cases does not purport to be randomized and scientific; and indeed, I will argue below that other cases present a different understanding of the sentence. This part has focused on cases in which judges impose LWOP (or prison terms designed to approximate LWOP where that sentence is unavailable)<sup>178</sup> as opposed to determinate

---

<sup>172</sup> *Witzel Sentenced for Murder*, wmtv.com, June 26, 2009, <http://www.nbc15.com/home/headlines/33653284.html>.

<sup>173</sup> Griffin Pritchard, *Hawes Found Guilty of 2003 Murder*, at <http://alada19.com/inthenews2008/080319.htm>.

<sup>174</sup> Vik Jolly, *Woman Gets Life In Ill Husband's Death*, ORANGE COUNTY REGISTER, Mar. 24, 2012.

<sup>175</sup> Alaina Patrokus, *Killer Gets Life Without Parole*, SYRACUSE NEWSPAPERS, April 5, 2012, at A3.

<sup>176</sup> Gerry Smith, *Quinn Angers Some Families, Relatives of Some Victims*, CHI. TRIB., Mar. 10, 2011, at A7.

<sup>177</sup> *Found Guilty a Second Time*, DETROIT FREE PRESS, Oct. 12, 2011, at A5.

<sup>178</sup> One such case is *State v. Setagord*, 565 N.W.2d 506 (Wisc. 1997), in which the trial judge sentenced the defendant, convicted of aggravated kidnapping, to LWOP. The Court of Appeals reversed, holding that the relevant Wisconsin statute foreclosed the sentence. 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). In *Diamond v. State*, 2012 WL 141232 (Tex. Ct. App. April 25, 2012), the trial judge was foreclosed from sentencing the defendant, a minor, to LWOP, so instead imposed a 99-year sentence for aggravated robbery: “I believe in my heart that if you’re given the

prison terms. Such cases involve judgments that the defendant and his crimes merit particularly severe punishment. Trial judges, prosecutors, and victims embrace the idea, endorsed by the *Graham* and *Miller* opinions, that an LWOP sentence reflects a judgment that the defendant is “beyond rehabilitation” and merits the community’s affirmative hatred. 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 terrible sentence, LWOP is it.

### III. Life Without Parole as Soft Punishment

When contrasted with a determinate prison sentence, life without parole appears unbearably 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

---

opportunity to get back out on the street you’re going to kill the next one.” *Id.* at \*4. In sentencing 13-year-old rapist Jose Walle (who could not be sentenced to LWOP under *Graham*) to 65 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 B1. Finally, in *State v. Bundy*, No. 02 CA 211, 2005 WL 1523818, at \* 17 (Ohio Ct. App. June 24, 2005), the judge, foreclosed by law from imposing LWOP, sentenced a rapist to 89 years in prison. He explained his reasoning:

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 [rained] 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.

afforded access to vocational and educational programs. And the characterization of LWOP as a sentence that crushes hope in those so punished is also flawed. Inmates serving LWOP sentences cherish hopes of release, and these hopes cannot be regarded as unrealistic.

A. LWOP Compared to Death Penalty: 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.<sup>179</sup> Tried and convicted of capital murder, the only issue at the sentencing hearing was LWOP or death. 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.” 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?”<sup>180</sup>

Such impassioned argument point to what has long been understood to be the chasm separating a death sentence and all other punishment, 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.”<sup>181</sup> As one district court explained, “Capital punishment is qualitatively different from any other form of criminal<sup>7</sup> penalty we may impose. With *it*, we deny the convict any possibility of rehabilitation.”<sup>182</sup>

The remainder of this part 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

---

<sup>179</sup> Danielle Thomas, *Murder Suspect Has Extensive Criminal Past*, WLOX, <http://www.wlox.com/Global/story.asp?S=6699014>

<sup>180</sup> *Id.*

<sup>181</sup> *Ford v. Wainwright*, 477 U.S. 399, 411 (Marshall, J., plurality opinion).

<sup>182</sup> *US v. Sampson*, 335 F. Supp.2d 166, 169 (D. Mass. 2004) (emphasis added).

issue is the death penalty or LWOP, is the defendant's "potential for rehabilitation."<sup>183</sup> Defense lawyers regularly claim that their clients possess this potential, with the necessary implication being that the potential will be realized *in prison*.<sup>184</sup> A defendant's rehabilitation while already incarcerated is said to be evidence of his ability to be a productive citizen while serving an LWOP sentence.<sup>185</sup> For example, in *Rojem v. State*,<sup>186</sup> the defendant argued that he had "grown spiritually while in prison by becoming a lay disciple of the Buddhist religion." 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 [making] a contribution to society even in prison"; making it "possible for death row inmates to become organ donors"; and "help[ing] others by knitting afghans that are then sold to help finance projects aiding other people." Other cases are to the same effect, with defendants emphasizing the contributions they could make while serving an LWOP sentence.<sup>187</sup>

---

<sup>183</sup> *Blanco v. Florida Department of Corrections*, 688 F.3d 1211, 1219 (11<sup>th</sup> Cir. 2012). See also *State v. Roberts* 2012 WL 3517318 (S.D. 2012) ("his ability to be rehabilitated"); *Rojem v. State*, 207 P.3d 385, 397 (Okla. Crim. App. 2009) ("potential for rehabilitation"); *State v. Dann*, 220 Ariz. 351, 374 (2009) ("A defendant's potential for rehabilitation may be considered a mitigating factor."). The risk in raising an amenability to rehabilitation argument in a capital sentencing proceeding is it opens the door to future dangerousness evidence. And airy claims of the defendant's "potential for rehabilitation" in prison are likely to be reviewed with skepticism, at least in the absence of any hard evidence. *Orme v. State*, 25 So.3d 536, 549 (Fla. 2009). 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.").

<sup>184</sup> *State v. Adams*, 2011 WL 4923522, at \*19 (Ohio App. 7 Dist., 2011) ("the defense raised the issue in the sentencing phase to show his rehabilitation while in prison"); *State v. White*, 194 Ariz. 344, 351 (1999) (arguing at a capital sentencing in favor of LWOP: "In his sentencing memorandum, the defendant asserts capability of *rehabilitation within the limits of a life sentence in prison*." (emphasis added)).

<sup>185</sup> See *State v. Banks*, 2007 WL 1966039 (Tenn. Crim. App. 2007). See also *Franqui v. State*, 804 So.2d 1185, 1196 (Fla. 2001) (referring to "self-improvement and faith since being incarcerated"); *Lott v. Trammell*, 705 F.3d 1167, 1202, 2013 WL 142067, at \*33 (Okla. 2013) (referring to defendant's improved behavior while on death row for over a decade as indicator of future behavior). In *Wilkerson v. State*, 881 S.W.2d 331, 330 (Tex. Crim. App. 1994), two Justices dissented from an affirmance of a death penalty, arguing that the majority had neglected evidence that the defendant was "rehabilitatable in prison."

