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AGAINST LIFE WITHOUT PAROLE*

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I. Introduction

Until just a few years ago, vocal criticism of the American criminal justice system focused almost entirely 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—at least three objections have become familiar. One is the death penalty's enormous costs compared even to a sentence of life imprisonment—a seemingly counterintuitive fact resulting from the very high legal costs 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. Finally, there is the increasing difficulty of carrying out executions humanely as pharmaceutical companies who provide the drugs used for the most commonly used method, lethal injection, have become wary of ethical

* 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. I would also like to thank Marcia Baron, David Luban, Robert Leider, Jeffrey Reiman, and Matthew Shields for valuable feedback.

¹ See, e.g., Death Penalty Information Center, *Costs of the Death Penalty*, at <https://deathpenaltyinfo.org/costs-death-penalty>.

missteps or bad publicity. For these and perhaps other reasons, both executions and support for the death penalty have fallen in 2016 to levels lower than they have been in decades.²

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).³

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

II. 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.

² Richard Perez-Pena, *Executions Hit 25-Year-Low and Support Is Falling*, N.Y. Times, Dec. 22, 2016, at https://www.nytimes.com/2016/12/21/us/death-penalty-capital-punishment.html?_r=0; and Death Penalty Information Center, *The Death Penalty in 2016: Year-End Report*, at <http://www.deathpenaltyinfo.org/YearEnd2016>. On the pharmaceutical issues see, e.g., the inaugural episode, *Cruel and Unusual*, of the NPR podcast series MORE PERFECT, June 2, 2016, at <http://www.npr.org/podcasts/481105292/more-perfect>.

³ 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.

A. Explosion of LWOP sentences

One is the explosion of these sentences in the last few decades. As of 2012, 49,081 people were serving LWOP sentences.⁴ Between 2008 and 2012 LWOP sentences increased by 22.2 percent; they have quadrupled since 1984.⁵ In six states and the federal system all life sentences are LWOP.⁶ In 2012, over 3200 people were serving LWOP sentences for nonviolent drug and property offenses.⁷ According to the ACLU, “no one sentenced to life without parole has ever been released on parole.”⁸

Meanwhile, from 1984 to 2012 the US population increased only 33 percent, from about 236 to 314 million.

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.⁹ (Those serving life sentences, with and without parole, constitute 9.5 percent of all prisoners.) “In eight jurisdictions for which data are available since the 1980s, average time served by lifers with murder

⁴ Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, The Sentencing Project (2013), at <http://www.sentencingproject.org/wp-content/uploads/2015/12/Unlocking-Justice-Historic-Rise-in-Life-Sentences-Webinar.pdf>. These sentences are sometimes called “natural life sentences”; in the UK they go by the name “whole life sentences.”

⁵ Nellis, *Life Goes On*, supra note 4, at 13.

⁶ ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 9 (The Sentencing Project, July 2009), at <http://www.sentencingproject.org/publications/no-exit-the-expanding-use-of-life-sentences-in-america/>.

⁷ AMERICAN CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 2 (2013), at <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses>.

⁸ ACLU Northern California, *The Truth About Life Without Parole: Condemned to Die in Prison*, at <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison>.

⁹ NELLIS & KING, NO EXIT, supra note 6, at 3, 6.

convictions nearly doubled from 11.6 years for those paroled in the 1980s to 23.2 years for those paroled between 2000 and 2013.”¹⁰

In 26 states, parole boards have almost unlimited power to make decisions; often operating behind closed doors, their decisions are largely unreviewable.¹¹ The average state parole board considers 8,355 inmates for release a year—35 decisions a day—and has other responsibilities. In 44 states, the board is wholly appointed by the governor; these remunerative positions can be rewards for former aides and allies.¹²

Lifers in Tennessee must serve 51 years before they become eligible for parole.¹³ In California, the parole board recommends parole 2 to 5 percent of the time; its recommendations are often rejected by the governor’s office.¹⁴ In Maryland, almost 10 percent of prisoners are serving life sentences with parole; not a single one was released between 1996 and 2014.¹⁵ 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. Some attribute Dukakis’s defeat in the election to the Horton ad run by the George H.W. Bush campaign.¹⁶ Politicians learned a lesson.

