

Comments

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Bandage the Knife: On Life with No Mercy

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*[E]ven the guilty are human. . . . Do the stars have a meaning?
Then my life has a meaning.*

Leonard Peltier¹

INTRODUCTION

The United States is, above all, an idea. It is an idea of freedom, opportunity, and equality even before it is a nation. The United States is its own greatest ideologue and touts itself as a beacon of civilization the world over in order to obfuscate the long shadow cast by its policies, both global and domestic.² To maintain this idea of itself, the United States must cobble a rhetoric of its people as free

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¹ LEONARD PELTIER, PRISON WRITINGS: MY LIFE IS MY SUN DANCE 20 (Harvey Arden ed., 1999).

² See, e.g., HOWARD ZINN ET AL., A PEOPLE'S HISTORY OF AMERICAN EMPIRE (2008).

agents who, if doing wrong, do so strictly of their own volition, spurred by personal and damnable moral failings. By means of this internal logic, the State is able to justify the measures it takes to discipline and punish these supposed wrongdoers, as well as the scale of such measures. The result is this: The United States currently boasts the largest prison population in the history of the world.³ For every 100,000 Americans, 583 are incarcerated.⁴ And of over 1.9 million incarcerated persons in the United States,⁵ one in seven are serving a sentence of life without the possibility of parole (LWOP).⁶ It is with LWOP in particular that this Comment is concerned: with its national history, its global context, and pathways to its undoing.

I am focusing on LWOP for a number of reasons: first, because I don't believe it has garnered sufficient critical attention among either legal professionals or laypersons, especially when compared to the death penalty; second, because I believe that life imprisonment is a punishment of commensurate brutality and finality to death itself, and is in practical terms a *type* of death sentence; and third, because I believe LWOP is indicative of a foundational sociopolitical ill, and that it draws nourishment from a taproot reaching deep into the Gordian core of the United States criminal punishment system.⁷ I argue in this Comment that the contemporary prevalence of LWOP is a result of our culture of retribution and punishment pursued to its own lightless outer reaches. To make this argument, I will examine LWOP in a state and

³ INCARCERATING US (Life Is My Movie Entertainment 2022). This is to say nothing of the United States prison population having been higher in years past. El Salvador recently surpassed the United States in its rate of incarceration, locking up almost two percent of its population as of 2023. See *El Salvador Opens 40,000-Person Prison as Arrests Soar in Gang Crackdown*, REUTERS (Feb. 1, 2023, 1:14 PM), <https://www.reuters.com/world/americas/el-salvador-opens-40000-person-prison-arrests-soar-gang-crackdown-2023-02-01/> [<https://perma.cc/TP6J-PTP3>].

⁴ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/D8WW-AQNX>].

⁵ *Id.*

⁶ *No End in Sight: America's Enduring Reliance on Life Imprisonment*, THE SENT'G. PROJECT 1, 11 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [<https://perma.cc/8E4P-H7YR>]. See also MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES* 14–15 (2018) (exploring the role of race in life sentences: “Two-thirds of people serving life sentences are people of color . . . one of every five African Americans in prison is serving a life sentence. . . . Nearly one in six lifers (16 percent) are Latino, but the number ranges as high as 47 percent in New Mexico and 37 percent in California.”).

⁷ I purposefully do not use here, or anywhere, the term “criminal justice system.”

federal context, in an international human rights context, and in the context of its sibling, the death penalty, about whom much more has historically been said.

I approach this issue through a lens of mercy, which is antithetical to punishment. I owe my introduction to mercy to Bryan Stevenson,⁸ and my deeper understanding to many thinkers⁹ including Father James Keenan, who defines mercy as “the willingness to enter into the chaos of others.”¹⁰ Timothy Neary, in his work theorizing a rhetoric of mercy, finds that “true mercy and lasting justice” are the result of a willingness to be affected by what one encounters within the chaos of others.¹¹ Mercy is both a conceptual framework and a bodily process, and in this Comment I will advocate for its full range of application—this means attending to both the sociological circumstances and the fleshly realities of incarceration, rather than treating it as a mere thought exercise or policy matter. Because mercy and the prison are both somatic, and because the body is an extension of its environment, my framework includes felt sense theory pioneered by Eugene Gendlin,¹² Roger Caillois’ theory of legendary psychasthenia and “depersonalization by assimilation to space”,¹³ and Elaine Scarry’s theory of bodily pain and the structure of torture.¹⁴ As for legal theories, I have drawn much inspiration from the feminist, anti-capitalist, and abolitionist thinking of Angela Davis, Mariame Kaba,

⁸ See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

⁹ The evolution of my thinking about mercy over the years has been deeply influenced by the work of Carl Ransom Rogers and Thich Nhat Hanh. See, e.g., CARL ROGERS, *A Client-Centered/Person-Centered Approach to Therapy*, in *THE CARL ROGERS READER* 135 (Howard Kirschenbaum & Valerie Land Henderson eds., 1989); THICH NHAT HANH, *ANGER: WISDOM FOR COOLING THE FLAMES* (2001). I also recommend the writings of Danielle Sered, executive director of Common Justice, for a nuanced look at the relationship between mercy, justice, and accountability. See DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019).

¹⁰ Timothy B. Neary, *The Rhetoric of Mercy: Do-Gooders, Corporatists, and Warriors*, in *MERCY ILLUMINATES* 49, 52 (2008), <https://salve.edu/document/mercy-illuminates> [<https://perma.cc/36JC-CXP6>].

¹¹ *Id.*

¹² See, e.g., EUGENE T. GENDLIN, *FOCUSING* (1978).

¹³ Roger Caillois, *Mimicry and Legendary Psychasthenia*, 31 *OCTOBER* 16, 30 (1984).

¹⁴ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 16 (1985) (“the fact that the very word ‘pain’ has its etymological home in ‘poena’ or ‘punishment’ reminds us that even the elementary act of naming this most interior of events entails an immediate mental somersault out of the body into the external social circumstances that can be pictured as having caused the hurt.”).

Andrea J. Ritchie, and bell hooks, among others.¹⁵ Prison and police abolition in the United States is a political movement with a long and vibrant history, and the fight goes on. From this abolitionist perspective, I argue that revision and reform are a mere treatment of the symptom, inadequate to heal the condition from which the symptom originates. Instead, I look to the core issue of punishment itself; only by tracing LWOP to its roots can we hope to excise it completely.¹⁶

I

LIFE WITH NO MERCY

I begin with an exploration of the scope and application of LWOP. We—legal professionals, abolitionists, or otherwise concerned persons—may, if we choose, take refuge in the fact that the number of people on death row has dropped slowly each year since 2000,¹⁷ or that the overall prison population has incrementally decreased from a peak occurring in 2009.¹⁸ But within this marginally hopeful trajectory, one practice that shows no signs of stopping is LWOP, which increased by sixty-six percent between 2003 and 2021.¹⁹ And although a number of legal scholars have done important work around this issue,²⁰ it is clear that the attention paid to LWOP pales in comparison to that garnered by capital punishment—this despite their many commonalities.