<sup>186</sup> 207 P.3d 385, 397 (Okla. Crim. App. 2009).

<sup>187</sup> *Id.* See also *Belmontes v. Brown*, 414 F.3d 1094, 1139-40 (9<sup>th</sup> 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

But will the jury wonder whether an inmate, once rehabilitated, is then eligible for release? The question arose in *Commonwealth v. Cox*.<sup>188</sup> After a jury convicted the defendant of murder, a penalty phase followed in which counsel argued as follows:

I think a boy who is 18-years old should be given a chance to rehabilitate himself. The other alternative you have is life imprisonment. The alternative we're giving him is life imprisonment, two counts, if you return that count of 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.<sup>189</sup>

Such heated arguments for the defendant's capacity for rehabilitation were ingeniously framed on appeal as ineffective assistance of counsel. The argument was that trial lawyer's reference to "rehabilitation" would lead the jury to fear that, if the defendant were not sentenced to death, he could rehabilitate himself and then be released. The Pennsylvania Supreme Court denied the appeal: "While making his closing argument, trial counsel highlighted the young age of Appellant and stressed that *he could be rehabilitated while in prison.*"<sup>190</sup>

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.<sup>191</sup> 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

---

activity" if granted life without parole.); *State v. Thomas* 2004 WL 370297, at \*39 (Tenn.Crim.App. 2004) ("The Defendant's family indicated a belief that the Defendant could contribute to their lives, even if incarcerated.").

<sup>188</sup> *Commonwealth v. Cox*, 863 A.2d 536 (Pa. 2004).

<sup>189</sup> *Id.* at 551.

<sup>190</sup> *Id.* at 554.

<sup>191</sup> See, e.g., *Flippen v. Polk*, 2004 WL 1348220 (M.D.N.C. 2004) ("When questioning about her fitness to serve on a capital jury, one prospective juror 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.").

death-approved jury,<sup>192</sup> 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.<sup>193</sup> In response to a perceived public clamor, as well as academic studies questioning the efficacy of rehabilitative efforts, 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 tuition, and conjugal visits.<sup>194</sup> Americans, it is said, have abandoned the quixotic goal of rehabilitating inmates. Prisons exist to punish offenders and separate criminals from society.<sup>195</sup>

Against this backdrop, the *Graham* Court’s claim that an LWOP sentence “forfeits altogether the rehabilitative ideal” needs clarification. Every prison sentence in American could be said to forfeit 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? The fact that LWOP is even a possible outcome in any given case means that a very serious crime was committed, and that the alternative to LWOP is a prison term denominated in decades. How much more does the community forfeit the rehabilitative ideal when sentencing a defendant to LWOP, as opposed to 40 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

---

<sup>192</sup> See *Lockhart v. McCree*, 476 U.S. 162 (1986).

<sup>193</sup> See, e.g., Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 PUNISHMENT & SOCIETY, 161 (2001).

<sup>194</sup> See W. Wesley Johnson, Katherine Bennett, and Timothy Flanagan, *Getting Tough on Prisoners*, 43 CRIME AND DELINQUENCY, 24, 27-28 (1997) ; Adam Nossiter, Making Hard Time Harder, New York Times, Sept. 17, 1994.

<sup>195</sup> See generally Graham Hughes, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, 73 J. Crim. L. & Criminology 1322 (1982). The California Criminal Code, amended in 1998, begins: “The Legislature finds and declares that the purpose of imprisonment is punishment.” Cal. Penal Code § 1170(a)(1).

Americans have repudiated the rehabilitative ideal is belied, to some extent, by actual data. Prisons in the 1950s, the supposed heyday of that ideal, had fewer educational and vocational programs than in the 1990s.<sup>196</sup> And a recent comprehensive survey comparing prison programs in 1979 and 2005 found offerings to be roughly constant.<sup>197</sup> So the issue is at last identified: Are inmates sentenced to LWOP differently treated with respect to access to such programs than other inmates, and in particular inmates sentenced to long determinate 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 life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. See Brief for Sentencing Project as *Amicus Curiae* 11–13.<sup>198</sup>

The Court thus adopts as a factual finding an assertion made in an amicus brief written by an organization on record as advocating the elimination of all LWOP sentences in America.<sup>199</sup> That brief, in turn, relies upon a 4-page treatment in a policy paper.<sup>200</sup>

None of these claims were ever peer-reviewed or subject to cross-examination, prompting my own survey of prison officials in 48 states (omitting New Mexico and Alaska, which have no LWOP-sentenced inmates). Four states (Alabama, New York, Pennsylvania, and West Virginia) declined to provide any information. Of the remaining 44, only 4 jurisdictions attach substantial disabilities to LWOP sentences, that is, such inmates are excluded from certain educational and vocational programs.<sup>201</sup> The remaining jurisdictions were almost evenly divided. In half, LWOP

---

<sup>196</sup> LEO CARROLL, *LAWFUL OLDER: A CASE STUDY OF CORRECTIONAL CRISIS AND REFORM* (1998).

<sup>197</sup> Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, *LAW & SOC'Y REV.* 33 (2011).

<sup>198</sup> *Graham*, 130 S.Ct. at 2030.

<sup>199</sup> See No Exit, *supra* note 93, at 40 (“Life without parole sentences are costly, shortsighted, and ignore the potential for transformative personal growth.”).

<sup>200</sup> Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 70-71 (2005).

<sup>201</sup> These jurisdictions are Florida, Idaho, Oregon and Vermont. Notes on file with author.

inmates have access to the same programs (other than pre-release opportunities) as other inmates, although parole-eligible may have priority in programs assignments if there is a waiting list.<sup>202</sup>

In the other half, inmates serving LWOP sentences suffer no disabilities compared to inmates serving determinate sentences, other than in access to re-entry programs.<sup>203</sup> For example, Katherine Sanguinetti, 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 offender.”<sup>204</sup>

Inmates sentenced to LWOP, even if originally housed in supermax prisons and thereby deprived of many of the amenities that make life worth living,<sup>205</sup> are seldom fated to spend the remainder of their days there. Most jurisdictions 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 2 years, and to medium security prisons after another three years.<sup>206</sup> Three of the four jurisdictions that attach a “substantial

---

<sup>202</sup> These jurisdiction are Arizona, Delaware, Illinois, Iowa, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, Washington, Wisconsin, and Wyoming. Notes on file with author.

<sup>203</sup> These jurisdictions are Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, and Utah. Notes on file with author.

<sup>204</sup> Colorado: Email from Katherine Sanguinetti on July 9, 2012. Notes on file with author.

<sup>205</sup> See *Wilkinson v. Austin*, 545 U.S. 209, 223-24 (2005).