¹⁰ NAZGOL GHANDNOOSH, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES (The Sentencing Project, Jan. 31, 2017), at <http://www.sentencingproject.org/publications/delaying-second-chance-declining-prospects-parole-life-sentences/#II.%20Key%20Findings>.

¹¹ Beth Schwartzapfel, *Life Without Parole* 3 The Marshall Project (July 10, 2015), at <https://www.themarshallproject.org/2015/07/10/life-without-parole>.

¹² *Id.* at 8, 4.

¹³ 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).

¹⁴ *Id.*

¹⁵ GHANDNOOSH, *supra* note 10, at 26.

¹⁶ For a good account and a recent interview with Horton see Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, The Marshall Project (May 13, 2015), at <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited#.LQhugD6MV>. William Horton (who was not called Willie until Lee Atwater, who ran Bush’s campaign, so named him) is incarcerated today at Jessup Correctional Institution in Maryland and maintains his innocence.

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. *Roper v. Simmons* (2005) struck down the death penalty for juveniles. *Graham v. Florida* (2010) 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. This ruling alone affected 2500 prisoners—not surprising when we consider that adolescence is prime time for criminal activity.¹⁷

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 to 21 years. That includes Anders Breivik, convicted for the murder of 69 young people and eight others at a Workers' Youth League summer camp in 2011.¹⁸

As Dukakis puts it in an interview reported in this article, “The easy thing to do is never to commute anybody, never parole anybody. And unfortunately, in my judgment, that’s happening more and more.” Id.

¹⁷ See Joshua Ravner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project (July 1, 2016), at <http://www.sentencingproject.org/publications/juvenile-life-without-parole/>. The *Roper* decision affected 72 prisoners, the *Graham* decision 123.

¹⁸ That doesn’t mean Breivik will be freed after 21 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, (March 20, 2015), at <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime#.jVKAeF0cA>. Recently Marc Mauer of the Sentencing Project recommended a 20-year maximum on federal criminal sentences. Marc Mauer, *A Proposal to Reduce Time Served in Federal Prison, Testimony to Charles Colson Task Force on Federal Corrections* (March 11, 2015), <http://www.sentencingproject.org/publications/a-proposal-to-reduce-time-served-in-federal-prison/>.

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. 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. . . .”¹⁹ 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.”²⁰

These disparities do not show that the Europeans are right and the Americans wrong. But they are enough to make a reflective person think.

III. 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

¹⁹ Life Imprisonment Case (1977), 45 BVerGE 187 [in *The Constitutional Jurisprudence of the Federal Republic of Germany* 308-09 (Donald P. Kommers ed. & trans., 2d ed. 1997).] 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: “Every 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.”

²⁰ *Vinter v. United Kingdom*, 2013-III-Eur. Ct. H.R. 317 (Grand Chamber)(July 9, 2013): “...in 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,” §119. On January 17, 2017, however, the Grand Chamber of the European Court of Human Rights announced that the whole life sentence of a UK prisoner, brought before the ECtHR in *Hutchinson v. UK*, Appl. no. 57592/08 (Jan. 17, 2017), does not violate Article 3—thereby reversing a previous ruling. 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.” International Justice Resource Center, *ECtHR: UK ‘Whole Life Sentences’ Now Compatible with ECHR*, Jan. 23, 2017, http://www.ijrcenter.org/2017/01/23/ecthr-u-k-whole-life-sentences-now-compatible-with-ecthr/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+InternationalJusticeResourceCenter+%28International+Justice+Resource+Center%29.

death penalty," according to James Liebman, Columbia Law professor and scholar of the death penalty. "The drop in death sentences"—from 320 in 1996 to 125 in 2005—"would not have happened without LWOP."²¹ 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.²² 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.²³ 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 percent, the latter by 31 percent.²⁴

Ironically, prisoners sentenced to LWOP are legally disadvantaged compared to those sentenced to death, who have rights of appeal and review noncapital defendants don't get.²⁵ As Adam Liptak puts it, "The 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."²⁶ Courts could not extend these kinds of protections to those serving LWOP sentences without incurring staggering costs.²⁷

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

²¹ Quoted in Adam Liptak, *No Way Out: Serving Life, With No Chance of Redemption*, N.Y. Times, Oct. 5, 2005, at http://www.nytimes.com/2005/10/05/us/serving-life-with-no-chance-of-redemption.html?_r=0.

