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AGAINST LIFE WITHOUT PAROLE

JUDITH LICHTENBERG*

ABSTRACT

We have many good reasons to abolish life without parole sentences (LWOP, known in some countries as whole life sentences) and no good reasons not to. After reviewing the current state of LWOP sentences in the United States, I argue that the only rationale for punishment that can hope to justify them is retributivism. But even if retributivism is a sound principle, it in no way entails life without parole. One reason is that unless one believes, like Kant, that appropriate punishments must be carried out whatever the circumstances, we must acknowledge that other considerations are relevant to determining punishments. Furthermore, retributivism does not dictate particular punishments, and so the question remains which are reasonable and appropriate.

Even retributivists, then, can reject life without parole. But showing why it's wrong requires a positive case for abolition as well. I offer several reasons. First, shortening and tempering sentences need not trivialize the gravity of the crimes to which they respond, as some suggest, because the expressive meaning of sentences is malleable. Second, most if not all people are not fully culpable for their criminal acts, and we should mitigate their punishment accordingly. Third, abolishing life without parole—and indeed all life sentences—is likely to bring many benefits: to prisoners, their loved ones, the community in general, and to those who decide for abolition and who carry it out. Among these is the promotion of certain attitudes it is good for people to have—what, following Ryan Preston-Roedder, I call faith in humanity. Finally, there's a certain pointlessness in continuing to punish a person who has undergone changes of character that distance him greatly from the person who committed the crime many decades earlier.

* Professor of Philosophy, Adjunct Professor of Law, Georgetown University. I have benefitted from discussion of this paper with students in my Law and Philosophy seminar in spring 2017 as well as audiences at Georgia State University, the University of Maryland, Cornell University, the University of Lisbon, and the University of Baltimore. Marcia Baron, Arthur Evenchik, Robert Leider, David Luban, Jeffrey Reiman, and Matthew Shields also gave me valuable feedback, as did the editors of this journal. I am especially grateful to students in my classes over the last three years at Jessup Correctional Institution in Maryland and at the D.C. Jail in Washington, who have had a profound influence on my thinking about these matters.

INTRODUCTION

Until about a decade ago, vocal criticism of sentences in the American criminal justice system focused mainly on the death penalty. The U.S. stood out, and still does, as nearly the only developed country in the world with capital punishment, and for this it has been subject to sharp criticism both internally and internationally. The death penalty is still a target of criticism, but it may well be on its way out. In addition to the view that it is inherently wrong or barbaric—or, if not inherently wrong, then wrong or barbaric in an advanced society like the United States—there are at least three familiar objections. One is the death penalty’s enormous costs compared to even a sentence of life imprisonment—a seemingly counterintuitive fact resulting from the very high legal expenses associated with the lengthy and mandatory appeals process in death penalty cases.¹ Another has to do with the glaring racial and socioeconomic disparities in how the death penalty is and has been applied.² Finally, there is the increasing difficulty of carrying out executions humanely, as pharmaceutical companies that provide the drugs for the most commonly used method, lethal injection, have become wary of ethical missteps or bad publicity.³ For these and perhaps other reasons, both executions and support for the death penalty fell in 2016 to levels lower than they had been in decades.⁴

If the death penalty disappears, and even if it doesn’t, the time has come to closely examine other harsh punishments in use in our system. Here I consider what is generally considered the next harshest punishment: life in prison without the possibility of parole (LWOP).⁵

In section I, I explain why the time is ripe to evaluate the legitimacy of life sentences. Section II explores the relationship between LWOP and the

1. See, e.g., *Costs of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/costs-death-penalty> (last visited Nov. 20, 2018).

2. The racial disparities are well-documented. See, e.g., Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFORMATION CENTER (1998), <https://deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#Executive%20Summary>. For socioeconomic disparities and their consequences for the quality of lawyering in death penalty cases, see, e.g., Stephen Bright, “Imposition of the Death Penalty upon the Poor, Racial Minorities, the Intellectually Disabled and the Mentally Ill,” <https://deathpenaltyinfo.org/documents/SBrightUN2014.pdf>.

3. On the pharmaceutical issues see, e.g., the inaugural episode, “Cruel and Unusual,” of the NPR podcast series *More Perfect*. See *More Perfect: Cruel and Unusual*, NATIONAL PUBLIC RADIO (June 2, 2016), <https://www.npr.org/podcasts/481105292/more-perfect>.

4. Richard Perez-Pena, *Executions Hit 25-Year-Low and Support Is Falling, Report Finds*, N.Y. TIMES, (Dec. 22, 2016), https://www.nytimes.com/2016/12/21/us/death-penalty-capital-punishment.html?_r=0; see also *The Death Penalty in 2016: Year-End Report*, DEATH PENALTY INFORMATION CENTER, (2016), <http://www.deathpenaltyinfo.org/YearEnd2016>.

5. I say “generally considered” because some view life without parole as just as harsh or even harsher than the death penalty; more on this subject below.

death penalty, which helps to explain why LWOP has received insufficient scrutiny. In section III, I examine the main arguments for punishment and conclude that only retribution can plausibly ground LWOP. In sections IV and V, I examine various understandings of retributivism and conclude that no plausible interpretation entails or even necessarily recommends LWOP. Section VI offers three positive arguments for the abolition of LWOP. Section VII summarizes my conclusions.

I. WHY WE SHOULD REEXAMINE THE LEGITIMACY OF LIFE-WITHOUT-PAROLE SENTENCES

Close examination of life-without-parole sentences is overdue for a variety of reasons, familiar to many who study these issues but nonetheless worth reviewing.

A. *Explosion of LWOP Sentences*

One reason is the explosion of these sentences in the last few decades. As of 2012, 49,080 people were serving LWOP sentences.⁶ Between 2008 and 2012, LWOP sentences increased by 22.1%; they have quadrupled since 1984.⁷ In six states and the federal system all life sentences are LWOP.⁸ In 2012, over 3200 people were serving LWOP sentences for nonviolent drug and property offenses.⁹ Meanwhile, from 1984 to 2012, the U.S. population increased only 33%, from about 236 to 314 million.¹⁰

6. ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA (2013), <https://www.sentencingproject.org/publications/life-goes-on-the-historic-rise-in-life-sentences-in-america/>. These sentences are sometimes called “natural life sentences”; in the UK they go by the name “whole life sentences.”

7. *Id.* at 13.

8. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 9 (2009), <https://www.sentencingproject.org/publications/no-exit-the-expanding-use-of-life-sentences-in-america/>.

9. *Truth About Life Without Parole: Condemned to Die in Prison*, ACLU NORTHERN CALIFORNIA, <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison> (last visited Nov. 20, 2018).

10. See U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (June 28, 2000), <https://www2.census.gov/programs-surveys/popest/tables/1900-1980/national/totals/popclockest.txt>; U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES, [https://data.census.gov/cedsci/results/tables?q=Population%20Change%20and%20Components&t=Population%20Change%20and%20Components&tab=ACSDP1Y2016.DP05&ps=search*suggestions@false&app*from@RESULTS_ALL\\$stable*currentPage@1](https://data.census.gov/cedsci/results/tables?q=Population%20Change%20and%20Components&t=Population%20Change%20and%20Components&tab=ACSDP1Y2016.DP05&ps=search*suggestions@false&app*from@RESULTS_ALL$stable*currentPage@1).