Although capital punishment remains a contentious issue both nationally and internationally, the overall trend points away from its

¹⁵ See, e.g., ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); MARIAME KABA & ANDREA J. RITCHIE, *NO MORE POLICE: A CASE FOR ABOLITION* (2022); BELL HOOKS, *FEMINISM IS FOR EVERYBODY: PASSIONATE POLITICS* (2000).

¹⁶ I must here address that which is outside the scope of this Comment. Although I make repeated references to the subject, a comprehensive retelling of the racist history of the United States is a topic both broad and deep enough to fill a book—which it has done, many times. See NIKOLE HANNAH-JONES ET AL., *THE 1619 PROJECT* (2021); ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES* (2014). See also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010), for a history of the United States prison and policing systems specifically.

¹⁷ *Size of Death Row by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview/size-of-death-row-by-year> [<https://perma.cc/ZZ4R-Y7VF>] (last visited Mar. 29, 2024).

¹⁸ *Growth in Mass Incarceration*, THE SENT'G PROJECT, <https://www.sentencingproject.org/research/> [<https://perma.cc/A9UF-Q484>] (last visited Mar. 29, 2024).

¹⁹ *No End in Sight: America's Enduring Reliance on Life Imprisonment*, *supra* note 6, at 15.

²⁰ See, e.g., MAUER & NELLIS, *supra* note 6; *Juvenile Life Without Parole*, EQUAL JUST. INITIATIVE, <https://eji.org/news/tag/juvenile-life-without-parole/> [<https://perma.cc/NM48-Q4XQ>] (last visited Mar. 29, 2024).

use. A majority of countries have abolished capital punishment either legally or in practice, and international human rights law has taken an incremental approach toward its total abolition.²¹ Since 1976, upwards of eighty-five countries have completely abolished capital punishment for any crime.²² Even more do not practice it, including 160 member states of the United Nations,²³ in line with the recommendation of the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to abolish the death penalty worldwide.²⁴ In 2022, Amnesty International reported 883 executions across twenty countries.²⁵ By contrast, 53,000 people were serving sentences of LWOP in 2021 in the United States alone—and that number does not include the 44,000 others serving virtual life sentences.²⁶ An analysis by the Sentencing Project of nearly 30,000 life sentences between 1995 and 2017 found that two in five people sentenced to LWOP were under twenty-five years old at the time of sentencing,²⁷ whereas the U.S. Department of Justice reported zero persons on death row under the age of twenty-five at the end of 2021.²⁸

²¹ CHER WEIXIA CHEN & ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: A SURVEY 164 (2023).

²² *Countries That Have Abolished the Death Penalty Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976> [<https://perma.cc/U4QQ-JFRH>] (last visited Mar. 29, 2024).

²³ *Guidance Note on Human Rights for Resident Coordinators and UN Country Teams*, U.N. DEV. GRP. 66 (2017), <https://unsdg.un.org/sites/default/files/UNDG-Guidance-Note-on-Human-Rights-for-RCs-and-UNCTs-final.pdf> [<https://perma.cc/99TG-ME8F>].

²⁴ *UN Experts Call for Universal Abolition of the Death Penalty*, U.N. HUM. RTS. OFF. HIGH COMM’R (Oct. 9, 2023), <https://www.ohchr.org/en/press-releases/2023/10/un-experts-call-universal-abolition-death-penalty> [<https://perma.cc/RS45-U83P>].

²⁵ *Death Penalty 2022: Recorded Executions Skyrocket to Highest Figure in Five Years*, AMNESTY INT’L (May 16, 2023), <https://www.amnesty.org/en/latest/news/2023/05/death-penalty-2022-executions-skyrocket/> [<https://perma.cc/57PC-N3SW>].

²⁶ Brandon J. Baker, *Life Without Parole Is America’s Hidden Death Penalty*, PRISON JOURNALISM PROJECT (Sept. 21, 2022), <https://prisonjournalismproject.org/2022/09/21/life-without-parole-is-americas-hidden-death-penalty/> [<https://perma.cc/W664-5Q4F>] (a virtual life sentence is that which outlasts a person’s projected lifespan); see, e.g., *infra* note 34.

²⁷ Ashley Nellis & Niki Monazzam, *Left to Die in Prison: Emerging Adults 25 and Younger Sentenced to Life Without Parole*, THE SENT’G PROJECT (June 7, 2023), <https://www.sentencingproject.org/reports/left-to-die-in-prison-emerging-adults-25-and-younger-sentenced-to-life-without-parole/> [<https://perma.cc/PGG9-FMZ2>].

²⁸ Tracy L. Snell, *Capital Punishment, 2021 – Statistical Tables*, U.S. DEP’T JUST. 13 (2023), <https://bjs.ojp.gov/document/cp21st.pdf> [<https://perma.cc/TER6-4PUL>] (the most significant age group was persons fifty to fifty-four years old).

Of eleven states that have abolished the death penalty since 2007, all eleven still allow for sentences of permanent incarceration.²⁹

The international conversation surrounding LWOP is relatively limited, and perhaps this is because the United States contains eighty-three percent of all people sentenced to LWOP worldwide.³⁰ As Lila Kazemian summarized in a 2022 report by the Council on Criminal Justice, “[t]he use of long sentences has increased in nations across the globe over the last several decades, but the U.S. remains an outlier in the extent to which it imposes them.”³¹ Indeed, 183 countries and territories have formal laws allowing for life imprisonment, 65 use LWOP, and 50 have preventive detention statutes allowing for de facto LWOP with the addition of parole hearings.³² By and large, these policies comport with established international human rights norms, despite a number of legal challenges over the last few decades. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) forbids the use of “cruel, inhuman or degrading treatment or punishment,” and Article 10 states that the “essential aim” of the prison should be rehabilitation;³³ these were two of the Articles at issue in *Sholam Weiss v. Austria*, in which Weiss, a Florida resident, contested his sentence of 845 years in prison for a series of financial crimes, for which he faced extradition from Austria to the United States.³⁴ The State argued that Article 10 refers only to the conditions of imprisonment, not the duration, and that an 845-year sentence was proportionate to the harm caused by these crimes—namely, thousands of Americans losing their life savings—and thus did not violate Article

²⁹ *Life Without Parole Laws in States That Recently Repealed the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/lwop-post-repeal> [https://perma.cc/2J6U-9R5P] (last visited Mar. 29, 2024).