<sup>206</sup> See AZ Department Order 801, available at <http://www.azcorrections.gov/policysearch/800/0801.pdf> at 3-4. See also Arkansas: Phone Conversation with Tiffany Compton (security level based on behavior); California: Phone conversation with Bill Sessa on July 25, 2012 (security level based on behavior displayed within the institution rather than on the crime committed); Colorado: Email from Katherine Sanguinetti on July 9, 2012 (LWOP inmates can move to different levels of security based on behavior); Georgia: Phone conversation with Lynn McCoy on July 11, 2012 (based on behavior over time); Idaho: Phone conversation with Renee James on June 27, 2012 (first six months is spent in close custody, but can move to medium security based on good behavior). Notes on file with author.

disability” to inmates in terms of access to educational and vocational programs are fluid in the housing assignment of their LWOP inmates.<sup>207</sup>

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.<sup>208</sup> He found no evidence that inmates serving LWOP are denied access to any programs available to long-term inmates. To the contrary, here is one inmate in his own words:

I got the piano for winter because rec’s (the outdoor recreation area) pretty much closed. I want stuff to occupy my time that I enjoy . . . . It’s stuff to kill time but obviously to enjoy time.<sup>209</sup>

Other inmates reported writing poetry, watching news and sports, and cultivating an interest in current affairs.<sup>210</sup> Most inmates reported being in “merit status” or “super merit status,” entitling them to better housing assignments.<sup>211</sup> 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.”<sup>212</sup> 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.”<sup>213</sup> Wardens reported that they try to “assimilate [LWOP] inmates into the positive aspects” of prison; “ensure that they too have access to work assignments,

---

<sup>207</sup> See FL: Phone conversation with Allen Overstreet, Library Services Administrator (LWOP inmates assigned to facilities with some level of security fencing and continuous staff supervision but otherwise any facility); ID: Phone conversation with Renee James, Quality Control Coordinator (LWOP inmates spend first 6 months in high-security facility, but most are eventually in medium security); OR: Email from Elizabeth Craig, Media Contact (LWOP automatically sentenced to maximum security but can be transferred to medium security if well behaved). But see VT: Email from Kim Bushey, Program Services Director (LWOP inmates incarcerated in maximum security prisons). Notes on file with author.

<sup>208</sup> GLENN J. ABRAHAM, PRISONERS SERVING SENTENCES OF LIFE WITHOUT PAROLE: A QUALITATIVE STUDY AND SURVEY (Doctoral Dissertation, University of Kentucky, 2011), available at [http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1817&context=gradschool\\_diss](http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1817&context=gradschool_diss).

<sup>209</sup> *Id.* at 132.

<sup>210</sup> Abraham, *supra* note 208, at 131.

<sup>211</sup> *Id.* at 123.

<sup>212</sup> *Id.* at 174.

<sup>213</sup> *Id.* at 174.

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."<sup>214</sup>

Another, more informal survey was conducted by Professor Richard Blecker, who has traveled widely to prisons and interviewed many inmates and wardens. Blecker writes that wardens reported that they try to assist LWOP inmates in their adjustment to prison life: "The judge says this guy's doing life without," one warden told Blecker. "Our job is to make sure he does it. Our job is not to punish."<sup>215</sup> Inmates serving LWOP sentences, according to Blecker, are treated to diets more nutritious than what they had enjoyed outside prison walls, nor are their lives ones of constant privation:

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.<sup>216</sup>

Moreover, LWOP-sentenced inmates housed in high-security facilities are often able to secure preferred positions. As David McCord points out, "lifers are not usually segregated in a special unit, but are mixed in with the general prison population. A fact that the public probably does not understand well, though, is that the level of security compared to the outside world does not

---

<sup>214</sup> *Id.* An older study of 22 inmates serving LWOP in Utah State Prison reached many of the same conclusions. Doctoral student Sandy McGunigall-Smith quotes one "typical" officer, "I'm as comfortable with [inmates serving LWOP] as any other 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*, 8 PRISON JOURNAL 328, 330 (2008) (citing work that culminated in Sandy McGunigall-Smith, *Men of a Thousand Days: Death-Sentenced Inmates at Utah State Prison 2004* [unpublished doctoral dissertation]). Another officer reports that inmates serving LWOP "cope probably better" than other inmates. "[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. *See also People v. Hamilton*, 89 Cal.Rptr.3d 286, 357 (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 works of art and could lead a useful, productive life.").

<sup>215</sup> Robert Blecker, *Less Than We Might: Meditations on Life in Prison Without Parole*, 23 FED. SENT. R. 10 (2010). John DiUlio has called this the "keeper philosophy."

<sup>216</sup> *Id.*

necessarily correspond with the level of security within the prison.”<sup>217</sup> No one would claim that inmates serving LWOP have access to offerings as varied and well-funded as students attending Phillips Exeter or Princeton. But the question is whether they are relatively disadvantaged compared to inmates serving long prison terms. And the answer to that question is overwhelmingly negative.

As a final reality check, consider Louisiana’s Angola prison, where 70% of the roughly 5,000 inmates are serving life without parole. All of Angola’s inmates, excluding those on death row, are eligible to participate in an annual rodeo.<sup>218</sup> Angola’s warden, perhaps the most famous American to hold that position, is Burl Cain.<sup>219</sup> 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.”<sup>220</sup> Consider, then, two 25-year-old murderers, one sentenced to LWOP and the other sentenced to 50 years, which in a typical American jurisdiction might entail the possibility of release in 4 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

---

<sup>217</sup> David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 54 (1998).

<sup>218</sup> See Molly Hennessey-Fiske, *Prison Rodeo Offers Hope Where It Is Lacking*, L.A. TIMES, Nov. 27, 2012, at <http://articles.latimes.com/2012/nov/27/nation/la-na-adv-prison-rodeo-20121128>n the annual prison rodeo.

<sup>219</sup> See James Ridgeway, *God’s Own Warden*, MOTHER JONES, July/August 2011.

<sup>220</sup> See *Graham*, 130 S.Ct. at 2027 (LWOP “deprives the convict of the most basic liberties without giving hope for restoration”); *id.* (LWOP means “denial of hope”); *id.* at 2032 (LWOP means “no chance for reconciliation with society, no hope”); Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT’G REP. 75 (2010).

sentenced to 50 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.