B. Explosion of Life-with-parole Sentences

Life sentences—*with* the possibility of parole—have also quadrupled since 1984. As of 2009, almost 100,000 people were serving life sentences with parole.¹¹ (Those serving life sentences, with or without parole, constitute 9.5% of all prisoners.) “In eight jurisdictions for which data are available since the 1980s, average time served by lifers with murder convictions nearly doubled from 11.6 years for those paroled in the 1980s to 23.2 years for those paroled between 2000 and 2013.”¹²

In twenty-six states, parole boards—often operating behind closed doors—have almost unlimited power to make decisions, and these decisions are largely unreviewable.¹³ The average state parole board considers 8355 inmates for release a year—thirty-five decisions a day—and has other responsibilities. In forty-four states, the board is wholly appointed by the governor; these remunerative positions can be rewards for former aides and allies.¹⁴

Lifers in Tennessee must serve fifty-one years before they become eligible for parole.¹⁵ In California, the parole board recommends parole two to five percent of the time; its recommendations are often rejected by the governor’s office.¹⁶ In Maryland, almost ten percent of prisoners are serving life sentences with parole; not a single one was released between 1996 and 2014.¹⁷ Releasing prisoners is politically risky, as we saw in the 1988 presidential election when it emerged that Democratic candidate Michael Dukakis had released convicted felon “Willie” Horton on a weekend furlough program. Horton did not return to prison and was later convicted of violent crimes, including rape, committed after his escape.

11. Nellis & King, *supra* note 8, at 3, 6.

12. Nazgol Ghandnoosh, *Delaying a Second Chance: the Declining Prospects for Parole on Life Sentences*, THE SENTENCING PROJECT (Jan. 31, 2017), <http://www.sentencingproject.org/publications/delaying-second-chance-declining-prospects-parole-life-sentences/#11.%20Key%20Findings>.

13. Beth Schwartzapfel, *Life Without Parole*, THE MARSHALL PROJECT (July 10, 2015), <https://www.themarshallproject.org/2015/07/10/life-without-parole>.

14. *Id.* at 8, 4.

15. Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in CHARLES J. OGLETREE, JR. & AUSTIN SARAT, *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 69 (2012).

16. *Id.*

17. Ghandnoosh, *supra* note 12, at 8.

Some attribute Dukakis's defeat in the election to the Horton ad run by the George H.W. Bush campaign.¹⁸

In short, life with parole is often de facto life without parole.

C. Supreme Court Restrictions on Severe Sentences, Especially for Juveniles

At the same time, for the last decade or so the Supreme Court has been imposing restrictions on the death penalty and on life-without-parole sentences, at least for juveniles. In 2005, in *Roper v. Simmons*,¹⁹ the Court struck down the death penalty for juveniles. Later, in 2010, in *Graham v. Florida*,²⁰ the Court invalidated LWOP for juveniles not convicted of homicide. And in 2012, in a joint ruling deciding *Miller v. Alabama* and *Jackson v. Hobbs*, the Court announced that mandatory LWOP sentences for juveniles are unconstitutional.²¹ This ruling alone affected 2500 prisoners—not surprising when we consider that adolescence is prime time for criminal activity.²²

D. Comparison with Other Countries

Another reason to reevaluate LWOP policies is the enormous disparity in sentencing practices between the United States and other developed countries. Norway is best known—in some circles notorious—for capping the maximum sentence for any crime at twenty-one years. That includes the case of Anders Breivik, convicted for the murder of sixty-nine young people and eight others at a Workers' Youth League summer camp in 2011.²³

18. For a good account and a recent interview with Horton see Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited> - .LQhugD6MV. As Dukakis puts it in an interview reported in this article, “[t]he easy thing to do is never to commute anybody, never parole anybody. And unfortunately, in my judgment, that’s happening more and more.” *Id.*

19. *Roper v. Simmons*, 543 U.S. 551 (2005).

20. *Graham v. Florida*, 560 U.S. 48 (2010).

21. *Miller v. Alabama*, 567 U.S. 460 (2012).

22. See Joshua Ravner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (July 1, 2016), <http://www.sentencingproject.org/publications/juvenile-life-without-parole/>. The *Roper* decision affected 72 prisoners, the *Graham* decision, 123.

23. That does not mean Breivik will be freed after twenty-one years. “Judges will be able to sentence him to an unlimited number of five-year extensions if he is still deemed a risk to the public.” Dana Goldstein, *Too Old to Commit Crime?*, THE MARSHALL PROJECT (Mar. 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime> - .jVKAeF0cA. Recently Marc Mauer of the Sentencing Project recommended a twenty-year maximum on federal criminal sentences. Marc Mauer, *A Proposal to Reduce Time Served in Federal Prison, Testimony to Charles*

Germany outlawed LWOP in 1977. The Federal Constitutional Court argued that “rehabilitation is constitutionally required in any community that establishes human dignity as its centerpiece”—which the German constitution does.²⁴ Thus, “a humane enforcement of life imprisonment is possible only when the prisoner is given a concrete and realistically attainable chance to regain his freedom”²⁵ In 2013, the European Court of Human Rights decided that LWOP violated Article 3 of the European Convention of Human Rights, which prohibits “inhuman or degrading treatment or punishment.”²⁶

These disparities do not show that the Europeans are right and the Americans wrong. But they are enough to make a reflective person think about the meanings, purposes, and limits of criminal punishment.

II. LWOP AND THE DEATH PENALTY

LWOP invites scrutiny in part because of its intimate relationship with the death penalty. It’s almost impossible to think through the former without making comparisons with the latter. “Life without parole has been absolutely crucial to whatever progress has been made against the death penalty,” according to James Liebman, Columbia law professor and scholar of the death penalty. “The drop in death sentences”—from 320 in

Colson Task Force on Federal Corrections, THE SENTENCING PROJECT (Mar. 11, 2015), <http://www.sentencingproject.org/publications/a-proposal-to-reduce-time-served-in-federal-prison/>.

24. *Life Imprisonment Case (1977)*, 45 BVerGE 187 in THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 366 (Donald P. Kommers ed. & trans., 2d ed. 1997).

25. *Id.* at 308–09. Article 1.1 of the German constitution (the “Basic Law”) states that “human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” Article 2.1 states: “[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” *Id.*

26. *Vinter v. United Kingdom*, 2013-III-Eur. Ct. H.R. 317.

[I]n the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress toward rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

Id. (citing the Grand Chamber’s Judgment at §119). On January 17, 2017, however, the Grand Chamber of the European Court of Human Rights (ECtHR) announced that the whole life sentence of a UK prisoner, brought before the ECtHR in *Hutchinson v. United Kingdom*, 2017-Eur. Ct. H.R. 65, does not violate Article 3—thereby reversing a previous ruling. *Id.* The change comes from the finding that the UK law complies with the ECHR standards on release and review. “Specifically, U.K. law allows the Secretary of State to reduce a life sentence at any time on compassionate grounds, which, the State claims, encompass more than end-of-life situations and will be interpreted in line with the ECHR.” *ECtHR: UK ‘Whole Life Sentences’ Now Compatible with ECHR*, INTERNATIONAL JUSTICE RESOURCE CENTER (Jan. 23, 2017), http://www.ijrcenter.org/2017/01/23/ecthr-u-k-whole-life-sentences-now-compatible-with-echr/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+InternationalJusticeResourceCenter+%28International+Justice+Resource+Center%29).