³⁰ Lila Kazemian, *Long Sentences: An International Perspective*, COUNCIL ON CRIM. JUST. 16 (Dec. 2022), <https://counciloncj.foleon.com/tfls/long-sentences-by-the-numbers/an-international-perspective> [https://perma.cc/T22R-5XRA].

³¹ *Id.* at 3.

³² Olivia Rope, *Life Imprisonment – a Sentence in Dire Need of Reform*, WORLD PRISON BRIEF (June 14, 2021), <https://www.prisonstudies.org/news/life-imprisonment--sentence-dire-need-reform> [https://perma.cc/35VA-D2GM].

³³ U.N. HUM. RTS. OFF. HIGH COMM’R, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 7, 10 (1966).

³⁴ *Sholam Weiss v. Austria*, App. No. 74511/01 (June 13, 2002), <https://hudoc.echr.coe.int/fre?i=001-22526>. Weiss’s sentence was commuted by President Donald Trump in 2021. See Chris McKenna, *Trump Commutes Prison Sentence of Monsey Man Serving 835 Years for 1999 Fraud Conviction*, TIMES HERALD-RECORD (Jan. 20, 2021, 9:41 AM), <https://www.recordonline.com/story/news/local/2021/01/20/trump-commutes-monsey-sholam-weiss/4215267001/> [https://perma.cc/5VCV-PVWH].

7 as a death sentence would have.³⁵ Although the Human Rights Committee did not rule on the matter initially due to an issue of ripeness, a later reopening of the case in 2008 led to their finding that extradition to a state where one will serve a virtual life sentence is not an Article 7 violation per se.³⁶ The Committee's rationale included the United States' promise of opportunities for Weiss to appeal, as well the Committee's general deference to the rules of the jurisdiction in which the crimes took place.³⁷

Although the *Sholam Weiss* decision indicates that Austria is willing to extradite people sentenced to LWOP—or, as in this case, a presumptive life sentence—in 1998, Austria adopted a policy refusing to extradite incarcerated persons to retentionist countries, i.e., those still exercising the death penalty, without assurance that the individual will not be executed.³⁸ In other words, whereas Austria would not extradite a person toward a death sentence, it *would* extradite a person toward a life sentence.³⁹ What the Committee and the State fail to consider is that duration is itself a condition of imprisonment. To use a biblical analogy, what makes the “shame and everlasting contempt”⁴⁰ of perdition unbearable is not that it is an extremely painful or creative punishment, but that it is a punishment which lasts *forever*. The lunar yawn of days, weeks, and years is an equally, if not more, important condition of one's incarceration than overcrowding, filth, exposure to violence, lack of medical care, or questionable food. Furthermore, conditions of imprisonment are relevant to the penological purpose of rehabilitation,⁴¹ and nothing more thoroughly obliterates the likelihood of “rehabilitation” than removing one's potential to ever reenter society.

Federally and in twenty-nine states, LWOP is the only possible sentence for certain crimes.⁴² By comparison, the Supreme Court held mandatory death sentences unconstitutional in 1976's *Woodson v.*

³⁵ *Id.* at 9–11.

³⁶ Human Rights Committee, Communication No. 1821/2008, U.N. Doc. CCPR/C/106/D (Oct. 24, 2012).

³⁷ *Id.*

³⁸ *No Return to Execution – The US Death Penalty as a Barrier to Extradition*, AMNESTY INT'L 7 (Nov. 2001), <https://www.amnesty.org/en/wp-content/uploads/2021/06/amr511712001en.pdf>.

³⁹ U.N. HUM. RTS. OFF. HIGH COMM'R, *supra* note 33.

⁴⁰ *Daniel* 12:2 (King James).

⁴¹ U.N. HUM. RTS. OFF. HIGH COMM'R, *supra* note 33.

⁴² MAUER & NELLIS, *supra* note 6, at 9–10.

North Carolina.⁴³ By and large, international law has treated LWOP closer to the way we in the United States treat the death penalty; that is to say, our national thinking about LWOP is relatively archaic. For example, in the 2016 case *Murray v. the Netherlands*, the European Court of Human Rights (ECHR) found that irreducible life imprisonment was inhuman and degrading treatment due to the defendant's mental illness—because of this illness and its impact on Murray's comprehension, "his continued detention would no longer serve any penological purpose."⁴⁴ The court held unanimously that Murray's sentence violated Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enjoins that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁴⁵ On the national level, *Murray's* reasoning is comparable to the 1986 case *Ford v. Wainwright*, banning "the execution of the insane,"⁴⁶ and the 2002 case *Atkins v. Virginia*, banning the execution of "mentally retarded" persons.⁴⁷ One element these Supreme Court cases have in common is a recognition that severe punishments inflicted upon inculpable or incognizant persons are contraindicated by the "evolving standards of decency" set out in *Trop v. Dulles*.⁴⁸ Another national death-international life comparison can be drawn between 2013's *Mendoza v. Argentina*, wherein the Inter-American Court of Human Rights held that juvenile life sentences violate the American Convention on Human Rights,⁴⁹ and 2005's *Roper v. Simmons*, in which the Supreme Court abolished capital punishment for persons whose crimes were committed under the age of eighteen.⁵⁰ In both cases, the respective courts cited issues of

⁴³ *Woodson v. North Carolina*, 428 U.S. 280, 281 (1976).

⁴⁴ *Murray v. Netherlands*, App. No. 10511/10 ¶ 125 (Apr. 26, 2016), <https://hudoc.echr.coe.int/eng?i=002-10993>.

⁴⁵ *Id.* ¶ 91; *European Convention on Human Rights*, EUR. CT. OF HUM. RTS. 7 (1950), <https://www.echr.coe.int/european-convention-on-human-rights>.

⁴⁶ *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). See also Leah Roemer, *Under Recent State Legislation, Courts in Ohio and Kentucky Rule Four Men Ineligible for Execution Due to Serious Mental Illness*, DEATH PENALTY INFO. CTR. (Nov. 2, 2023), <https://deathpenaltyinfo.org/news/under-recent-state-legislation-courts-in-ohio-and-kentucky-rule-three-men-ineligible-for-execution-due-to-serious-mental-illness> [https://perma.cc/3YQ4-KYM7] (exploring recent developments in execution of the mentally ill; the Supreme Court has never expressly held that executing severely mentally ill persons is unconstitutional).

⁴⁷ *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

⁴⁸ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁴⁹ *Mendoza v. Argentina*, Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 183 (May 14, 2013).