²² *Id.* See also OGLETREE & SARAT, *supra* note 13, at 5.

²³ Note: *A Matter of Life and Death: the Effect of Life-without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838 (2006).

²⁴ *Id.* at 1852.

²⁵ "Unlike death sentences...life-without-parole sentences receive no special consideration from appellate tribunals" *Id.* at 1853.

²⁶ Liptak, *supra* note 21.

²⁷ Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform*, in OGLETREE & SARAT, *supra* note 13, at 207. Barkow provides a good analysis of the comparison between LWOP and the death penalty.

“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 such as life without parole.

IV. LWOP and the justifications for punishment

For all these reasons, then, it’s appropriate to look closely at LWOP and the justifications that have been 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 serving LWOP for nonviolent offenses. Without settling on what that standard is, I assume many people who do not oppose LWOP in principle would agree. Since my argument 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, and the other is that they are unrepentant or not rehabilitated.²⁸ 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*

²⁸ 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 inmates begs to be transferred to prison, which the staff take as further evidence for his lack of mental competence.

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 to a crime must eventually be released.

The traditional literature generally divides the justifications for punishment into four or five kinds: general deterrence, specific deterrence, incapacitation, rehabilitation, and retribution. Philosophers in recent years have offered others 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.²⁹ 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 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 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 how much.

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

²⁹ See also 18 U.S.C. 1853, according to which 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” (numbers and sections omitted).

are deterrable, or not as deterrable as they might be. No one is purely rational; 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 badly. 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, 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.”³⁰ For all these reasons, it's extremely unlikely that LWOP deters crime better than less harsh sentences.

What about specific deterrence? This term is sometimes used ambiguously. More literally, it refers to the idea that a person who has been incarcerated will be deterred by the negative experience from reoffending in order to avoid similar pain in the future. But specific deterrence may be conflated with incapacitation: while a person is locked up she is less likely to 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.³¹

But both these purposes are contradicted by a variety of findings. One is that for some kinds of crimes—drug trafficking especially—those sent to prison are quickly replaced by

³⁰ VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT, (The Sentencing Project, November 2010), 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 Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME AND JUSTICE 176 (2013) for a thorough review of the literature pointing to the ineffectiveness of severe penalties as general deterrents.

³¹ 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.

others.³² Moreover, almost all criminals, including violent ones, age out of crime before middle age.”³³ 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.”³⁴ The reason for this seemingly paradoxical finding 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. (Here I leave aside that, despite its appearance in 18 U.S. §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.”³⁵) The concept of rehabilitation is also ambiguous. Does it mean simply becoming a person who can live in society without risking injury to others, or does it include some notion of repentance or change of heart? I shall return to this question, but for my purposes here 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 aging out of crime. On the other hand, there is good reason to believe that prison sometimes makes people worse rather than better.³⁶ Leaving

³² Tonry, *supra* note 30, at 181-3.

³³ Goldstein, *supra* note 18. See also JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 193, 231 (2017).

³⁴ MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, *THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT* 24 (The Sentencing Project, 2004), <http://www.sentencingproject.org/publications/the-meaning-of-life-long-prison-sentences-in-context/>.

³⁵ 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>, and note 26 *supra*.

³⁶ See, e.g., Michael Mueller-Smith, *The Criminal and Labor-Market Impacts of Incarceration* (unpublished 2014), <http://www.columbia.edu/~mgm2146/incar.pdf>.

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 or 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.³⁷

What about punishment's expressive function? We punish people partly to express condemnation of their acts, respect for their victims, and commitment to the rule of law.³⁸ To perform these functions adequately—to take crime seriously and to repair the social and moral fabric produced 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 and to what extent they are culturally relative or socially determined. Would a 21-year sentence for the unrepentant Dylann Roof, who killed nine parishioners at 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 seems ludicrous to think that Norwegians do not value life to the same degree that Americans do, and thus that their shorter sentences express or represent a disrespect of humanity. And this seems in keeping with the idea that cultural variations in how norms are expressed are compatible with an objectivist view of their significance. For example, every culture has norms of civility and rudeness, but what constitutes civility and rudeness differs from place to place. In some places, we are told, belching is good manners; not in ours.