1996 to 125 in 2005—“would not have happened without LWOP.”²⁷ Why the connection? Death penalty opponents point to studies showing that support for it drops drastically among jurors and the general public when LWOP is an option.²⁸ It stands to reason that people who fear that abolishing the death penalty means letting dangerous criminals go free, or dispensing less punishment than they deserve, may be reassured by life-without-parole sentences. Death penalty abolitionists have sometimes even joined with “pro-incarceration activists and legislators” to pass LWOP statutes.²⁹ From 1992 to 2003, the LWOP population grew more than five times faster than the group of prisoners on death row: the former by 170%, the latter by 31%.³⁰

Ironically, prisoners sentenced to LWOP are legally disadvantaged compared to those sentenced to death, who have rights of appeal and review noncapital defendants do not get.³¹ As New York Times reporter Adam Liptak puts it, “[t]he pro bono lawyers who work so aggressively to exonerate or spare the lives of death row inmates are not interested in the cases of people merely serving life terms.”³² Courts could not extend these kinds of protections to those serving LWOP sentences without incurring staggering costs.³³

One might mistakenly infer from the disparity in treatment that LWOP is not so bad. But a different conclusion is that some have put “the death penalty” into a box that says “forbidden”—perhaps on deep-seated religious grounds that prohibit killing, even though as a matter of fact few people regard the taking of life as in all cases impermissible. The consequence has been to treat all non-corporal punishments as in a wholly different category, automatically legitimate or at the very least not forbidden. But the deep justifications for abolition of the death penalty have implications for other punishments, including life without parole.

27. Adam Liptak, *No Way Out: Serving Life, With No Chance of Redemption*, N.Y. TIMES (Oct. 5, 2005), (quoting James Lieberman), http://www.nytimes.com/2005/10/05/us/serving-life-with-no-chance-of-redemption.html?_r=0.

28. *Id.*; see also OGLETREE & SARAT, *supra* note 15, at 5.

29. Note, *A Matter of Life and Death: the Effect of Life-without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1839 (2006).

30. *Id.* at 1852.

31. “Unlike death sentences . . . life-without-parole sentences receive no special consideration from appellate tribunals.” *Id.* at 1853.

32. Liptak, *supra* note 27.

33. Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform*, in OGLETREE & SARAT, *supra* note 15, at 207. Barkow provides a good analysis of the comparison between LWOP and the death penalty.

III. LWOP AND THE JUSTIFICATIONS FOR PUNISHMENT

For all these reasons, then, it's appropriate to look closely at LWOP and the justifications offered for it. It's important first to clarify the scope of this argument. Some LWOP sentences are excessive by any reasonable standard—including at least those imposed for nonviolent offenses. Without settling on what that standard is, I assume many people who do not in principle oppose LWOP would agree. Since the case presented here against LWOP is an argument of principle, we may exclude from consideration those many incarcerated people who are subject to obviously excessive sentences.

A second group of those serving LWOP sentences should never be released. There are two possible reasons that might be given for continuing to incarcerate them. One is that they are too dangerous; the other is that they are unrepentant.³⁴ I address these reasons in more detail below. But requiring someone to remain incarcerated for their whole life is not the same as sentencing them at the time of conviction to LWOP. To oppose LWOP in principle is to oppose sentencing a person at the time of conviction to life in prison *without the possibility* of parole—it is to oppose making a final judgment at sentencing that no matter what a person does, no matter how he changes, he will never be fit to rejoin society. It is not to say that every person sentenced for a crime must eventually be released.

The traditional literature generally divides the justifications for punishment into several kinds: general deterrence, specific deterrence, incapacitation, rehabilitation, and retribution. Philosophers and criminal justice theorists in recent years have offered other aims of punishment that do not fit neatly into these categories but sometimes overlap with them, such as moral education, communication, and the expression of moral norms and values.³⁵ In what follows, I consider the standard justifications and indicate where and how the latter ones fit with them.

The aim of general deterrence is to punish individuals who have

34. Many people too dangerous to be released may suffer from mental illness and belong not in prison but in a facility where punishment per se is not the aim. Conditions in the latter can be awful too, of course—and people incarcerated in such facilities may sometimes even prefer prison, where their sentences may have an end point. An unforgettable illustration occurs in Frederick Wiseman's 1967 documentary, *Titicut Follies*, about patient-inmates in a Massachusetts hospital for the criminally insane. One of the men incarcerated there begs to be transferred to prison, which his custodians take as further evidence of his lack of mental competence.

35. *See also* 18 U.S.C. § 1853 (2012). According to the statutory provision, the sentence should “reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner” *Id.* (numbers and sections omitted).

committed crimes in order to send a message to others who might be contemplating criminal acts that they too will suffer punishment if they carry out their plans. Few would deny that general deterrence must and does play some part in the legitimate rationales for punishment. If no penalties attached to criminal behavior, it is safe to assume more people would commit crimes. This claim is perfectly compatible with the view that people refrain from committing crimes for other reasons besides the prospect of punishment. The question is which deterrents function to reduce the likelihood of committing crimes, and by how much.

One finding is that for some kinds of crimes—especially drug trafficking—those sent to prison are quickly replaced by others.³⁶ More important, much recent work shows that it is the certainty of punishment rather than its severity that deters would-be criminals. There are at least three reasons why severe punishments are less effective than abstract consideration might lead one to expect. First, not all potential offenders are deterrable; certainly some are less deterrable than others. No one is purely rational (whatever that means); substance abuse and mental illness make would-be offenders less so. It's clear that many people fail to perform cost-benefit calculations before breaking the law, or do so poorly. Second, to be deterred by a punishment, one has to know what the punishment is; people tend to underestimate the severity of penalties. Perhaps most important is that the many steps between crime and punishment—being caught, accused, tried, convicted, and sentenced—greatly reduce the likelihood of punishment. As Valerie Wright puts it in a report for the Sentencing Project, “since most crimes, including serious ones, do not result in an arrest and conviction, the overall deterrent effect of the certainty of punishment is substantially reduced.”³⁷ For all these reasons, it is extremely unlikely that LWOP deters crime better than shorter sentences.

What about specific deterrence? This term is sometimes used ambiguously. Most literally, it refers to the idea that the negative experience of incarceration will serve as an incentive for an offender not to engage in criminal activity again. But specific deterrence may be conflated with incapacitation: while people are locked up, they are less likely to

36. See Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 176, 181–83 (2013).

37. VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (Nov. 2010), available at <http://www.sentencingproject.org/publications/deterrence-in-criminal-justice-evaluating-certainty-vs-severity-of-punishment/>. This report is also the source of other claims in this paragraph. See also Tonry, *supra* note 36, for a thorough review of the literature pointing to the ineffectiveness of severe penalties as general deterrents.

engage in antisocial or destructive behavior. By incarcerating offenders, we decrease the chances that they will harm others—not entirely, of course, since they may harm fellow prisoners or prison employees, but largely.³⁸

However, neither of these purposes is served by LWOP sentences. The most important reason is that almost all criminals, including violent ones, age out of crime before middle age.”³⁹ As an extensive study by the National Research Council concluded in 2014:

[B]ecause recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very high-rate or extremely dangerous offenders.⁴⁰

In addition, one study shows that those released from life sentences were “less than one-third as likely as all released offenders to be rearrested within three years of release from prison.”⁴¹ The reason for this seemingly paradoxical fact may be at least partly that those released had already served long sentences and were no longer young. In any case, from the point of view of both specific deterrence and incapacitation, LWOP sentences make little sense.

Consider now rehabilitation.⁴² The concept of rehabilitation is also ambiguous. Does it mean simply becoming a person who can live in society without creating a risk of injury to others? Or does it include some

38. Some may think that since prisoners have done wrong and have forfeited some of their rights, the risks they bear of harm by other incarcerated persons should trouble us less than risks borne by those on the outside.

39. Goldstein, *supra* note 23; see also JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 193, 231 (2017).

40. NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 155–56 (2014), <http://doi.org/10.17226/18613>. Citing a study by Alfred Blumstein and colleagues, an article for the Marshall Project argues that “for the eight serious crimes closely tracked by the F.B.I.—murder, rape, robbery, aggravated assault, burglary, larceny-theft, arson, and car theft—five to 10 years is the typical duration that adults commit these crimes, as measured by arrests.” Dana Goldstein, *supra* note 23; see also ALFRED BLUMSTEIN, JACQUELINE COHEN, & PAUL HSIEH, NATIONAL INSTITUTE OF JUSTICE, DURATION OF ADULT CRIMINAL CAREERS: FINAL REPORT 12–22 (1982); Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 CRIME & JUST. 359, 445–51 (2003).

41. MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 24 (2004), <http://www.sentencingproject.org/publications/the-meaning-of-life-long-prison-sentences-in-context/>.

42. Here I leave aside that, despite its appearance in 18 U.S.C. § 3553 of the criminal code, rehabilitation has not been an explicit aim of the U.S. criminal justice system at least since Congress passed the Comprehensive Crime Control Act of 1984, which proclaimed that “imprisonment is not an appropriate means of promoting correction and rehabilitation.” See 18 U.S.C. § 3582 and Comprehensive Crime Control Act of 1984, U.S. House of Representatives, <https://www.congress.gov/bill/98th-congress/senate-bill/1762>; see also *supra* note 35.

notion of repentance or change of heart? I shall return to these questions, but for present purposes it doesn't matter, except in the sense that the stronger meaning of rehabilitation encompasses moral education, sometimes offered as a distinct justification for punishment.

Some prisoners no doubt become rehabilitated over years of incarceration, although it may be hard to distinguish rehabilitation from the usual process of aging out of crime. On the other hand, there is good reason to believe that prison sometimes makes people worse rather than better.⁴³ Leaving these factors aside, it is hard to see how rehabilitation could be a *purpose* of life-without-parole sentences, if, as seems clear, LWOP is neither necessary nor useful in realizing that purpose. On the contrary, it seems more likely that the prospect of eventual freedom would serve as an incentive for an incarcerated person to change.⁴⁴

What about punishment's expressive function? Punishment expresses condemnation of wrongful acts, respect for victims, and commitment to the rule of law.⁴⁵ To perform these functions adequately—to take crime seriously and to repair the social and moral fabric damaged by it—requires not just any punishments but ones that “fit” the crimes.

An important question is whether or to what extent the fit and proportionality of punishments are objectively given; or, conversely, to what extent they are culturally relative or socially determined. Would a twenty-one-year sentence for the unrepentant Dylann Roof, who killed nine parishioners at Mother Emanuel African Methodist Episcopal Church in Charleston, South Carolina in June 2015, express disrespect for his victims and the rule of law? This is the kind of sentence Roof would get in Norway. It would be surprising if Norwegians did not value life to the same degree that Americans do, and thus that their shorter sentences express or represent a disrespect of humanity.⁴⁶ This also seems consistent with the idea that cultural variations in how norms are expressed are compatible with an objectivist view of their significance. For example,

43. See, e.g., Michael Mueller-Smith, *The Criminal and Labor-Market Impacts of Incarceration* (Nov. 14, 2014) (unpublished manuscript) (on file with the Columbia University Department of Economics).

44. See, e.g., Dan Bernhardt, Steve Mongrain, & Joann Roberts, *Rehabilitated or Not: An Informational Theory of Parole Decisions*, 28 J. LAW & ECON. ORG. 186 (2012), arguing that rehabilitation correlates with sentences that are neither too short nor too long. Presumably LWOP sentences are too long. See section VI for discussion of how policies and expectations toward offenders can influence their behavior.

45. These functions might be thought separate and supportive of somewhat different rationales for punishment. I collect them together, and think together they fulfill the expressive function. The expressive function is sometimes understood to be a version of retributivism, although one might also view it as a close cousin of general deterrence. In general, the distinctions between the various justifications for punishments are less clear than they are often made out to be.

46. See *supra* section I.D.

every culture has norms of civility and rudeness, but what constitutes civility and rudeness differs from place to place. In some places, it is said, belching is good manners; not here.

This example might be thought to tell against my point, not for it. Maybe shorter sentences do not express disrespect for victims and the law in Norway, it might be argued; but given American habits and customs, in the U.S. they would. But this claim wrongly suggests that cultural practices and customs are immutable. Changes in attitude do not happen overnight. No doubt reforms need to occur gradually, not too far ahead of public sentiment and partly spurred by it. That is likely to be the way sentencing practices would evolve in any case, just as they have with the U.S. Supreme Court's erosion of the death penalty and LWOP sentences for juveniles.

The concept of a reasonable and appropriate minimum sentence is not completely malleable. A hundred-dollar fine for rape is too little; a twenty-year prison sentence for shoplifting is too much. But the concept is flexible enough to accommodate the abolition of LWOP without expressing disrespect for victims or the rule of law.

IV. RETRIBUTIVISM AS THE ONLY POSSIBLE GROUND FOR LWOP

I have argued that LWOP sentences cannot be justified in terms of general deterrence, specific deterrence, incapacitation, rehabilitation, or expressivism. That leaves retributivism as the ground on which their legitimacy must rest. Can this defense succeed? To decide will require an extended discussion.

Here is a simple formulation of the retributivist argument for LWOP:

1. Some people's crimes are sufficiently heinous that they deserve LWOP.

2. People ought to get the punishment they deserve.

The traditional and perhaps intuitive understanding of retributivism is *lex talionis*: the law of retaliation, "an eye for an eye." It's not difficult to show that this interpretation is morally unacceptable, for well-known reasons: it would allow or even require torturing torturers and raping rapists, among other things.⁴⁷ The alternative to *lex talionis* I will consider has been described as proportional retributivism: the idea that we should punish people in proportion to their crimes.⁴⁸ On this view, we should construct an ordinal ranking of crimes and punishments in which the worst crimes get the worst punishments; the next worst crimes get the next worst

47. See Jeffrey Reiman, *Justice, Civilization, and the Death Penalty*, 14 PHIL. & PUB. AFF. 115, 130, 119–21 (1985).

48. *Id.* at 120.

punishments, etc. Of course, this is at best an ideal that can be achieved only roughly. And, as I have just argued, the ranking should not be purely ordinal. If the worst punishment is too light, it will not take seriously the crimes it addresses.

The concept of proportional retributivism leaves open at least two important questions. First, what is the range—from minimum to maximum—of morally acceptable and appropriate punishments? Much of the rest of this article aims to show that LWOP lies beyond the maximum. Second, what is the deontic force of “ought” in “We ought to punish people in proportion to their crimes”? Retributivism is not satisfied, I believe, by the minimal view that a certain punishment is *permitted*—i.e., that guilt is a necessary condition for punishment.⁴⁹ To say a person deserves punishment *x* is at least to *recommend* that the person suffer *x*. But this still leaves much room for variation. Here are three possible interpretations:

(i) A should be punished, other things being equal.

(ii) A should be punished unless some important countervailing reasons apply.

(iii) A should be punished no matter what.

Kant notably believed (iii). On his view, punishing wrongdoers is morally *required*:

[W]hoever has committed murder, must die. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of justice. There is no likeness or proportion between life, however painful, and death Even if a civil society resolved to dissolve itself with the consent of all its members . . . the last murderer lying in prison ought to be executed before the resolution was carried out.⁵⁰

I shall assume a less absolute yet still strong interpretation of retributivism: that wrongdoers should receive the punishment they deserve unless there are strong countervailing reasons why they should not.

49. But some call this view “negative retributivism.” See Antony Duff, *Legal Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/legal-punishment/>. Others call it “modest retributivism.” See David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 542 (1991).

50. Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right*, in THE METAPHYSICS OF MORALS 142 (Mary Gregor trans., Cambridge Univ. Press 1991) (1780).

V. THREE POSSIBLE RESPONSES TO THE RETRIBUTIVIST ARGUMENT

In this section I consider three possible responses to the retributivist argument for LWOP.

A. *No wrongdoers deserve LWOP, because no wrongdoers deserve any punishment.* Although some wrongdoers must be confined against their will because they pose a danger to society, this is not punishment, i.e., the intentional infliction of suffering as a response to wrongdoing. This view constitutes a wholesale rejection of retributivism.