⁵⁰ *Roper v. Simmons*, 543 U.S. 551, 553 (2005).

proportionality and cruelty in imposing such extreme sentences on minors.⁵¹

Similar to the language appearing in Article 7 of the ICCPR,⁵² the Eighth Amendment to the United States Constitution forbids “cruel and unusual punishment,”⁵³ a deceptively simple phrase which has been interpreted and reinterpreted in a number of ways since its writing. In *Weems v. United States*, for example, the Supreme Court held that shackling and hard labor was a cruel and unusual punishment for the crime of forging documents.⁵⁴ Similarly, in *Solem v. Helm*, the Court held that the Eighth Amendment forbids “barbaric” as well as “grossly disproportionate” punishments, precluding Helm’s sentence of LWOP for the “relatively minor” crime of check forgery.⁵⁵ In *Harmelin v. Michigan*, however, the Court walked back its previous sentiments on proportionality, stating that the language of the Eighth Amendment contains no such guarantee, and that its language refers in fact to “the illegality, rather than the disproportionality, of punishments.”⁵⁶ Similarly, the ECHR has stated that life imprisonment comports with Article 3 of the European Convention on Human Rights so long as there exists “both a prospect of release for the prisoner and a possibility of review.”⁵⁷ But is the possibility of review an adequate model for addressing such a rapidly increasing number of LWOP sentences?

The “possibility of review” can mean a few different things in practice, and some outcomes are far from ideal: For instance, commutation in capital cases often means commutation *to* LWOP, and commutation of life sentences resulting in release may be conditional, meaning that commutation is revocable.⁵⁸ Let us here, then, examine the practice and prevalence of exoneration among life and death sentences, as exoneration presents the most ironclad promise of freedom once granted. Again, of over 200,000 people serving some

⁵¹ *Id.* at 554; *Mendoza*, Inter-Am. Ct. H.R., ¶ 147.

⁵² U.N. HUM. RTS. OFF. HIGH COMM’R, *supra* note 33.

⁵³ U.S. CONST. amend. VIII.

⁵⁴ *Weems v. United States*, 217 U.S. 349 (1910).

⁵⁵ *Solem v. Helm*, 463 U.S. 277, 287–88, 296–97 (1983).

⁵⁶ *Harmelin v. Michigan*, 501 U.S. 957, 958 (1991) (under this reasoning, the Court upheld Harmelin’s sentence of LWOP for possessing 650 grams of cocaine).

⁵⁷ *Life Imprisonment*, DEP’T FOR EXECUTION JUDGMENTS EUR. CT. HUM. RTS. 2 (2023), <https://rm.coe.int/thematic-factsheet-life-imprisonment-eng/1680ab3b93> [https://perma.cc/Y6U9-VZX6].

⁵⁸ See, e.g., Noelle Crombie, *Gov. Tina Kotek Yanks 5 Commutations; Asks Law Enforcement to Tell Her of Other Cases That Should Be Revoked*, OREGONIAN (Aug. 9, 2023, 6:27 PM), <https://www.oregonlive.com/politics/2023/08/gov-tina-kotek-says-shell-consider-revoking-commutations.html> [https://perma.cc/3KF9-NFC9].

kind of life sentence in the United States—including LWOP, life with parole, or a virtual life sentence—around 53,000 of those are currently serving a sentence of LWOP.⁵⁹ According to the National Registry of Exonerations, only 269 people sentenced to LWOP have been exonerated since 1989.⁶⁰ By comparison, there were just over 2,300 people on death row in 2022,⁶¹ and according to the Death Penalty Information Center’s Innocence Database, 150 death row inmates have been exonerated since 1989.⁶² It is clear that one’s odds of being exonerated while serving LWOP are much lower than the likelihood of exoneration from death row: Based on this data, a person on death row is almost *thirteen times* more likely to be exonerated than a person serving LWOP. This is likely due to death’s heightened appeals process, as well as the social spotlight cast on capital cases—unlike LWOP, death penalty abolitionists broadly see execution as something convicted persons need saving from, and that saving too often assumes the milquetoast form of “LWOP instead.” Take, for example, the seventeen death row inmates whose sentences were commuted to life without parole by Oregon Governor Kate Brown in 2022;⁶³ little has been said of them since, because as far as the public is concerned, the matter is settled once the threat of execution has been avoided.⁶⁴

Irrespective of the number of appeals a person is (or is not) afforded, exoneration is a model which relies on not only glaring procedural deficiencies or new indicia of innocence but also a sympathetic ear from the courts. This bar is often impossibly high,⁶⁵ asserting

⁵⁹ Baker, *supra* note 26.

⁶⁰ *Exoneration Detail List*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [<https://perma.cc/CQL2-X2ZM>] (last visited Mar. 29, 2024). Data collection began in 1989.

⁶¹ *Size of Death Row by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview/size-of-death-row-by-year> [<https://perma.cc/DV56-FEF8>] (last visited Mar. 29, 2024).

⁶² *Innocence Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/database/innocence> [<https://perma.cc/MCK9-HPD4>] (last visited Mar. 29, 2024). I arrived at this number by inputting the years 1989 through 2024 into the exoneration database.

⁶³ Julia Shumway, *Oregon Gov. Kate Brown Commutes 17 Death Sentences, Ending Death Row*, OR. CAP. CHRON. (Dec. 13, 2022, 4:30 PM), <https://oregoncapitalchronicle.com/2022/12/13/oregon-gov-kate-brown-commutes-17-death-sentences-ending-death-row/>.

⁶⁴ “Imminent” is a figure of speech here—it would be more accurate to say perhaps “tangible,” or “directly resulting from,” because a person often spends three decades or more on death row. *See infra* note 87.

⁶⁵ *See, e.g.*, Ed Pilkington, *Georgia Man Executed Despite Lawyer Being Impaired by Alcohol at Trial*, GUARDIAN (Dec. 10, 2014), <https://www.theguardian.com/us-news/2014/dec/09/georgia-inmate-lawyer-alcohol-execute> [<https://perma.cc/M744-5GES>]

actual innocence on appeal is not uncomplicated,⁶⁶ and even the unquestionably innocent may find themselves discarded and ignored. This begs the question: Are those who cannot assert their innocence worthy of consideration? What about justice for the guilty? In refusing to implicate itself, the criminal legal system implicates itself; “we do not care if you are guilty or innocent,” it says, “if you cannot point to the systemic flaw which allowed your conviction to occur.” To this end, an appellant who bases their primary argument on actual innocence is unlikely to gain an ear sympathetic enough to influence the “supreme Law of the Land.”⁶⁷ Why, then, should we feel compelled to leave the guilty behind, when the guilty and innocent are both subject to the same ritualistic cruelties? Indeed, the Supreme Court’s decisions in capital cases have succeeded in limiting death’s range of uses even when a person’s guilt is not in question. Perhaps most notably, in *Furman v. Georgia*, the Court deliberated the fate of an unquestionably “guilty” William Henry Furman, and ultimately held the implementation of the death penalty, though not the death penalty itself, unconstitutional⁶⁸ due to its “capricious” nature,⁶⁹ namely a marked racial disparity which persists even today.⁷⁰ The *Furman* decision led to a de facto moratorium on capital punishment lasting until *Gregg v. Georgia*,⁷¹

(discussing the execution of Robert Holsey; the Georgia Supreme Court refused to hear Holsey’s case despite Holsey being “represented at his murder trial by an alcoholic lawyer who was under investigation at the time for stealing from a client and who drank a quart of vodka every night of the trial.”).