³⁷ See, e.g., Dan Bernhardt, Steve Mongrain, & Joann Roberts, *Rehabilitated or Not: An Informational Theory of Parole Decisions*, 28 J. LAW & ECON. ORGANIZATION 186 (2012), arguing that rehabilitation correlates with sentences that are neither too short nor too long. Presumably LWOP sentences are too long. See section VII for discussion of how policies and expectations toward offenders can influence their behavior.

³⁸ 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.

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. Obviously 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 20-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.

V. 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 view as it applies to 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

unacceptable, for well-known reasons: it would allow or even require torturing torturers and raping rapists, among other things. 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.³⁹ 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 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? I leave this question aside here, except to argue 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.⁴⁰ 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.

³⁹ See, e.g., Jeffrey Reiman, *Justice, Civilization, and the Death Penalty*, 14 PHIL. & PUB. AFF. 115, 130, 119-21 (1985).

⁴⁰ But some call this view “negative retributivism,” Antony Duff, *Legal Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/legal-punishment/>, or “modest retributivism,” David Dolinko, *Some Thoughts about Retributivism*, 101 ETHICS 542 (1991).

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

whoever 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 deathEven 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.⁴¹

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

VI. 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 people 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.

V. No wrongdoers deserve LWOP, although they deserve some lesser punishment. A

lesser punishment than LWOP is justified by considerations of the offender's desert.

⁴¹ Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right*, in *THE METAPHYSICS OF MORALS* 142 (Mary Gregor trans., Cambridge Univ. Press 1991) (1780).

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 hard to isolate 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; suffering would rather 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 genuinely appreciates the immorality of his criminal acts. Yet his understanding is intellectual, not emotional, and so he does not suffer as a result—for that is how the pill works.⁴² 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.

⁴² 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 TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* (2011), chapters 3 and 4.

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. 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."⁴³ One sees evidence of order and the work of a gardener, the other of disorder and neglect. After further examination, research, and discussion, neither'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.⁴⁴

Of course this is just a way of saying that their disagreement is not empirical, and no one will be surprised to learn 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."⁴⁵ The jury found him guilty and in January 2017 he was sentenced to death.

⁴³ John Wisdom, *Gods*, 45 PROC. ARISTOTELIAN SOC'Y 185, 191 (1944-45).

⁴⁴ *Id.* at 192.

⁴⁵ Alan Blinder & Kevin Sack, *Dylann Roof, Addressing Court, Offers No Apology or Explanation for Massacre*, N.Y. TIMES, Jan. 4, 2017, <https://www.nytimes.com/2017/01/04/us/dylann-roof->

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 them 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 make excuses for having intentionally carried out these acts.)

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.⁴⁶ Without endorsing a simple view of criminality as disease in need of treatment rather than punishment, it can be hard to avoid the thought that his soul is disordered (even if you are not in the habit of talking about people’s souls). We may call this 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.⁴⁷ To those drawn to this perspective, *punishment* of someone like Dylann Roof may seem beside the point.

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

sentencing.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=EndOfArticle&pgtype=article&_r=0.

⁴⁶ 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 Hampton, *The Retributive Idea*, in JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 114-16 (1988)..

⁴⁷ “It is never just to harm anyone,” Socrates says in the *Republic* (335a-f) after an exchange in which Polemarchus asserts it is just to treat one’s friends well and to harm one’s enemies. PLATO’S REPUBLIC 10-11 (G.M.A. Grube trans., 1992).

First, one might argue that as such they are not truly incompatible. Those who regard some violent wrongdoers as personifying evil may agree that their souls are disordered. But 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 they think it is intrinsically good that the wrongdoer suffer or not. This is of course precisely the disagreement between retributivists and their opponents. I do think it is well-illustrated by the two pictures I have sketched. 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?—that Hitler and Stalin committed heinous crimes against millions of people continually, as adults, while Roof committed a crime on one day, in his youth? 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 leaving the Roofs of the world in a lesser circle of hell. But the question is whether *anyone* belongs in the first group.