B. *Some wrongdoers deserve LWOP, but because it is inhumane, uncivilized, or otherwise unacceptable we should not impose it and should impose a lesser punishment instead.* In this case, a lesser punishment than LWOP is justified not by the offender's desert but by other moral considerations such as the prohibition on cruelty or inhumanity.

C. *No wrongdoers deserve LWOP, although they deserve some lesser punishment.* A lesser punishment than LWOP is justified by considerations of the offender's desert.

A. *Should We Reject Retributivism?*

Consider the view that no wrongdoers deserve LWOP because no one deserves *any* punishment. It implies that even the suffering of a wrongdoer imposed as punishment is an intrinsic evil that can be justified only as a means to some greater good. This is a view typically associated with consequentialism, although one can hold it without being a consequentialist.

Evaluating this view is not easy, in part because it's difficult to identify the nature and purpose of suffering a wrongdoer might undergo while being punished. Suppose you believe that an essential aim of punishment is rehabilitation, including moral education. You might well think that suffering is required for moral education to take place—that no one could be rehabilitated in the desired sense unless they suffered, at some point at least, in recognition of the wrongs they had committed. In that case, the wrongdoer's suffering would be a necessary element in punishment. But it would not be intrinsically desirable in the way a retributivist believes it is; rather, suffering would be an empirically necessary precondition for rehabilitation. We can test our intuitions about this matter by imagining a person who by taking a pill not only becomes harmless, but also genuinely appreciates the immorality of their criminal acts. Yet their understanding is intellectual, not emotional, and so they do not suffer as a result—for that

is how the pill works.⁵¹ Is this enough? If you think not, then it appears you believe suffering is an intrinsic and not simply an instrumental good.

The problem is that it's difficult to imagine how someone could recognize the wrongness of what they had done intellectually without at the same time suffering *in* so recognizing it; if they didn't suffer, we would have good reason to doubt that genuine recognition had taken place. In that case, suffering, although not intrinsically good, would be an essential part of coming to believe you have done wrong.

In any case, it is best not to rest the argument against LWOP on a wholesale rejection of retributivism, because retributivism and anti-retributivism seem to be foundational positions impossible to establish or disestablish, and because many people have strong retributivist intuitions. One is reminded of the philosopher John Wisdom's discussion, in his classic paper "Gods," of the two people who "return to their long neglected garden and find among the weeds a few of the old plants surprisingly vigorous."⁵² One sees evidence of order and the work of a gardener, the other of disorder and neglect. After further examination, research, and discussion, neither person's view has changed. At this point, Wisdom argues, when one says

"I still think a gardener comes" and the other says "I don't," their different words now reflect no difference as to what they have found in the garden, no difference as to what they would find in the garden if they looked further and no difference about how fast untended gardens fall into disorder.⁵³

Of course this is just a way of saying that their disagreement is not empirical, and no one will be surprised that the differences between retributivists and nonretributivists do not rest primarily on disagreements about the facts. But Wisdom's metaphor is salient. Consider two people responding to the crimes and trial of Dylann Roof. Roof has shown no remorse for the murders; in a white supremacist manifesto he wrote in prison, he said, "I would like to make it crystal clear I do not regret what I did. I am not sorry. I have not shed a tear for the innocent people I killed."⁵⁴ The jury found him guilty and in January 2017 he was sentenced to death.

51. The anti-retributivist Victor Tadros argues that it is the wrongdoer's recognition of wrongdoing, rather than his suffering, that we should aim to bring about. See Victor Tadros, *Recognition and Choice and Against Desert*, in *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 41–87 (2011).

52. John Wisdom, *Gods*, 45 *PROC. ARISTOTELIAN SOC'Y* 185, 191 (1944-1945).

53. *Id.* at 192.

54. Alan Blinder & Kevin Sack, *Dylann Roof, Addressing Court, Offers No Apology or*

To many people, Roof personifies evil. He killed nine innocent people; they were in a church, at a Bible study meeting; he had spent time with the victims and talked with them; his acts were motivated by racial hatred; they were premeditated; he showed no remorse. He appears to be the poster child for the harshest punishment our system permits. Probably the only thing that can be said in his favor is that he neither denies nor makes excuses for having intentionally carried out these acts.⁵⁵

Others, however—although no less appalled by Roof’s actions—may see him differently. He’s pathetic, to be pitied rather than hated. We would not want to be him. We do not think of him as someone who has taken advantage of the rules to do what others would do if they were less fair-minded.⁵⁶ Even if we reject a simple view of criminality as disease in need of treatment rather than punishment, it is hard to avoid the thought that his soul is disordered (even if you are not in the habit of talking about people’s souls). This may be called a Platonic conception of crime and punishment, even if we are not prepared to follow Plato all the way to the conclusion that wrongdoing is simply (or not so simply) a form of ignorance. But we might agree with Plato that we should never harm any person, even if they have harmed us.⁵⁷ *Punishment* of someone like Dylann Roof may seem to those drawn to this perspective beside the point.

Let me consider three responses that might be made to this way of contrasting the two pictures.

First, one might argue that the two pictures are not truly incompatible. Those who regard some violent wrongdoers as personifying evil may agree that their souls are disordered. However, there is an essential difference between one who adopts the first picture and one who adopts the second. It lies in the attitude they take toward the wrongdoer, more specifically whether or not they think it is intrinsically good that the wrongdoer suffer. This is, of course, precisely the disagreement between

Explanation for Massacre, N.Y. TIMES, (Jan. 4, 2007), https://www.nytimes.com/2017/01/04/us/dylann-roof-sentencing.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=EndOfArticle&pgtype=article&_r=0.

55. At the same time, proudly avowing one’s intention to murder innocent people and spark a race war is not exactly a mark in someone’s favor.

56. This is the argument for punishment from fair play, usually considered a retributivist argument, according to which the wrongdoer has taken advantage of the system and therefore should be punished. This argument is implausible when it comes to violent crime, although it makes sense in some realms, such as paying one’s taxes. Jean Hampton notes the limits of the fair play argument in Jean Hampton, *The Retributive Idea*, in JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 114–16 (1988).

57. “It is never just to harm anyone,” Socrates says in the Republic after an exchange in which Polemarchus asserts it is just to treat one’s friends well and to harm one’s enemies. PLATO, REPUBLIC bk. I, at 335e (G.M.A. Grube trans., C.D.C. Reeve rev., Hackett Pub. Co., Inc. 2d ed. 1992) (c. 380 B.C.).

retributivists and their opponents. The retributivist does not think the wrongdoer is pitiable or pathetic insofar as that implies we should not cause him suffering for its own sake.

Second, one might argue that even if the picture of wrongdoers as pitiable rather than evil fits people like Roof, it is inadequate to the Hitlers and Stalins of the world. Is that because of the magnitude of their evil deeds? Or that Hitler and Stalin committed heinous crimes against millions of people continually throughout their lives, while Roof committed a crime on one day while still young and immature? Certainly, some people will want to distinguish wrongdoers along these lines and reserve their strongest retributive impulses only for the worst of the worst, perhaps relegating the Roofs of the world to a lesser circle of hell. But the question is whether *anyone* belongs in the first circle.

These two objections reinforce Wisdom's view that the disagreement we encounter here is close to bedrock, representing attitudes that are highly resistant to changes of mind or heart. Two people may look at the same set of facts and have radically different moral responses that cannot be rationally adjudicated.

Finally, the idea that the wrongdoer is pitiable or pathetic might not seem to fit with the conception of human dignity on which the European Court of Human Rights rests its rejection of the death penalty and LWOP.⁵⁸ Perhaps "pitiable" and "pathetic" are not the right terms; nevertheless, *dignity* is not what comes to mind.