⁶⁶ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 390 (1993) (holding that “Herrera’s claim of actual innocence does not entitle him to federal habeas relief.”).

⁶⁷ U.S. CONST. art. VI.

⁶⁸ *Furman v. Georgia*, 408 U.S. 238, 295 (1972) (“In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.”).

⁶⁹ *Id.* at 239–40 (“The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”).

⁷⁰ *Race and the Death Penalty*, ACLU (Feb. 26, 2003), <https://www.aclu.org/documents/race-and-death-penalty> [<https://perma.cc/WD3Z-TKFM>].

⁷¹ *Gregg v. Georgia*, 428 U.S. 153, 197 (1976). Interestingly, the moratorium on death continued past this case; Troy Gregg escaped from prison after his sentencing only to die in a suspected bar fight later that night. See Associated Press, *Charlotte Man Held in Escapee’s Death*, STAR-NEWS, Aug. 9, 1980, at 11, <https://news.google.com/newspapers?id=ecosAAAAIBAJ&sjid=URMEAAAAIBAJ&pg=1855%2C1767625> [<https://perma.cc/P6WY-9FN9>]. The moratorium on executions came to an end with the execution of Gary Gilmore in 1977, marking nearly ten years without an execution, the longest period in our nation’s history. See Chris Miller, *Deseret News Archives: Gary Gilmore Firing Squad Death in 1977 Was First U.S. Execution in 4 Decades*, DESERET NEWS (Jan. 17, 2025), <https://www.deseret.com/utah/2025/01/17/deseret-news-archives-gary-gilmore-firing-squad-death-in-1977-was-first-us-execution-in-4-decades/> [<https://perma.cc/E9FM-44CW>].

another case involving a “guilty” defendant, and whose verdict attempted to create more judicious standards for implementing the death penalty, including bifurcated jury sentencing based on aggravating and mitigating factors.⁷² As we will see, the legacy of these two cases has reaching procedural implications not only for capital punishment⁷³ but for LWOP as well.

Since *Furman*, death cases have followed an “evolving standard[] of decency,”⁷⁴ where decency appears increasingly incompatible with the practice of execution. Again, this decency standard applied to death by *Furman* is derived from *Dulles*, in which the Court stated that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷⁵ When decency prevails and death is not imposed, the alternative sentence of choice is LWOP. In fact, LWOP gained its current popularity partly *because* of *Furman* and *Gregg*. At least three states—Alabama, Illinois, and Louisiana—adopted LWOP statutes in direct response to *Furman*.⁷⁶ LWOP is not, however, afforded the same standards of decency analysis as death, despite it being an alternative to the death penalty in retentionist states, and a replacement for the death penalty in abolitionist states. *Gregg*’s aggravating and mitigating factor framework may have forestalled certain executions, but it also cemented LWOP as an easy backstop: Aggravating factors indicate a person should die now in one part of the prison, while mitigating factors indicate a person should die later in a different part of the prison.

⁷² *Gregg*, 428 U.S. at 206–07 (“The new Georgia sentencing procedures, by contrast, focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury’s discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.”).

⁷³ See, e.g., *Post-Furman Limits on the Death Penalty Generally*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-8/post-furman-limits-on-the-death-penalty-generally> [<https://perma.cc/AUF4-M7UJ>] (last visited Mar. 29, 2024).

⁷⁴ *Furman v. Georgia*, 408 U.S. 238, 242 (1972).

⁷⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that revocation of citizenship as punishment for a crime is unconstitutional).

⁷⁶ Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J.L. & SOC. POL’Y 173, 179 (2020). See also Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155 (2008).

Although one sentence is death by injection⁷⁷ and the other is death by attrition, their similarity does not extend to their implementation. While the tide of executions slows nationwide with each passing decade,⁷⁸ every state besides Alaska has enacted, and makes good use of, LWOP legislation.⁷⁹ And unlike death, there is no strict standard of proportionality for life sentences: In some states, over thirty percent of LWOPers are in prison for nonhomicide offenses. In Idaho, for example, fifty-four percent of those serving LWOP were sentenced based on nonhomicide offenses.⁸⁰

We draw death's proportionality requirement largely from *Coker v. Georgia*, in which the Supreme Court held that a person cannot be executed for any offense other than homicide.⁸¹ Five years later, in 1982, the Court decided *Enmund v. Florida*, holding that a person who is not directly involved in a homicide cannot be executed via the felony murder rule.⁸² Proportionality is, in a sense, always at issue in death cases due to the prevailing wisdom that "death is different." This adage is a nod to *Furman*, in which Justice Brennan's concurrence states:

The unfortunate effect of this punishment upon the functioning of the judicial process is well known; no other punishment has a similar effect. The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing

⁷⁷ Certain states may also allow for execution by firing squad—or a recent innovation, execution by nitrogen gas. See Kim Chandler, *Alabama Executes a Man with Nitrogen Gas, the First Time the New Method Has Been Used*, ASSOCIATED PRESS (Jan. 26, 2024, 3:16 AM), <https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900>.

⁷⁸ Notwithstanding that some states have not slowed their rate of execution, eleven states have totally abolished capital punishment and some number more have de facto abolition. See *Executions by State and Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year> (last visited Mar. 29, 2024).

⁷⁹ *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/year-that-states-adopted-life-without-parole-lwop-sentencing> [<https://perma.cc/JNQ7-JH8V>] (last visited Mar. 29, 2024). Alaska's maximum sentence is ninety-nine years, which amounts to virtual LWOP. See ALASKA STAT. ANN. § 12.55.125 (West 2025).

⁸⁰ THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA, 8 (2013), <https://www.sentencingproject.org/app/uploads/2022/08/Life-Goes-On.pdf> [<https://perma.cc/56QK-JJ5W>].

⁸¹ *Coker v. Georgia*, 433 U.S. 584, 600 (1977) ("It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim.").