These two objections reinforce Wisdom's view that the disagreement we encounter here is close to bedrock, representing attitudes toward those who have committed horrible crimes 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.⁴⁸ 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.”⁴⁹ For my purposes here it is perhaps enough to note that in these contexts (and no doubt others) 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

So resting the argument against LWOP on a wholesale rejection of retributivism would fail to touch many seemingly reasonable people with some retributive ground-beliefs. Consider next the argument that 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. According to Reiman, “Publicly refusing to do horrible things to our fellows...signals the level of our civilization and...*continues the work of civilizing*.”⁵⁰ 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.”⁵¹ Unless the death penalty has significant marginal deterrent value (which Reiman

⁴⁸ See *Vinter*, supra note 20, at §113: “...it 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.”

⁴⁹ See Charles R. Beitz, *Human Dignity in the Theory of Human Rights: Nothing But a Phrase?*, 41 PHIL. & PUB. AFF. *Philosophy & Public Affairs* 259 (2013).

⁵⁰ Reiman, supra note 39, 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.

⁵¹ Id. at 140.

doubts, for good reason), it lies beyond the realm of acceptable punishments.⁵² Reiman thus rejects Kant's claim that a wrongdoer's desert is the only consideration relevant to deciding their punishment.

The concession that some wrongdoers deserve to die makes Reiman's 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.⁵³ 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 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.

⁵² Id. at 138. Emphasis in original.

⁵³ According to Bryan Stevenson, director of the Equal Justice Initiative, discussed in Liptak, *supra* note 21. 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 possibility of new evidence coming to light.

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. So the link between retributivism and LWOP is severable and contingent: justice does not require LWOP. In the remainder of this paper I hope to show why 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.⁵⁴

It might be said that *any* risk, no matter how small, posed by someone who once 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 and loved ones and the community from which he comes. Presumably these latter people are also innocent in the relevant sense. And the requirement of

⁵⁴ Recall that even Norway, whose maximum sentence is 21 years, permit judges to extend sentences in five-year increments to dangerous offenders. Goldstein, *supra* note 18.

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. In other words, one who sincerely regrets and repents of his wrongdoing is likely to be no longer dangerous. But some of those who commit violence—such as domestic abusers—may regret their acts even though they may act violently again. And, on the other hand, ceasing to be dangerous may result from physical or other 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.

VII. 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 believe 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. 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 serving life sentences, many or most 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,⁵⁵ and 10,000 convicted of crimes committed before they were 18 (of whom one in four is sentenced to LWOP).⁵⁶ 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, talking about a relatively small number of prisoners who they think should never be released. Why isn't it enough, then, for LWOP abolitionists if its defenders concede that *most* prisoners should have a chance to get out? 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.

⁵⁵ Nellis, *supra* note 4, at 1.

⁵⁶ *Id.*

The argument for the wholesale abolition of LWOP rests partly on the view that as long as the sentence offenders endure does not trivialize the gravity of their crime, 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* an unending 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 concerns are not necessary conditions for rejecting retributivism, they are, it seems clear, sufficient. You can't 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 axioms 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.⁵⁷ 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 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

⁵⁷ An important and nearly universally acclaimed source of this view is P.F. Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACADEMY 1 (1962); reprinted in P. F. STRAWSON, FREEDOM AND RESENTMENT AND OTHER ESSAYS (2008).

compatibilist as the next moral philosopher, the view is satisfying only 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 axiom: the recognition that many of the factors that contribute to a person's committing crimes are beyond their control.

Suppose three out of ten people who grow up in environments with certain kinds of deprivations (high poverty, poor schools, easy access to guns and drugs, non-intact families, inadequate access to decent employment) go on to commit violent crimes, but only five out of 100 people in the general population commit them. In that case, growing up in the harsher environment increases one's chances of criminal behavior six-fold.⁵⁸ It seems altogether wrong 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.⁵⁹ From a purely logical point of view, this solution may appear wholly inadequate. It wants to have its cake and eat it too, and must distort

⁵⁸ I made up these numbers, but soon after came across statistics comparing the murder rate in Baltimore for 2015 with the U.S. as a whole. The rate in Baltimore was 55.4 per 100,000 people, more than ten times the rate for the U.S. as a whole: 4.9 per 100,000. The numbers come from the FBI's uniform crime reports, according to AREA VIBES, BALTIMORE at <http://www.areavibes.com/baltimore-md/crime/>. Obviously this is a crude statistic that needs further parsing and analysis. But still. 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, *Law Enforcement in an Unjust Society*, chapter 6 of *Rethinking Punishment and Responsibility*, (forthcoming); 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. (1973).