There is much controversy about the meaning and role of the concept of dignity in discussions of human rights—with some asserting that it's "nothing but a phrase."⁵⁹ Here it is perhaps enough to note that in this context, dignity is a normative rather than a descriptive concept. It tells us that we ought to treat people a certain way, not that they are a certain way. We should *treat* people with dignity, but that doesn't mean they always behave with dignity.

B. Overriding Retributivism

Resting the argument against LWOP on a wholesale rejection of retributivism, then, would fail to touch many seemingly reasonable people with some retributive ground-beliefs. Consider next the argument that

58. See *Vinter v. United Kingdom*, 2013-III-Eur. Ct. H.R. 317. "[I]t would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom." *Id.* at §113.

59. See Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing But a Phrase?*, 41 PHIL. & PUB. AFF. 259 (2013).

some wrongdoers deserve LWOP, but because it is inhumane, uncivilized, or otherwise unacceptable we should not impose it. This is Jeffrey Reiman's reason for rejecting the death penalty: "[p]ublicly refusing to do horrible things to our fellows . . . signals the level of our civilization and . . . continues the work of civilizing."⁶⁰ The death penalty is horrible, he believes, because of the intense pain (psychological if not physical) accompanying it and "the spectacle of one human being completely subject to the power of another."⁶¹ Unless the death penalty has significant marginal deterrent value (which Reiman doubts, for good reason), it lies beyond the realm of acceptable punishments.⁶² Reiman thus rejects Kant's claim that a wrongdoer's desert is the only consideration relevant to deciding their punishment.

Reiman's view that some wrongdoers deserve to die makes his argument highly attractive in certain ways. It allows one to reject the death penalty without seeming to soft-pedal criminal acts. But can Reiman's approach delegitimize the death penalty without doing the same for LWOP? Does locking someone up for the rest of his life with no prospect of release cause less intense psychological pain than killing him? The six Alabama defendants charged with capital crimes who chose death over LWOP clearly thought not.⁶³ And they are not alone.

Indeed, it's not obvious that Reiman's approach even clearly delegitimizes the death penalty. It might be wrong to torture the torturer and rape the rapist but still be acceptable to kill the killer. So in the end the strategy of claiming a punishment to be "deserved, but uncivilized" may not be helpful in deciding whether sentences such as death and LWOP are morally permissible; it might seem to beg the question.

For similar reasons, the considerations suggesting that a punishment is deserved but uncivilized might equally warrant the conclusion that it is in fact undeserved. Indeed, it becomes hard to tell the difference between these claims. That brings us to the third response to the retributivist argument for LWOP: that wrongdoers deserve to be punished, but not with LWOP.

60. Reiman, *supra* note 47, at 136 (emphasis in original). And "from the fact that something is justly deserved, it does not automatically follow that it should be done, since there may be other moral reasons for not doing it such that, all told, the weight of moral reasons swings the balance against proceeding" *Id.* at 134.

61. *Id.* at 140.

62. *Id.* at 138.

63. See Bryan Stevenson, director of the Equal Justice Initiative, discussed in Liptak, *supra* note 27. It's also true, however, that most people on death row fight hard to get their sentences converted to life. But it's unclear whether that's because they prefer living a long life in prison to death or because a life sentence still leaves the door open for eventual release, either because of a liberalizing of sentencing practices or the introduction of new evidence or some other exculpatory matter.

C. A Moderate Retributivism

I have argued that of the standard justifications for punishment, only retributivism can hope to justify LWOP. But without the implausible assumption that retributivism *requires* punishment equal or proportional to the crime, irrespective of any other considerations, retributivism neither entails nor even suggests that some people should remain in prison for life. Thus, the link between retributivism and LWOP is severable and contingent: justice does not require LWOP. In the remainder of this paper, I argue that even retributivists should reject it.

Proponents of LWOP believe some offenders should never be released from prison no matter what they do or how they change. Two kinds of change are significant. One is the change from being dangerous to being not dangerous. Nonretributivists think that when the (forward-looking) justifications for punishment are not met offenders should be released. If we agree that LWOP does not serve the purposes of general deterrence or rehabilitation, in practice this means that offenders who are no longer dangerous should be released.⁶⁴

It might be said that *any* risk, no matter how small, posed by someone who has committed a violent crime is sufficient to warrant their continued incarceration. That person, after all, is guilty, and should bear the burden as against innocent people. But this is an unacceptably rigorous standard. Absolute certainty is unattainable in any predictive enterprise. There are costs to not releasing a person too—not only monetary costs and costs to the offender, but also in many cases to his family, loved ones, and community. Presumably these latter people are also innocent in the relevant sense. And the requirement of certainty could allow us to lock up just about anybody at any time, in the absence of any criminal behavior whatsoever.

Opponents of LWOP may demand evidence of repentance and change of heart before a wrongdoer is released, even when the wrongdoer is believed to pose no danger and has been incarcerated long enough to serve the purpose of general deterrence. This may be the most plausible view, and I will take it as my starting point.

Nondangerousness and repentance are logically distinct, even though the second often suggests the first. Presumably, one who sincerely regrets his wrongdoing is less likely to pose a danger than one who does not. But some who commit violence—such as domestic abusers—may regret their

64. Recall that even Norway, whose maximum sentence is twenty-one years, permits judges to extend sentences in five-year increments to dangerous offenders. See Goldstein, *supra* note 23, at 18.

acts even though they may act violently again. And, on the other hand, ceasing to be dangerous may result from physical inability and does not necessarily reflect repentance.

So here is the view I defend:

Those who commit the worst crimes (and are morally responsible for committing them, i.e. are not legally insane or otherwise excused from punishment) deserve punishment and ought to be punished, but those who are no longer dangerous and have undergone a change of heart amounting to repentance must be evaluated for release after serving a reasonable and appropriate sentence that satisfies aims of punishment such as deterrence and respect for law and persons.

VI. POSITIVE ARGUMENTS FOR ABOLISHING LWOP

In the remainder of this article, I offer positive arguments for abolishing LWOP. Together with the arguments already adduced, I think they add up to an overwhelming case that LWOP should be abolished.

The considerations that follow divide into three groups. The first focuses on offenders' culpability and mitigating circumstances that might reduce it. The second concerns the beneficial consequences of abolishing LWOP and the personal and institutional virtues it reinforces. The third considers the rationality, or lack of it, of punishing people who are importantly different from those who committed the crimes for which we are punishing them.

A. Mitigated Responsibility

Even if LWOP is not absolutely wrong, it's clear that of the nearly 50,000 LWOP prisoners and the more than 100,000 prisoners serving life sentences, many of which are de facto LWOP, the overwhelming majority should eventually be released. Many are serving sentences that are excessive by any reasonable standard. There are 10,000 lifers convicted of nonviolent offenses,⁶⁵ and 10,000 lifers convicted of crimes committed before they were eighteen years old (of whom nearly one in four is sentenced to LWOP).⁶⁶ There are many others too who have committed violent crimes but whose sentences should be tempered because of mental illness, drug addiction, and other mitigating circumstances.

Most defenders of LWOP are, I believe, focused on a relatively small number of prisoners who they think should never be released. Why isn't it

65. Nellis, *supra* note 6, at 1.

66. *Id.* at 3.

enough, then, if opponents of LWOP concede that *most* prisoners should have a chance to return to society? It would certainly be an improvement. Compared to the harsh and unjust punishment suffered by many of these 150,000 prisoners, LWOP for a much smaller number would be major progress. After all, the revocation of each and every unjust LWOP sentence would give one person some of his life back.