## 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’re 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.<sup>221</sup> Why not me, the inmate wonders, and why not indeed? The prospect of a successful appeal, however small the odds, can

---

<sup>221</sup> Consider five examples:

- Marie LaPinta. Convicted of murdering her husband in 1983, her LWOP was overturned when lawyers persuaded a judge that her lawyers had been ineffective. N.Y. Woman Released After 2 Decades in Prison, [http://www.nbcnews.com/id/7984243/ns/us\\_news-crime\\_and\\_courts/t/n-y-woman-released-after-decades-prison/](http://www.nbcnews.com/id/7984243/ns/us_news-crime_and_courts/t/n-y-woman-released-after-decades-prison/).
- Sheila Deverux. Convicted of drug trafficking in 2005, her LWOP 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, available at [http://www.tulsaworld.com/article.aspx/Judge\\_throws\\_out\\_Tulsa\\_womans\\_life\\_without\\_parole\\_sentence/20110616\\_14\\_0\\_hrimg184731](http://www.tulsaworld.com/article.aspx/Judge_throws_out_Tulsa_womans_life_without_parole_sentence/20110616_14_0_hrimg184731).
- 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 evidence was a “liar and perjurer.” Nina Totenberg, Can Prosecutors Be Sued By People They Framed, April 4, 2009, at <http://www.npr.org/templates/story/story.php?storyId=120069519>.
- 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 (Okla. Crim. Ap. 2006).
- 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. U.S.* 497 F.Supp.2d 143, 151 (D. Mass. 2007).

nourish hope.<sup>222</sup> How else are we to account for the many inmates serving LWOP sentences tirelessly laboring in the prison law library?

## 2. Executive Clemency

Although electorally accountable officials are loath to deploy political capital on criminals, executive clemency does occur, and sometimes for the benefit of unsympathetic defendants. For example, Sergeant Maurice Schick, convicted of raping an 8-year-old girl, was not once, but twice the recipient of executive clemency. Sentenced to death in 1956, President Eisenhower commuted his sentence to life in prison, attaching the condition that Schick be forever ineligible for parole. The Supreme Court, in *Schick v. Reed*,<sup>223</sup> rejected his challenge to the “no parole” condition, and in passing upheld the constitutionality of an LWOP sentence. *Schick* was, apparently, the first time the Supreme Court opined on an LWOP sentence, and it is cited today as a foundational case.<sup>224</sup> Little 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 parole.<sup>225</sup>

In the *Graham* and *Miller* opinions, as well as in academic commentary,<sup>226</sup> the odds of executive clemency are treated as an asymptotic approximation of zero. Yet the foundational

---

<sup>222</sup> 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.”).

<sup>223</sup> 419 U.S. 256, 267 (1974).

<sup>224</sup> See Wright, *supra* note 67, at 535 (noting that “an imposing amount of precedent has developed based upon *Schick*”).

<sup>225</sup> See President Ford’s Pardon, Jan. 17, 1976 (“Maurice Leroy Schick is hereby granted the rights, privileges, claims or benefits of parole”). On file with author. It seems that Schick was released. See Richard Serrano, *Pvt. John Bennett is the Only 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. <http://www.ancientfaces.com/person/maurice-l-schick/24063123>.

<sup>226</sup> Ashley Nellis, *Tinkering With Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIA. L. REV. 439, 454 (2013).

case of the Court's LWOP jurisprudence undercuts this claim. Presidents and Governors exercise clemency for a variety of reasons, such as the offender's youth,<sup>227</sup> difficult upbringing,<sup>228</sup> minor role in the crime,<sup>229</sup> or advanced age.<sup>230</sup> In Nevada, for example, between 1975 and 1989, 17 inmates sentenced to LWOP were released and another 5 had their sentences commuted to life with the possibility of parole.<sup>231</sup> Some governors, moved by "religious and moral convictions," have been notably receptive to clemency pleas.<sup>232</sup> Massachusetts Governor Dukakis made 55 inmates serving LWOP sentences eligible for work release programs,<sup>233</sup> and Arkansas Governor Mike Huckabee commuted dozens of sentences, including some that approximated LWOP.<sup>234</sup> Not all recipients of clemency seized the opportunity to reform their lives,<sup>235</sup> which complicated Dukakis's and Huckabee's presidential ambitions and will likely make current and future governors warier of showing leniency.<sup>236</sup>

---

<sup>227</sup> Convicted of a murder committed when she was 16, Sarah Kruzan had her sentence commuted by California Governor Schwarzenegger in 2011 to 25 years, which was then 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*, at <http://www.kpbs.org/news/2013/jan/18/new-deal-allows-sara-kruzan-seek-parole-1995-murder/>.

<sup>228</sup> Convicted of murdering her father, Stacey Lannert's LWOP sentence was commuted to 20 years by Missouri Governor Blunt, citing the sexual abuse she had suffered. See Jennie Yabroff, *Why She Killed Her Father*, May 13, 2011, at <http://www.thedailybeast.com/newsweek/2011/03/13/why-she-killed-her-father.html>.

<sup>229</sup> 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*, DAILY TIMES, Dec. 30, 2010, at <http://www.delcotimes.com/articles/2010/12/30/news/doc4d1cbb6b3e962106706333.txt>

<sup>230</sup> Convicted of murdering a toddler when she was 20 years old, Betty Smithey sentenced to LWOP, Arizona Governor Jan Brewer commuted her sentence to 49 years to life, citing Smithey's advanced age. Bob Ortega, *Woman Walks Free After 49 Years in Prison*, AZCentral.com, April 3, 2012, at <http://www.azcentral.com/news/articles/20120813woman-walks-free-after-49-years-arizona-prison.html>.

<sup>231</sup> See *Summer v. Shuman*, 483 U.S. 66, 84 n.1 (1987).

<sup>232</sup> See Rachel Barkow, *Prosecutorial Administration: Prosecutorial Discretion and the Department of Justice*, 99 VA. L. REV. 271, 327 (2012).

<sup>233</sup> See Robert Cottrol, *Finality With Ambivalence, The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641, 1670 n.117 (2004).

<sup>234</sup> See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009).

<sup>235</sup> Eleven of the 55 defendants Dukakis allowed on work release programs escaped, and five of those committed serious crime. See Cottrol supra note 233, at 1670 n.1117. 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), <http://abcnews.go.com/blogs/headlines/2009/11/why-was-suspected-cop-shooter-not-in-jail/>.

<sup>236</sup> See Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C.L. & C.R. 191, 194 (2003).

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 incarceration evolves. Young inmates, brimming with energy, can be troublesome and costly; those in middle age adjust and prove manageable; the old ones, accumulating physical ailments, then pose a financial burden as medical costs soar.<sup>237</sup> Significantly, Medicare and Medicaid do not cover incarcerated persons.<sup>238</sup> 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.<sup>239</sup> Many states already have mechanisms that provide for geriatric release,<sup>240</sup> and it seems reasonable to expect, and hope, if one were an inmate,<sup>241</sup> that such mechanisms will expand, as states opportunistically shed burdens onto the federal government.<sup>242</sup>

---

<sup>237</sup> See Timothy Curtin, *The Continuing Problem of America's Aging Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473 (2007). Consider, for example, the case of one 82-year-old female inmate in California whose medical treatment for renal dialysis costs \$436,000 each year. See Nicole Murphy, *Dying To Be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1693 (2012).

<sup>238</sup> See Nicole Murphy, *Dying To Be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1693 (2012).