⁸² *Enmund v. Florida*, 458 U.S. 782, 801 (1982) ("For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.").

punishment is comparable to death in terms of physical and mental suffering.⁸³

Contrary to this statement, death is not unusual in its infliction of pain, in its finality, or in its enormity—not unusual at all when held up to the gruesome leviathan that is LWOP. Lifers have fewer avenues to appeal than do persons on death row post-*Furman*,⁸⁴ whereas people sentenced to death spend twenty-two years on average⁸⁵—and some upwards of forty years⁸⁶—in prison filing appeal after appeal,⁸⁷ those sentenced to LWOP are afforded no special treatment in the appeals process. In this sense, death’s supposed difference rings hollow—if the finality of death necessitates greater caution and more escape valves, then life’s current state of *greater* finality ought to be treated with a comparable degree of seriousness.

One more noteworthy outcome of *Furman* and *Gregg* is the “Marshall Hypothesis,” Justice Thurgood Marshall’s prediction that the more a person learns about the death penalty, the less likely they are to be in favor of it.⁸⁸ This theory has been proven with varying degrees of success in the ensuing decades,⁸⁹ and it arguably follows that the average person, upon learning the particulars of LWOP, would be more critical of its use. The same issues outlined in *Furman*—inequitable, arbitrary, and capricious implementation of the death penalty, clearly disadvantaging low-income people of color—apply just as readily to LWOP, and by extension, these issues all apply to

⁸³ *Furman v. Georgia*, 408 U.S. 238, 287 (1972).

⁸⁴ *The Truth About Life Without Parole: Condemned to Die in Prison*, ACLU N. CAL. (Sept. 25, 2013), <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison> [https://perma.cc/R4Y4X-T2KX].

⁸⁵ John Gramlich, *10 Facts About the Death Penalty in the U.S.*, PEW RSCH. CTR. (Jul. 19, 2021), <https://www.pewresearch.org/short-reads/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/> [https://perma.cc/2K9J-H93P].

⁸⁶ See, e.g., Douglas Ray Stankewitz & Richard Arlin Walker, *California’s Longest Serving Death-Row Prisoner on Pain, Survival and Native Identity*, THE MARSHALL PROJECT: LIFE INSIDE (Mar. 18, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/03/18/california-longest-serving-death-row-prisoner-on-pain-survival-and-native-identity> [https://perma.cc/CA5T-PB3P].

⁸⁷ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [https://perma.cc/92VD-Y3BM] (last visited Mar. 29, 2024).

⁸⁸ See Dwight Aarons, *The Marshall Hypothesis and the Rise of Anti-Death Penalty Judges*, 80 TENN. L. REV. 381 (2013).

⁸⁹ Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment—Testing the Marshall Hypothesis*, U.S. DEP’T OF JUST. (1976), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/public-opinion-death-penalty-and-eighth-amendment-testing-marshall> [https://perma.cc/RJ88-3PGS].

incarceration itself. In 2008, the Equal Justice Initiative found that every thirteen- and fourteen-year-old child sentenced to die in prison was Black, Latine, or Native.⁹⁰ Black adults are also more likely to be sentenced to life in prison, and of those currently serving life sentences for nonviolent offenses, about sixty-five percent are Black and nearly sixteen percent are Latine.⁹¹ Another group overrepresented in prisons is persons with disabilities: According to data from the Bureau of Justice Statistics, in 2016 an estimated sixty-six percent of incarcerated people self-reported a physical or mental disability,⁹² despite disabled people making up only thirteen percent of the general population.⁹³ Childhood trauma, another factor over which individuals have no control, roughly doubles the likelihood of certain types of criminal activity.⁹⁴ Finally, incarceration is also a class issue—the Prison Policy Initiative found in 2015 that incarcerated people had a pre-incarceration income forty-one percent lower than that of non-incarcerated people.⁹⁵ As Aristotle famously wrote in his *Politics*, “poverty is the parent of revolution and crime.”⁹⁶

To return to an element of my central argument, that the prevalence of LWOP in the United States is indicative of an underlying issue, I offer one more illustrative example. In 2005, the Supreme Court decided *Roper*.⁹⁷ At the time of this decision, the United States was one of only two countries allowing for juvenile death sentences.⁹⁸ Today, the United States is the only country in the world that sentences

⁹⁰ Bryan Stevenson, *Punishment*, in THE 1619 PROJECT 277 (Nikole Hannah-Jones ed., 2021).

⁹¹ *A Living Death: Life Without Parole for Nonviolent Offenses*, ACLU, <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses> [https://perma.cc/LW3U-62KT] (last visited Mar. 29, 2024).

⁹² Lauren Bixby et al., *The Links Between Disability, Incarceration, and Social Exclusion*, 41 HEALTH AFFS. 1460, 1462 (2022).

⁹³ Rebecca Leppert & Katherine Schaeffer, *8 Facts About Americans with Disabilities*, PEW RSCH. CTR. (July 24, 2023), <https://www.pewresearch.org/short-reads/2023/07/24/8-facts-about-americans-with-disabilities/> [https://perma.cc/8GQL-PQX9].

⁹⁴ Les Picker, *Does Child Abuse Cause Crime?*, NAT’L BUREAU ECON. RSCH. (2007), <https://www.nber.org/digest/jan07/does-child-abuse-cause-crime> [https://perma.cc/EH3C-AGRH].

⁹⁵ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL’Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [https://perma.cc/FTS2-86LS].

⁹⁶ Aristotle, *Politics*, in ARISTOTLE’S POLITICS 1, 35 (Jonathan Barnes ed., 2016) (c. 350 B.C.E.).

⁹⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁹⁸ *Juveniles and the Death Penalty*, ACLU (May 11, 2004), <https://www.aclu.org/documents/juveniles-and-death-penalty> [https://perma.cc/ZNQ2-J6C6].

children to life without parole.⁹⁹ Attached to juvenile life without parole (JLWOP) is a relative minimum of case law. The Court has, however, recognized that juveniles have a degree of culpability differing from adults, which comes with certain protections: *Graham v. Florida* held that JLWOP cannot be imposed for nonhomicide offenses;¹⁰⁰ and *Miller v. Alabama* held mandatory JLWOP unconstitutional, requiring courts to consider a child's particular circumstances in sentencing.¹⁰¹ However, in 2021, the Court held in *Jones v. Mississippi* that no specific finding of “permanent incorrigibility” is required in JLWOP cases¹⁰²—in other words, it is unnecessary to determine that a child has no hope of future rehabilitation before sentencing them to die in prison. Any committed death penalty abolitionist, and even some who are in favor of capital punishment, would find it unconscionable to see a person sentenced to death who has not been found incorrigible in any way, who within some stretch of the imagination may change, as people almost always do with the aid of time. And yet, the United States criminal legal system does this injustice more or less routinely to both children and adults through the mechanism of permanent incarceration. Culturally, we have accepted LWOP as a progressive, and even merciful, alternative to capital punishment. In truth, LWOP is the bastardization of mercy. This sentence may seem a civil rather than physical death, but the moment of its imposition is the moment a person begins to physically die: The death chamber ceases to be a single room and becomes instead the entire prison.