The argument for the wholesale abolition of LWOP rests partly on the view that as long as the sentences offenders endure do not trivialize the gravity of their crimes, respect for persons and their agency means leaving open the possibility that offenders can be morally rehabilitated and undergo significant change. (I will say more about this shortly.) It may seem laughable to think that people like Anders Breivik and Dylann Roof (not to mention Hitler and Stalin) might change, but that's irrelevant. It's the principle that *if* they did they should be considered for release.

Now of course adamant defenders of LWOP will disagree, asserting that *only* a life sentence (or death) is appropriate for such people. Either they reject the argument that the meaning or expressive function of sentences is partly relative, or they simply reassert the well-worn phrase that LWOP (or death) is what these people *deserve*.

There is a hint of a paradox in the reasoning of those who defend LWOP for "the worst of the worst." It suggests that people like Breivik and Roof are evil through and through. Is it, then, that such people cannot change, or that they will not? If the latter, so be it; they should remain locked up. If the former, we come up against grave questions about free will and responsibility that threaten the very idea of punishment.

I have so far avoided such questions. It may be suspected that many who reject retributivism as a matter of principle do so partly because they doubt the existence of free will and thus genuine moral responsibility. Although such doubts are not necessary conditions for rejecting retributivism, they are, it seems clear, sufficient. You cannot believe people *deserve* to suffer unless you think they are morally responsible for the acts that have rendered them deserving of suffering. The case of psychopaths is instructive. They do not fit the usual criteria for mental illness or legal insanity, which would excuse them from punishment (although not from involuntary incarceration). But how did they get the way they are? If they were either born or made by their environments to have the characteristics that render them indifferent to others' suffering, on what moral basis can we punish them? Similar arguments could be made about wrongdoers who are not psychopaths. Many, perhaps most, of those incarcerated for life have experienced conditions (whether due to nature or nurture or both) that have contributed to their committing crimes, such that if they had not experienced these conditions they would not have

committed those crimes. Isn't that *relevant* to determining how much punishment they deserve? But if it is, how do we avoid falling down the slippery slope to the conclusion that no one is ever morally responsible for their actions and thus no one can ever justly be punished?

Here is one way to avoid the slippery slope. We do it by compromising between two powerful, intuitive perspectives neither of which we can abandon entirely. One is that, practically and humanly, we must hold people responsible for their actions most of the time. We cannot think of ourselves or, usually, others as beings whose behavior is the inevitable outcome of everything that happened to them before.⁶⁷ This is the lesson of (or perhaps the reason for) compatibilism, probably the dominant view of the free will problem among contemporary moral philosophers and criminal law theorists. Compatibilism says that determinism (universal causation) and free will or moral responsibility are compatible—that if one's actions are caused in the right way or by the right things (and different theories will offer different accounts of what the right way or the right things are), then we are morally responsible for them; our wills are for the most part as free as they need to be. After all, the compatibilist rightly points out, if our actions were *not* caused they would be uncaused, i.e. random, and that would hardly make them free. Although I am as much of a compatibilist as the next moral philosopher, the view is satisfying as long as you don't push on it, which we can often avoid doing. But the principle and its upshots clash with another, equally indispensable principle—that the freedom to choose one's actions is essential to determining what a person deserves—along with the recognition that many of the factors that contribute to a person's committing crimes have severely limited their freedom.

We know that growing up in environments with certain kinds of deprivations—such as high poverty, poor schools, easy access to guns and drugs, non-intact families, inadequate access to decent employment—greatly increases the likelihood that people will go on to commit violent crimes. For example, the probability that if you live in the city of Baltimore you will commit a violent crime is more than five times greater than for residents of the United States as a whole. This comparison significantly understates the effect, since the figures for the US as a whole include many places with high crime rates and thus obscure the contrast with safer places. For example, Baltimore's rate of violent crime is more than thirty times that of Frederick, Maryland, a small city about an hour

67. An important and nearly universally acclaimed source of this view is P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962); reprinted in P. F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS (Routledge 2008) (1974).

west of Baltimore.⁶⁸ It seems altogether unjust to ignore such disparities in judging what offenders deserve.

The way to square this circle is to punish, but to punish less harshly than we would if a more robust conception of free will were in play.⁶⁹ From a purely logical point of view, this solution may appear wholly inadequate. It wants to have it both ways, and must distort each of the two principles under consideration. But the compromise, I believe, does as much justice as we can hope to find in this world.

B. The Benefits of Abolishing LWOP

Another reason to abolish LWOP and other extremely long sentences is simply that doing so will likely have good consequences. Consider first the prisoners whose sentences would be shortened. I shall assume that they would be better off than if they remained incarcerated. That's not quite as obvious as it might seem, since formerly incarcerated people can find it very difficult to secure a decent life on the outside in the absence of education, training, and money—which they so often lack. Any rational criminal justice system must put mitigating these disadvantages at the center of its approach. Nonetheless, I assume that even in the absence of such changes formerly incarcerated people will be better off out of prison than in it. One piece of evidence is that most of them fervently want to get out.

68. I have calculated these comparisons based on rates of violent crime as reported in Table 6 of the FBI's 2017 Statistics on Crime in the United States. See FBI: UNIFORM CRIME REPORTING PROGRAM, VIOLENT CRIME (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-6>. On hearing such facts, we typically think of the increased probability if you live in a high-crime area of being the victim of a crime. But equally significant is the far greater chance of being a perpetrator.

A further reason to doubt the legitimacy of bringing the full force of the law down on these offenders is that the state and society in question are often complicit, at the very least, with these criminogenic conditions, and this may invalidate their right to punish, or to punish beyond a certain point. For discussion of this increasingly popular view see, e.g., ERIN KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* 149–77 (2018); Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391 (2009); Gary Watson, *A Moral Predicament in the Criminal Law*, 58 INQUIRY 168 (2015); Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFF. 126 (2007); Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217–43 (1973).

69. Part of the problem is that it's hard to imagine what a robust conception of free will could be. If the only alternative to an event or action's being caused is its being uncaused, we don't have a solution, because randomness is not freedom. This is, of course, one of the appeals of compatibilism. It reasons that if uncaused actions would not be free, then perhaps caused actions are not necessarily unfree, because otherwise freedom would be logically impossible. So we must mean something by freedom that is not incompatible with causation, i.e. causal determinism. For a good survey of compatibilism and its varieties, see Michael McKenna & D. Justin Coates, *Compatibilism*, STANFORD ENCYC. PHIL. (Feb. 25, 2015), <https://plato.stanford.edu/entries/compatibilism/>.

What about the effects of abolition on society more generally? The waste of human lives condemned to prison for life, or even for decades, is tragic as well as irrational, and can be justified only by some powerful offsetting benefits. As we have seen, there is scant evidence that long sentences have either general or special deterrent value. Incarceration is very expensive, and becomes more so as prisoners age.⁷⁰

Of course, in considering the benefits of LWOP, we cannot ignore the interests of victims. Some victims want offenders to receive the maximum penalties possible and may otherwise feel unhappy or insecure. But not all victims do; some reject the idea that because one life has been lost others must be as well.⁷¹

But just as important are the families and communities of those who have committed crimes, who are also victims. The harms of having their members—especially men and, disproportionately, young black men—disappear from the community for years at a time are incalculable, even taking account of the benefits of having violent people taken away.⁷² It's hard to know how to weigh these harms against any benefits of very long sentences to direct crime victims and their loved ones. But I doubt that in this comparison the benefits of lengthy sentences, including LWOP, outweigh their costs.

Also relevant are the benefits to those who adopt a less vindictive approach. If such policies result from democratic decision-making, that includes “us” as a society, in addition to individual agents of reintegration. To embrace this approach is to express a certain optimism about the possibilities of good and redemption in human beings, and those attitudes may benefit those who hold them.