<sup>239</sup> Consider Steven Martinez. Sentenced to 157 years in prison in 1997 (effectively LWOP, given California parole law), he was released in 2012. Martinez, now a quadriplegic thanks to a prison attack a decade ago, was costing the California \$625,000 per year, part of which the State can palm off on the federal government thanks to his release. See Staey Ann-Facey, *Quadriplegic Rapist To Be Released From Prison*, Nov. 16, 2012, at [http://www.examiner.com/article/quadriplegic-rapist-to-be-freed-from-prison?cid=taboola\\_inbound](http://www.examiner.com/article/quadriplegic-rapist-to-be-freed-from-prison?cid=taboola_inbound).

<sup>240</sup> See Tina Chiu, Vera Inst. of Just., *It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release 7* (2010), <http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>.

<sup>241</sup> See Abraham, *supra* note 208, at 138 (noting that inmates serving LWOP in Ohio speculated that financial considerations might result in the abolition of LWOP).

<sup>242</sup> 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 Prison Inmates*, NEW YORK TIMES, Oct. 8, 2011.

### 3. Change in Laws

Apart from 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.<sup>243</sup> Or systematic relief could come from the judicial branch. The Supreme Court's decisions in *Graham* and *Miller* overturned perhaps more than 2,000 LWOP sentences.<sup>244</sup> It is reasonable to expect the United States Supreme Court (and state courts applying the Eighth Amendment or the state constitutional analog) to continue this trend.

Indeed, the logic and the 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.<sup>245</sup> As a concurring Justice Breyer observed in *Miller*, this suggests limitations on LWOP when juveniles are convicted of felony or accomplice murder.<sup>246</sup> And although the *Miller* majority only foreclosed LWOP when juveniles were sentenced in a mandatory scheme, which deprived the judge of any discretion, the Court

---

<sup>243</sup> For example, the Michigan legislature enacted a "650-Lifer" statute in 1981, imposing mandatory LWOP on any defendant convicted of distributing more than 650 grams of heroin or cocaine. In 1998, the legislature amended the law, and applied it retroactively. As a consequence, one inmate sentenced in 1989 to LWOP ended up serving just 9 years in prison. See Sharon Cohen, *Life Relishes Unexpected Freedom*, L.A. TIMES, Mar. 7, 1999.

<sup>244</sup> Given the rarity of the juveniles sentenced to LWOP for nonhomicides, *Graham* overturned only 123 sentences. See *Graham*, 130 S.Ct. at 2024. Roughly 2,000 juveniles had been sentenced to LWOP for homicides as part of a mandatory sentencing scheme, but it is unclear if *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 *State v. Ragland*, 2013 4309970 (Iowa) (applying *Miller* retroactively); *Hye v. State*, 2013 WL 2303518 (Miss. App. May 28, 2013) (same); *People v. Morfin*, 981 N.E.2d 1010 (Ill. App. 1<sup>st</sup>. 2012) (same) with *Getter v. State*, 2012 WL 4448860 (Fla.Ct. App. 3d 2012) (not applying *Miller* retroactively); *Gonzalez v. State*, 101 So.3d 886 (Fla. Ct. App. 1<sup>st</sup> 2012); *People v. Carp*, 2012 WL 5846553 (Mich. App. 2012) (same)

<sup>245</sup> See *Graham*, 130 S.Ct. at 2027.

<sup>246</sup> See *Miller*, 132 S.Ct. at 2476 (Breyer, J. concurring) (suggesting that LWOP would be inappropriate when the death was accidental or caused by an accomplice).

gratuitously added that in *any* sentencing scheme juvenile LWOP “will be uncommon.”<sup>247</sup> What this nebulous dicta portends is anyone’s guess,<sup>248</sup> but all juveniles serving LWOP, including those sentenced in a discretionary scheme, will likely find inspiration in these three words. Finally, the Court in both *Graham* and *Miller* invoked the idea of an “adolescent brain” in invalidating juvenile LWOP sentences.<sup>249</sup> If neuro-abnormalities raise doubts about LWOP, then mentally retarded, brain-injured, and even elderly criminals are plausibly entitled to relief.<sup>250</sup> 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*).<sup>251</sup>

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. 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.”<sup>252</sup> An older study of inmates sentenced to LWOP at Utah State Prison paints a more emotionally wrenching picture of the lives of inmates sentenced to LWOP.<sup>253</sup> Yet whether it is an indeterminate hope of release, or more simply the

---

<sup>247</sup> *Id.* at 2469.

<sup>248</sup> Untethered from text and history, the Court’s Eighth Amendment jurisprudence is an evolving mystery. *See, e.g.*, Bradford Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2006).

<sup>249</sup> *Graham*, 130 S.Ct. at 2026; *Miller* 132 S.Ct. at 2464.

<sup>250</sup> *See* Lerner, *supra* note 244, at 36 (noting that old people are as likely as adolescents to have brains that fall short of peak performance).

<sup>251</sup> For other possible ways in which the Court can extend *Graham* and *Miller*, and apply strict scrutiny to LWOP sentences, see Berry, *supra* note 11 at 1143-1146.

<sup>252</sup> Abraham, *supra* note 208, 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, sentenced to LWOP, said that he once envied the inmates on death row: “I was the unlucky one, they got to die.” He was released from prison on April 9, 2009. *See* Damon Agos, *In An About-Face, Gregoire Commutes Sentence*, Apr. 15, 2009, SEATTLE WKLY, <http://www.seattleweekly.com/2009-04-15/news/in-an-about-face-gregoire-commutes-sentence/>.

<sup>253</sup> *See* Johnson and McGunigall, *supra* note 214, at 336-344.

hope for an incremental improvement in their lot, such as an upgrade in housing or access to special programs, even inmates sentenced to LWOP can be stimulated to self-improvement. If an LWOP sentence extinguished all such incentives, how can we explain the many inmates sentenced to LWOP who have credibly claimed moral development.<sup>254</sup> 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 which case the LWOP sentence did not have the crushing effect on their souls that the *Graham* and *Miller* Courts presume.

#### IV. Making Sense of Life Without Parole

This section is divided into a negative part, laying out the errors in the *Graham* and *Miller* opinions, and then a positive part, proposing a more complete understanding of LWOP. In the *Graham* and *Miller* opinions, melodramatic language obscures the complicated reality of LWOP. Life without parole is, of course, a bad lot. But the relevant question is: compared to what? Perhaps the most glaring fault in the Court's reasoning is the failure to consider how LWOP meaningfully differs from a long prison sentence. The Court is correct that LWOP conveys an "expressive judgment," but it fails to appreciate the complexity of that judgment. To make sense of LWOP, the second part begins with a pair of crimes that, when laid out in concrete detail, inspire horror. In confronting such cases, LWOP becomes intelligible as a sentence that 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

---

<sup>254</sup> See, e.g., Cindy Chang, *Angola Inmates Taught Life Skills, Then Spend Their Lives Behind Bars*, THE TIMES PACAYUNE, May 15, 2012 (discussing Johna Hayes); Richard Lindstrom and Neumer, *Criminal Law and Criminology: A Survey of Recent Books*, 95 J. CRIM. L. & CRIMINOLOGY 1423, 1425-28 (2005) (discussing James Palucah).