II

PUNISHMENT AND THE BODY

“A weapon is an object that goes into the body and produces pain.”¹⁰³ When a weapon enters the body, the sensation's origin registers not in the object but in the body—the body causing pain as if acting upon the mind. This violation of the body's allegiance to itself,

⁹⁹ *Juvenile Life Without Parole (JLWOP)*, JUV. L. CTR., <https://jlc.org/issues/juvenile-life-without-parole> (last visited Mar. 29, 2024).

¹⁰⁰ *Graham v. Florida*, 560 U.S. 48, 2016 (2010).

¹⁰¹ *Miller v. Alabama*, 567 U.S. 460, 2464 (2012).

¹⁰² *Jones v. Mississippi*, 593 U.S. 98, 104 (2021).

¹⁰³ SCARRY, *supra* note 14.

argues Elaine Scarry, is a primary feature of torture.¹⁰⁴ In Part I, Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations defines torture as

any act by which *severe pain or suffering*, whether *physical or mental*, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, *punishing him for an act* he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. *It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*¹⁰⁵

Not unlike the Court's opinion about proportionality in *Harmelin*,¹⁰⁶ legality here is a rhetorical construct which allows outrageous acts of state-sanctioned violence to go unexamined. Because LWOP is a punishment certain to cause severe pain and suffering, it not only meets the basic definition of torture but exemplifies torture due to its unending nature—or, rather, LWOP *would* exemplify torture were it not “incidental to lawful sanctions.”¹⁰⁷ Making no mention of legality, the World Health Organization defines violence as “[t]he intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.”¹⁰⁸ I argue in this Part that, lawful or not, permanent incarceration is a singular form of violence, and that the ensuing harm is one in which all people, free or otherwise, are implicated.

Pain has the practical effect of not only resisting language but actively destroying it¹⁰⁹—and with the destruction of language comes

¹⁰⁴ *Id.* at 47 (“The ceaseless, self-announcing signal of the body in pain, at once so empty and undifferentiated and so full of blaring adversity, contains not only the feeling ‘my body hurts’ but the feeling ‘my body hurts me.’”).

¹⁰⁵ U.N. HUM. RTS. OFF. HIGH COMM’R, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Dec. 10, 1984) (emphasis added).

¹⁰⁶ *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991).

¹⁰⁷ U.N. HUM. RTS. OFF. HIGH COMM’R, *supra* note 105.

¹⁰⁸ Etienne G. Krug, et al., *World Report on Violence and Health*, WORLD HEALTH ORG. 1, 5 (2002), https://iris.who.int/bitstream/handle/10665/42495/9241545615_eng.pdf?sequence=1 [<https://perma.cc/86S5-Y4UT>].

¹⁰⁹ SCARRY, *supra* note 14, at 4.

the destruction of the world,¹¹⁰ which is glued together by our ability to name it. Acute, intense pain banishes its subject to the preverbal realm of sound intended only to bring pain to an end.¹¹¹ Protracted pain, as in the case of torture, brings its sufferer to interpret their entire environment, their entire waking life, as a weapon which enters the body. Intense pain without end, then, finds its subject with a fraying and ultimately ruptured membrane between the self and the environment—as Scarry puts it, “dissolution of the boundary between inside and outside.”¹¹² The distinguishing characteristic of LWOP is that it *does not end*, that there is no exit date, besides death, from the brutal conditions of the prison—conditions which are known to cause immense physical and psychic agony.¹¹³ Of course, one cannot claim that receiving an execution date occurring before the natural end of one’s life is any less distressing than receiving an execution date which coincides with the natural end of one’s life.¹¹⁴ One key difference, however, is that with LWOP, help is not on the way as it may be for a person facing death by lethal injection.¹¹⁵ Further, the death of a person sentenced to permanent incarceration is not understood in the eye of the observer to be *real*, or an affront to the natural order, in the same way as the sort of death about which George Orwell writes in “A Hanging”:

It is curious, but till that moment I had never realized what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to avoid the puddle, I saw the mystery, the unspeakable wrongness, of cutting a life short when it is in full tide. This man was not dying, he was alive just as we were alive. All the organs of his body were working . . . his brain still remembered, foresaw, reasoned—reasoned even about puddles.¹¹⁶

What makes an execution *real* is this thing highlighted by Orwell, the fundamental contradiction present in the act of killing an organism

¹¹⁰ *Id.* at 29.

¹¹¹ *Id.* at 54.

¹¹² *Id.* at 53.

¹¹³ See, e.g., *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/prison-conditions/> [https://perma.cc/TK4T-3R8Q] (last visited Mar. 29, 2024).

¹¹⁴ See, e.g., Ashley Nellis, *Nothing But Time: Elderly Americans Serving Life Without Parole*, THE SENT’G PROJECT (June 23, 2022), <https://www.sentencingproject.org/reports/nothing-but-time-elderly-americans-serving-life-without-parole/> [https://perma.cc/2FE9-2GKQ]. Over a quarter of those serving LWOP are over sixty years old.

¹¹⁵ ACLU N. CAL., *supra* note 84.

¹¹⁶ GEORGE ORWELL, *A Hanging*, in *BURMESE DAYS* (1931), <https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/a-hanging/> [https://perma.cc/TM7Z-2XFZ].

despite its innate desire to live—and not only to live but to advocate for its wishes, including the wish to keep one’s feet dry. This desire persists even on the eve of death where, as in Jean-Paul Sartre’s short story “The Wall,” one who understands their death as not only inevitable but occurring soon begins to lose the sense of alterity that gives an environment its meaning in relation to itself and the body.¹¹⁷ Ibbieta’s mind registers the fixtures of his life as valueless and arbitrary in their total subjection to the wall upon which he will be executed, losing even the desire to speak to his lover of over a year. His mind becomes the wall upon which he is soon to die; his body, however, has no choice but to continue its life processes. A person sentenced to LWOP dies, perhaps, in stages coinciding with sentencing, and with the exhaustion of avenues for appeal. Inside this living death, suffering is elemental, and “normal needs like excretion and special wants like sexuality are made ongoing sources of outrage and repulsion.”¹¹⁸ Even wishes may become weapons to one who loses their ability to sidestep a puddle.