Ryan Preston-Roedder has explored this terrain in his insightful essay “Faith in Humanity,” arguing that “having a certain form of faith in people’s decency . . . is a centrally important moral virtue.”⁷³ Faith in

70. See Goldstein, *supra* note 23, at 3. The reader may notice that much of what I argue in this paper—although not everything—applies to life with parole and other decades-long sentences, not only to life without parole.

71. There are many examples, including the families of Dylann Roof’s victims, who forgave perpetrators of violence on their loved ones. See also the Radiolab story *Dear Hector*, NEW YORK PUBLIC RADIO (Sept. 13, 2018), <http://www.radiolab.org/story/317629-dear-hector/>. But to forgive does not necessarily entail advocating shortening a person’s sentence, so it can be difficult to identify instances where the two go together.

72. See, e.g., Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUES SCI. & TECH. (Fall 2015), <https://issues.org/the-effects-of-mass-incarceration-on-communities-of-color/>; Katy Reckdahl, *Mass Incarceration’s Collateral Damage: The Children Left Behind*, THE NATION (Jan. 15, 2015), <https://www.thenation.com/article/mass-incarcerations-collateral-damage-children-left-behind/>; IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Patillo, Bruce Western, & David Weiman, eds., 2006).

73. Ryan Preston-Roedder, *Faith in Humanity*, 87 PHIL. & PHENOMENOLOGICAL RES. 664–65 (2013).

humanity must not be confused with naïveté; optimism can be risky. But, as Preston-Roedder notes, all moral virtues carry risks, and it's possible to exhibit the virtue while taking the risks responsibly.

Faith in humanity, according to Preston-Roedder, makes the world better both for those who have faith and for those in whom they have faith. Take first the idea that it is good for those in whom one has faith. Viktor Frankl, psychotherapist and Auschwitz survivor, proclaimed that “if we treat people as if they were what they ought to be, we help them become what they are capable of becoming.”⁷⁴ It sounds nice, of course. But there is good social-scientific evidence confirming this view—showing, for example, that people tend to internalize others' view of them, and that when people have certain expectations of others' behavior they may send subtle signals to which those others then conform.⁷⁵ For these and other reasons, “having faith in people's decency tends to encourage them to act rightly.”⁷⁶ It's not foolproof; we can make mistakes, and we can sometimes be taken in by clever actors. Blind trust is not advisable. But an attitude that does not reduce people to their worst acts, as Bryan Stevenson puts it, and that does not permanently label them as criminals is more likely to succeed.⁷⁷ It is also very much in keeping with religious teachings many people hold dear.

Is faith in humanity good only because of its presumed effects on those in whom one has faith? Preston-Roedder argues that it is also good for those who have faith. Some may think his reasons beg the question. He believes those with faith in humanity not only will encourage people to act well but are more likely to treat others justly and to enter “into an important form of community with them.”⁷⁸ Those who support LWOP think that it *is* just treatment for people who have committed violent crimes, and they may argue that entering into community with them is not desirable.

But faith in humanity can be good for those who have it even apart

74. VIKTOR FRANKL, *THE DOCTOR AND THE SOUL: FROM PSYCHOTHERAPY TO LOGOTHERAPY* 8 (Richard Winston & Clara Winston trans., 3d ed. 1986), quoted in Preston-Roedder, *supra* note 73, at 664.

75. See Preston-Roedder, *supra* note 73, at 676. The well-known phenomena at work include the self-fulfilling prophecy, a now-ubiquitous term coined by Robert Merton in *The Self-Fulfilling Prophecy*, 8 *ANTIOCH REV.* (1948), and stereotype threat, where lower expectations of African Americans or women produce lower results on tests. See, e.g., Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 797 (1995); Claude Steele, *Thin Ice: Stereotype Threat and Black College Students*, *THE ATLANTIC* (Aug. 1999), <http://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/304663/>.

76. Preston-Roedder, *supra* note 73, at 676.

77. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 15–18 (2015).

78. Preston-Roedder, *supra* note 73, at 687.

from its effects on others. To be hopeful and optimistic is good for one's own well-being.⁷⁹ That alone is not sufficient to recommend it. But we can count this trait as a virtue if we agree that having it is on balance good for those who possess it and for others. A world in which we do not give up on people who have done terrible things, and where we aim to facilitate their journey to a different place, is a better world than the alternative.

C. Punishment and Personal Identity

A final reason to abolish LWOP has to do with the strangeness of continuing to punish a person who committed a crime years earlier but may have changed radically since then. This is the situation of many people serving extremely long sentences. They may have committed murder—or something less serious—when they were teenagers, and are still serving life sentences thirty to sixty years later. Leaving aside the moral legitimacy of continued punishment, we may question its rationality. What is the *point* of punishing a person who recognizes the wrongness of what he has done, who no longer identifies with those acts, and who bears little resemblance to the person he was so many years earlier? It's tempting to say he is no longer the same person.

That judgment might appear to land us into dense philosophical thickets. But is it really so complicated? To say that the prisoner is in one sense the same person he was at seventeen, and in another sense not, may seem unsatisfying—but it seems pretty accurate, and conforms to ways we commonly talk. As Jennifer Lackey argues, because we take mental states to be relevant to punishment, we should also take two stages of the same person “with radically different attitudes toward his crime, as deserving of different punishments. . . . Current selves and future selves can vary from one another no less than two altogether distinct people do.”⁸⁰

These considerations may seem abstract. For them to become concrete and palpable, it helps to become acquainted, many years after their crimes, with people who have been incarcerated from a young age. Doing so can cause you to ask whether it makes any sense to continue to punish these people to the end of their lives. From my experience, the answer is no.

79. See, e.g., Ciro Conversano et al., *Optimism and Its Impact on Mental and Physical Well-Being*, 6 CLINICAL PRAC. & EPIDEMIOLOGY MENTAL HEALTH 25 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2894461/>, and references therein.

80. Jennifer Lackey, *The Irrationality of Natural Life Sentences*, N.Y. TIMES, (Feb. 1, 2016), <https://opinionator.blogs.nytimes.com/2016/02/01/the-irrationality-of-natural-life-sentences/>. Lackey argues that it is irrational to ignore such information in sentencing decisions. It's only irrational, however, if there are no good moral reasons for ignoring it. I have tried to show here that there are no good moral reasons.

VII. CONCLUSION

I have argued that we have many good reasons to abolish life-without-parole-sentences, and no good reasons not to. The only rationale for punishment that can hope to justify LWOP is a retributive one. Even if retributivism is a sound principle, however, it does not obviously support LWOP. One reason is that unless one accepts a view like Kant's that appropriate punishments *must* be carried out whatever the circumstances, we must acknowledge that other considerations are relevant to determining punishments. Thus, even if someone deserves a certain punishment it does not follow that they should get it; some punishments, like torturing the torturer or raping the rapist, are too ghastly to be imposed. Furthermore, retributivism does not dictate particular punishments, so the question remains which are reasonable and appropriate. Tempering sentences need not trivialize the gravity of the crimes to which they respond, because the expressive meaning of sentences is partly relative—to other sentences and to cultural norms, which are malleable.

These arguments show that we need not reject retributivism to reject LWOP: justice does not demand it. But showing why LWOP is wrong also requires making a positive case for abolition. I have offered several reasons for this conclusion. First, few people are fully culpable for their criminal acts, and so we should mitigate their punishment accordingly. Second, abolishing LWOP—and indeed all life sentences—is likely to bring many benefits, to prisoners, their loved ones, the community, and to those who decide for abolition and who carry it out. Finally, it is pointless to continue to punish a person who has undergone changes of character that distance him greatly from the person who committed the crime many decades earlier.

Life-without-parole sentences should be abolished. But abolition alone will not suffice; parole must become a more realistic possibility than it is now. That, however, is another subject.