⁵⁹ 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, at <https://plato.stanford.edu/entries/compatibilism/>.

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 provision of these at the center of its approach. Nonetheless, I assume that even in the absence of such changes formerly imprisoned 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.

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.⁶⁰

Of course, in considering the benefits of LWOP, we cannot ignore the interests of victims of crime. Some victims want offenders to receive the maximum penalties possible, and may

⁶⁰ Goldstein, *supra* note 18. The reader may notice that much of what I say in this paper—although not everything—applies to life *with* parole and other decades-long sentences, not only to life without parole.

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.⁶¹

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 removed.⁶² It's hard to know how to weigh these harms against any benefits to direct crime victims and their loved ones of very long sentences. But I doubt that in this comparison the benefits of lengthy sentences, including LWOP, outweigh its 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.”⁶³ Faith in humanity must not be confused with naïveté; optimism can be

⁶¹ 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*, at <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.

⁶² See, e.g., Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 ISSUES IN SCIENCE & TECHNOLOGY (2015), <http://issues.org/32-1/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, at <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).

⁶³ Ryan Preston-Roedder, *Faith in Humanity*, 87 PHIL. & PHENOMENOLOGICAL RESEARCH 664 (2013).

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.”⁶⁴ 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.⁶⁵ For these and other reasons, “having faith in people’s decency tends to encourage them to act rightly.”⁶⁶ It’s not foolproof; we can make mistakes, and we can sometimes be taken in by people. 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.⁶⁷

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 a 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

⁶⁴ VIKTOR FRANKL, *THE DOCTOR AND THE SOU*, 8 (3d ed. 1986), quoted in Preston-Roedder, *supra* note 63, at 664.

⁶⁵ See Preston-Roedder, *supra* note 63, at 676 ff. for sources. 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 REVIEW* (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. PSYCH.* 797 (1995); and Claude Steele, *Thin Ice: Stereotype Threat and Black College Students*, *THE ATLANTIC*, August 1999, at <http://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/304663/>.

⁶⁶ Preston-Roedder, *supra* note 63, at 676.

⁶⁷ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 15 (2015).

community with them.”⁶⁸ 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 is good for those who have it even apart from its effects on others. To be hopeful and optimistic is good for one’s own well-being.⁶⁹ That alone is not sufficient to recommend it. But we can count these traits as virtues if we agree that having them is on balance good for those who possess them and for others. A world in which we do not give up on people who have done terrible things, and 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, when she may have changed radically. This is the situation of many people serving extremely long sentences. They may have committed murder when they were teenagers, and are serving life sentences thirty or forty (or fifty or 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 changed convicted felon is in one sense the same person he was

⁶⁸ Preston-Roedder, *supra* note 63, at 687.

⁶⁹ See, e.g., Ciro Conversano et al., *Optimism and Its Impact on Mental and Physical Well-Being*, 6 CLIN. PRACT. EPIDEMIOL. MENT. HEALTH 25 (2010), at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2894461/>, and references therein.

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.”⁷⁰

These considerations may seem abstract. For them to become concrete and palpable, it helps to become acquainted, many years later, 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.

VIII. Conclusions

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, 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; like torturing the torturer or raping the rapist, the punishment might be too ghastly to be imposed. Furthermore, retributivism does not dictate particular punishments, so the question remains which ones are reasonable and appropriate. Tempering sentences need not trivialize the gravity of the crimes to which they respond, because

⁷⁰ 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 is only irrational, however, if there are no good *moral* reasons for ignoring it. I have tried to show in this article that there are not.

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, there is a certain pointlessness in continuing to punish a person who has undergone changes of character that distance him so 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 today. That, however, is a subject for another day.