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.”<sup>255</sup> This suggests 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 issued, is intended as unalterable, over time many sentences are modified: Thousands of people sentenced to LWOP have either been released or had their sentences reconfigured over the past few decades.<sup>256</sup> The term “irrevocable judgment” illustrates the Court’s penchant for exaggerated rhetoric concealing more nuanced realities.

Elsewhere in the opinion, the Court uses “rehabilitation” in the broader sense of expressing remorse and achieving maturity and self-improvement, that is, achieving (or re-achieving) fitness as a morally responsible human being.<sup>257</sup> 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 educational, vocational, and educational opportunities. Section III.B tests this claim and reveals it to be incorrect.

---

<sup>255</sup> 130 S.Ct. at 2030.

<sup>256</sup> See *supra* at III.C.

<sup>257</sup> See text accompanying n. 259.

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

[1] Finally, a categorical rule [no 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.<sup>258</sup>

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.”<sup>259</sup> That would suggest that Justice Kennedy simply intends “rehabilitation” as a synonym for “reform.” Elsewhere, however, “rehabilitation” is linked to a “return to society.” The paragraph’s second sentence lapses into the passive voice but simply 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 the defendant of this opportunity, and here the puzzle begins. We all die, and unless “maturity of judgment” and

---

<sup>258</sup> 130 S.Ct. at 2032-33.

<sup>259</sup> *Id.* at 2030.

“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.<sup>260</sup> 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 least the gravity of the crime.”<sup>261</sup>

Sentences [4] and [5] 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, he wrote that “[i]n 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 the offense.”<sup>262</sup> 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 the criminal the wretchedness of his acts and the imperative to repent. Rehabilitation in this, arguably the deepest sense, can

---

<sup>260</sup> See 2 JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 849 (1960) (1791) (“Depend on it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates the mind wonderfully.”). For a critique of this argument, see Daniel Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1164, 1196-97 (2009).

<sup>261</sup> *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

<sup>262</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

occur only when those who have committed the greatest of crimes experience truly proportionate punishment.<sup>263</sup>

But perhaps the suggestion of sentences [4] and [5] is that “maturity of judgment” and “self-recognition of human worth and potential” are only available outside prison walls, for 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 is said to be the foundation of “remorse, renewal, and rehabilitation.” Some semantic questions arise: What exactly is being *renewed* 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 way are down deep inside. It becomes increasingly difficult to hide from yourself. Often you find yourself lost in the darkest crevices of your being and not too happy with what you are finding. You are

---

<sup>263</sup> See Joseph L. Falvey, Jr., *Crime and Punishment: A Catholic Perspective*, 43 CATHOLIC LAWYER 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”).

hesitant to continue but you do so, hoping for the best, finding the worst. Constantly you are thinking, thinking, thinking. It happens when you are working, pacing the 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 away like the skin of an onion, and don't expect to find flower buds to be hidden at the core.<sup>264</sup>

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 [7] claims that a person sentenced to LWOP has “little incentive to become a responsible individual.” Again, clarity about the margin we are operating on would be useful. If the offender is not serving an LWOP sentence, the alternative is decades in prison. It may be that the *possibility* of parole some decades in the future creates an “incentive” to become responsible, but surely the possibility of obtaining recreational privileges *right now* is 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.<sup>265</sup> It is, consequently, unclear how much the prospect of release decades hence influences their decisionmaking, certainly compared to real benefits tomorrow.

In sentences [8] and [9], 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, this statement is incorrect.<sup>266</sup> Sentence [10], with its embedded double negative, needs to be unraveled, but the conclusion is that LWOP has the “perverse consequence” of “reinforcing” the offender’s “lack of maturity.” Why is the

---

<sup>264</sup> Johnson & McGunigal-Smith, *supra* note 214, at 343,

<sup>265</sup> See, e.g., Manuel A. Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct*, 44 HOUS. L. REV. 609, 612 (2007).

<sup>266</sup> See *supra* at III.B.

Court so sure that juveniles (or anyone) who commit crimes resulting in LWOP sentences are immature? Is it possible that in some instances the ability and willingness to commit murder, rape, or armed kidnapping suggests not less, but more maturity than the typical 17-year-old?<sup>267</sup> In any event, the Court claims that an LWOP sentence reinforces the 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 17-year-old who commits 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 answers this question.

In the *Graham* opinion the Court observes that an LWOP sentence conveys an “expressive judgment.”<sup>268</sup> It would even be fair to say that, with an LWOP sentence, the community expresses greater abhorrence than it does with a long prison term.<sup>269</sup> Where the *Graham* Court goes astray is its suggestion that LWOP conveys unmitigated revulsion—that the

---

<sup>267</sup> See Lerner, *supra* note 14, 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 juveniles who commit the most serious crimes may be more mature than their age peers.

<sup>268</sup> 130 S.Ct. at 2030.

<sup>269</sup> Consider *State v. Chase in Winter*, 534 N.W.2d 350, (S.D. 1995), in which the trial judge chose not to sentence a 21-year-old defendant to LWOP, instead ordering a 200-year prison term. 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. 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 whom 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.* at 354.

community regards any reform as “immaterial” and it “forswears altogether the rehabilitative ideal.” At bottom, the Court fails to grapple with the complexity of LWOP.

#### B. Life Without Parole as Synthesis of Retributivist and Rehabilitative Impulses

What accounts for the rise of LWOP? 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. 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.”<sup>270</sup> 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 verdict. Witzel was an even less attractive candidate for leniency. It’s not simply that he murdered two people and seriously wounded two others (to get revenge on an ex-girlfriend). It’s that he refused to offer any of the usual excuses. Here he is, 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, his 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.<sup>271</sup>

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.”<sup>272</sup> Witzel’s victims were more emphatic:

---

<sup>270</sup> Susan Bischoff, *Emotions Erupt at Potter Case Sentencing*, MEDIA MILWAUKEE, April 18, 2010, at <http://www4.uwm.edu/mediamilwaukee/news/sentence.cfm>.

<sup>271</sup> *Witzel Sentenced for Murder*, wmtv.com, June 26, 2009, <http://www.nbc15.com/home/headlines/33653284.html>.

<sup>272</sup> Bischoff, *supra* note 270.

“I hope [Witzel] rots in hell, the coward that he is when he hid in the basement waiting to shoot my sons,” said the father; “I want him to suffer in prison for the rest of his [expletive] life,” said a friend.<sup>273</sup>

To understand why LWOP has soared in popularity over the past few decades, at least in America, cases such as these provide a ready answer: revenge and retribution.<sup>274</sup> 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 the prospect of a life sentence that is truly and irrevocably a life sentence.<sup>275</sup> And simple incapacitation is another plausible rationale; yet given that the alternative to LWOP is likely decades in prison, it is fair to ask whether a 60- or 70-year old inmate really poses a substantial risk if released into the general public.<sup>276</sup> 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. Through LWOP, the community indulges its thirst for vengeance and in so doing affirms its solidarity with those most directly harmed.

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 may not demand revenge. But nonviolent crimes likely describe only a tiny minority of the LWOP cases.<sup>277</sup> The

---

<sup>273</sup> *Witzel Sentenced*, *supra* note 270.

<sup>274</sup> This might be regarded as redundant, but there is a literature drawing a distinction between the two concepts. Compare Dan Markel, *State Be Not Proud: A Retributivist Defense of Commutation of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. Rev. 407, 437 (2005) (arguing that a “nobler image of . . . retribution” should be “contrasted with revenge”) with WILLIAM IAN MILLER, *EYE FOR AN EYE* (2006) (arguing that retribution is rooted in the desire for revenge).

<sup>275</sup> See *United States v. [Dwight] Jackson*, 835 F.2d 1195, 1199 (7<sup>th</sup> 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 concludes in that case that general deterrence failed to support such an extreme sentence.

<sup>276</sup> See *id.* (“[I]t is extremely unlikely that if he were released 25 or 35 years from now . . . he would resume his career as a bank robber. . . . Crimes that involve a risk of physical injury . . . are a young man’s game.”).

<sup>277</sup> It is sometimes reported that the prison system is rife with nonviolent drug offenders serving LWOP sentences. See, e.g., Paula Mitchell & Tara Lundstrom, *Book Review*, *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH*

crimes that culminate in LWOP (predominantly murder, and to a lesser extent rape, aggravated kidnapping, and armed robbery) leave real victims.<sup>278</sup> In addition to their demand for revenge, the wider community can experience an empathetic thirst for vengeance. Nothing will bring Jackson's or Witzel's victims back to life; and their 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 a comfort to members of the community, insofar as they identify with the victims.<sup>279</sup> Unlike a prison term of years, LWOP is society's pledge to the victims that they will never be

---

*PENALTY?*, 60-Jul. Fed. Law. 84, 84 (2013) ("Nearly 10 percent of those inmates (well over 3,000) were convicted only of drug, property, or other nonviolent offenses and sentenced to LWOP under habitual offender statutes"). This claim is based on data that is hard to verify, is nearly two decades old, and perhaps encompasses those sentenced to LWOP *or* life with the possibility of parole had committed a nonviolent offense. My own research suggests that the claim that "nearly 10%" of those now serving LWOP committed nonviolent offenses is far, far off the mark. See *infra* note 278. There is, of course, anecdotal evidence of a few such inmates, see, e.g., John Tierney, *Life Without Parole: Four Inmates' Stories*, N.Y. TIMES, Dec. 12, 2012, but some of the claimed cases fall apart upon study. For example, it is claimed that Mark Young was sentenced to LWOP "for participating in the sale of marijuana." See Ogletree and Sarat, *supra* note 4, at 85. This is true; omitted is the fact that the sentence was overturned on appeal and reduced to 151 months. *Who's Really in Prison for Marijuana*, at 24-25, [http://www.prisonpolicy.org/scans/whos\\_in\\_prison\\_for\\_marij.pdf](http://www.prisonpolicy.org/scans/whos_in_prison_for_marij.pdf).

<sup>278</sup> To take Arkansas as an example, my research assistants and I reviewed a list of all inmates serving LWOP in that state. See 3/13/12 Email from Shea Wilson. 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. All but 3 were convicted of murder. Notes on file with author.

<sup>279</sup> The family of Laurie Troup, murdered by Kuntrell Jackson, reports both the satisfaction of the LWOP sentence, and their dismay at the Supreme Court's overturning of that sentence in *Jackson v. Mississippi*, the companion case of *Miller v. Alabama*: "We thought it was all behind us and one where you can move on. . . . Now it's all being relived again." *Families Decry Supreme Court Verdict on Life Without Parole*, Jun 26, 2012, at <http://www.thedailybeast.com/articles/2012/06/26/families-decry-supreme-court-decision-on-juvenile-life-without-parole.html#sthash.ju9NRjMm.dpuf>. 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." *A Voice for Victims of Juveniles Sentenced to Life Without Parole*, at <http://victimsofjwop.blogspot.com/2009/10/kristina-grill.html>. In other cases, victims express disappointment that offenders are sentenced to life *with* the possibility of parole. Said the brother of a 20-year-old Arizona State University student, who was robbed and then dragged from a fleeing car, "I hope he dies in prison. . . . He shouldn't breathe another breath of free air again." Mike Sakai, *Marquez Sentenced to Life in Dragging Death of ASU Student*, Dec. 15, 2012, [http://www.eastvalleytribune.com/local/cop\\_shop/article\\_66403542-4653-11e2-b0fb-0019bb2963f4.html](http://www.eastvalleytribune.com/local/cop_shop/article_66403542-4653-11e2-b0fb-0019bb2963f4.html).

compelled to relive the crime in an agonizing parole hearing, because in no circumstances will the criminal be released.<sup>280</sup>

Yet an LWOP sentence does not quite deliver on its promise. As several family victims discover, to their bitter disappointment, inmates sentenced to LWOP *are* released.<sup>281</sup> Nor are the offenders' lives in prison simply the hell that many victims imagined. The mother of one seven-year-old girl, who was raped and murdered, expressed her discontent:

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.”<sup>282</sup>

If retribution and a desire for closure account for the appeal of LWOP, surely there is, at least in theory, a more attractive sentence: the death penalty.<sup>283</sup> 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 them and sympathy for their victims, while also proclaiming the terror and majesty of the law. By inflicting the death penalty, the community chooses a truly irrevocable sentence. It displays confidence in its

---

<sup>280</sup> Richard Blecker describes LWOP as a “binding covenant with the past.” See Blecker, *supra* note 215.

<sup>281</sup> See *supra* at Section III.C (detailing the various ways inmates sentenced to LWOP can be released). Learning by email that his brother's murderer, sentenced to life over 4 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*, Nov. 27, 2008. See also Richard Serrano, *Ruling on Juvenile Killers Reopen Wounds for Victims' Families*, Aug. 16, 2012. Specific cases in which *Graham* and *Miller* upset victims' expectations are quoted in note 279. Other victims discover that even after an LWOP sentence is ordered, they may still be in the position of fending off efforts to secure the offender's release. The family of Paul Wang, murdered by then 13-year-old Barry Massey, have organized an extensive website dedicated to keep Massey in prison.

[http://www.barrymasseykiller.com/Barry\\_Massey\\_Killer/1.\\_Home.html](http://www.barrymasseykiller.com/Barry_Massey_Killer/1._Home.html).

<sup>282</sup> Hugh R. Morley, Privileged Prisoners: Is Justice Served by TV Sets and Stereos?, *The Record* (Northern N.J.), Nov. 13, 1994, quoted in McCord, *supra* note 217, at 80.

<sup>283</sup> As implemented in America today, the death penalty seldom provides “closure” because only a fraction of condemned offenders are executed. And furthermore, the decades that precede an execution are filled with litigation. Prosecutors thus often urge victims to forego the death penalty to avoid the pain of prolonged hearings and appeals. “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.” Griffin Pritchard, *Hawes Found Guilty of 2003 Murder*, at <http://alada19.com/inthenews2008/080319.htm>. As already discussed, it is not clear that LWOP-sentenced inmates truly can be said to “rot in jail.”

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.<sup>284</sup>

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 70-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.<sup>285</sup> There were compelling reasons to execute Jackson and Witzel when their crimes were fresh in memory, and punishment might have satisfied the victim’s family 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, life without parole 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 impulse to impose LWOP—that is, to proclaim a human being worthless and banish him forever—converges, in its retributivism, on the impulse to impose the death penalty. Other than concerns of political feasibility, it is fair to question why a principled death penalty abolitionist would embrace such a sentence.<sup>286</sup> The

---

<sup>284</sup> For classic summaries of such arguments, see Ernest van den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis* in HUGO BEDAU, *THE DEATH PENALTY IN AMERICA* (1982) and Walter Berns, *supra* note 1. Counterarguments are too numerous to catalog.

<sup>285</sup> Many inmates, even those sentenced for the most serious crimes, truly reform in prison. *See, e.g., supra* note 254 (discussing cases of James Palucah and Johna Hayes).

<sup>286</sup> Occasionally, death penalty abolitionists who have embraced LWOP have been candid about their misgivings. Reverend Joseph Ingle has said:

rationale for LWOP supplied by Beccaria, that life without parole is a harsher sentence (“perpetual enslavement,” “beast of burden”)<sup>287</sup> with greater deterrence and more retributive effect, fails. As implemented in America today, life without parole is not, at least for most inmates, more painful than death. And the reason was alluded to by John Stuart Mill, who in this respect proved himself more prescient than Beccaria. Mill predicted that once the “memory of the crime is no longer fresh,” there is “an insuperable difficulty in executing” a hard life sentence.<sup>288</sup> Mill’s apparent meaning is that the “memory of the crime” can harden our collective hearts to the humanity of the offender, and to insist that he *suffer*. But anger is hard to sustain; even people who have suffered the most staggering atrocities can make their peace, and move on.<sup>289</sup>

For Nietzsche, the “ability and obligation to exercise prolonged . . . revenge” is the “morality of the ruling class.”<sup>290</sup> But this viewpoint seems deranged to many today; and we prefer to regard our compassion as evidence of our humanity. When the once 20-year-old murderer is a reformed senior citizen, it seems (to many) cruel to continue to incarcerate him. And notwithstanding all the harsh talk about letting inmates “rot in jail,” the community doesn’t really mean it: we want the defendant to reform. In perhaps all but the most incorrigible

---

[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. . . .

. . . [T]hose of us who are [in contact with death row inmates], you're not gonna 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!

Quoted in McCord, *supra* note 217, at 44-45

<sup>287</sup> See *supra* at text accompanying notes 19-21.

<sup>288</sup> Mill, *supra* note 25-27.

<sup>289</sup> See JEAN HATZFELD, *THE STRATEGY OF ANTELOPES* (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*, *THE NEW CRITERION*, Feb. 2008.

<sup>290</sup> NIETZSCHE, *BEYOND GOOD AND EVIL* section 260.

cases,<sup>291</sup> 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 truly committed to *hard* punishment. Blecker suggests that in such a world LWOP would take the form of “permanent punitive segregation”:

Those condemned to [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 beutraloaf—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.<sup>292</sup>

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.<sup>293</sup>

---

<sup>291</sup> 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.

<sup>292</sup> Blecker, *supra* note 209. David McCord made a very similar proposal a decade earlier, styled as “sensory deprivation punishment.” David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 123 (1998). His more modest proposal is that the harsh conditions would be imposed on the inmate either for fixed terms within a life sentence or on certain dates, e.g., the anniversary of the murder.

<sup>293</sup> For another imagined alternative to LWOP that truly forswears the rehabilitative ideal, consider the “punitive coma” explored in Philip Kerr’s brilliant, dystopian novel, *PHILOSOPHICAL INVESTIGATION* (1993) Convicted defendants are sentenced to comas, and—in the case of serious crimes—for the duration of their lives. However ghastly, an “irrevocable punitive coma” is still inadequate from the perspective of the principled retributivist, such as Blecker, for it fails to actively cause pain. See *id.* at 114 (noting that a 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 it 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 all but minor offenders.” *Id.* The punishment of punitive coma is embraced in J.C. Oleson’s Swiftian proposal, *The Punitive Coma*, *supra* note 22.

LWOP is thus 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 observers 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, in concluding, analogize LWOP to the establishment of a constitutional rule. As many have observed, by adopting a constitution a political body purports to act with the foresight of Odysseus when his ship skirted the Sirens’ Island.<sup>294</sup> Having been warned that the Sirens’ music is irresistibly enchanting, Odysseus compels his men to bind him “hard and fast, so that I cannot stir.”<sup>295</sup> A constitution is said to constrain future generations from succumbing to temptation. Discussions of the Homeric passage, however, often fail to note that here 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 procedural and structural obstacles.

---

<sup>294</sup> See, e.g., Michael Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1645 (2009); Adam Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 655-56 (2008); JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36-111 (1988). 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. REV. 561, 572 (2004-05). See also Blecker, *supra* note 215 (LWOP, as a covenant with the past, promises that “we will never let our rage and disgust deteriorate”).

<sup>295</sup> The *Odyssey* of Homer, Book XII, lines 39-54 (Richard Lattimore trans. 1965).

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.<sup>296</sup> If there were a simple legal mechanism for release, it would be difficult to resist the temptation to mercy. In that sense, LWOP in its harshness is nonetheless an 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 for decades.

## **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 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"

---

<sup>296</sup> See Blecker, *supra* note 294 at 572.

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 to argue 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 the defendant with the mark of Cain, but as administered the sentence does not withhold the possibility of reform, nor does it deny hope to the convicted defendant. LWOP as implemented today is a conflicted sentence, imposed by a community on the one hand open to vengeance, but on the other hand aware of the humanity of the offender. The impulse to punish and the impulse to forgive are both manifest in the sentence of life without parole.