This assertion that LWOP is a living death is in no way meant to discount or devalue the richness of the lives of those serving sentences of permanent incarceration; I only mean to speak realistically about the pain around which that richness must take its shape. Leonard Peltier, for instance, served forty-eight years of a presumptive life sentence before he was granted a commutation by President Joe Biden.¹¹⁹ Peltier spent that time producing stirring poetry and visual artwork that drew upon his constant state of hardship behind bars.¹²⁰ “[T]ime does you,” he wrote in his 1999 memoir; “[t]ime is a cannibal that devours the

¹¹⁷ JEAN-PAUL SARTRE, *The Wall*, in LE MUR (1939), <https://www.sjsu.edu/people/cynthia.rostankowski/courses/HUM2BS14/s0/Sartre-The-Wall-reading.pdf> [<https://perma.cc/K2AC-PUZ9>].

¹¹⁸ SCARRY, *supra* note 14, at 48.

¹¹⁹ Leonard Peltier, a Native American activist, was the longest-held political prisoner in the United States. See INT’L LEONARD PELTIER DEF. COMM., <https://www.whoisleonardpeltier.info> (last visited Mar. 29, 2024); Jeremy Roebuck & Dana Hedgpeth, *Biden Commutes Sentence for Leonard Peltier, Convicted in FBI Killings*, WASH. POST (Jan. 20, 2025), <https://www.washingtonpost.com/national-security/2025/01/20/leonard-peltier-sentence-commuted-biden/> (“It’s finally over—I’m going home . . . I want to show the world I’m a good person with a good heart. I want to help the people, just like my grandmother taught me.”); Janene Yazzie & Nick Estes, *Leonard Peltier Is America’s Longest-Held Indigenous Prisoner. He Should Be Freed*, GUARDIAN (Feb. 2, 2022), <https://www.theguardian.com/commentisfree/2022/feb/02/leonard-peltier-is-americas-longest-held-indigenous-prisoner-he-should-be-freed> [<https://perma.cc/6TLE-ZMBG>].

¹²⁰ See PELTIER, *supra* note 1; LEONARD PELTIER ARTWORK, <https://leonardpeltiermatters.com> [<https://perma.cc/G53U-VQES>] (last visited Mar. 29, 2024).

flesh of your years day by day, bite by bite.”¹²¹ In a poem titled “The Knife of My Mind,” Peltier describes the present as a thing stolen or destroyed, leaving only his past, and the possibility of his future as a temporal anchor.¹²² The hope of a future, to Peltier, is the same as the dream of freedom: Freedom and existence are utterly coextensive. However, a key distinction here is that Peltier had been eligible for parole since 1993.¹²³ If the future does not, and can never, exist, where does a permanently incarcerated person find himself but in the past, or in a present which *also* does not exist?

As Angela Davis wrote over twenty years ago, “Prisons do not disappear problems, they disappear human beings.”¹²⁴ It is little wonder, then, that those sentenced to LWOP are forgotten by so many, including some who fight energetically against the death penalty; instead of becoming dead in one act of final injustice, and even before his death by attrition, the lifer becomes the prison, becomes the “convulsive possession”¹²⁵ of that space into which he is disappeared. And like Dr. Davis’s point that the prison’s mechanism of disappearance causes harm not only to those it disappears but disserves a society experiencing unmitigated social problems, the harms of LWOP are felt by all of us on the outside. This is not to say that LWOP presents a unique type of harm, so much as it is an extreme form of the harm routinely caused by incarceration—harm not only to the incarcerated but to the entire society which participates, willingly or not, in that exercise of moral condemnation. In *A Process Model*, Eugene Gendlin argues that body and environment are always already in conversation;¹²⁶ just as any harm occurring within an ecosystem echoes into all its inhabitants, any harm occurring behind bars is not simply contained by those bars. The body of a lifer ingresses with a space infinitely cruel in its singularly finite shape, but the “body” of the prison also ingresses with *its* environment, taking the prisoner with it.

¹²¹ PELTIER, *supra* note 1, at 32.

¹²² *Id.* at 33.

¹²³ James Giago Davies, *Peltier’s Last Chance for Clemency?*, LAKOTA TIMES (Feb. 28, 2024), <https://www.lakotatimes.com/articles/peltiers-last-chance-for-clemency/> [<https://perma.cc/3GTQ-WAE5>].

¹²⁴ Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), <https://colorlines.com/article/masked-racism-reflections-prison-industrial-complex/> [<https://perma.cc/3N5U-S43M>] (often misquoted as “social problems.”).

¹²⁵ Caillois, *supra* note 13, at 30.

¹²⁶ EUGENE T. GENDLIN, *A PROCESS MODEL* 112 (2018).

In a 1984 essay titled “Mimicry and Legendary Psychasthenia,” Roger Caillois explores the tendency of certain animals to take on, under threat of harm, the characteristics of their environment—a mechanism also carried out by persons under intense distress, what Caillois describes as “depersonalization by assimilation to space.” At the instant this mechanism is no longer a line of defense, or only a thin defense against the inevitable, Caillois writes:

The feeling of personality, considered as the organism’s feeling of distinction from its surroundings, of the connection between consciousness and a particular point in space, cannot fail under these conditions to be seriously undermined; one then enters into the psychology of psychasthenia, and more specifically of *legendary psychasthenia*, if we agree to use this name for the disturbance in the above relations between personality and space.¹²⁷

Again, one can hardly criticize the permanently incarcerated for the ways they choose to make a life. What remains true is that with the exception of a family visit, or of books and television, the lifer’s life is contained utterly by the prison—and few would claim that the United States prison system is an ideal context for life. Life inside the prison is defined by its excesses and its lack, by the rote suffering it inflicts on its occupants. These 53,000 plus 44,000¹²⁸ people who will most likely never again set foot outside the prison have no choice but to become it: as a weapon enters the body and causes pain, the torture or death chamber itself becomes a weapon.¹²⁹ The body enters the prison, the prison enters the body; society enters prison, prison enters society. The prison is a weapon, both to its occupants, and to the communities from which those occupants are stolen.

III

THE PROBLEM WITH POLICY RECOMMENDATIONS

As argued in Part II of this Comment, LWOP is an extreme manifestation of a harm that all forms of incarceration have in common, although LWOP is unique in its being both a mode of incarceration and

¹²⁷ Caillois, *supra* note 13, at 28.

¹²⁸ Baker, *supra* note 26.

¹²⁹ SCARRY, *supra* note 14, at 40–41 (“It is itself literally converted into another weapon, into an agent of pain. All aspects of this basic structure—walls, ceiling, windows, doors—undergo this conversion. . . . The room, both in its structure and its content, is converted into a weapon, deconverted, undone. Made to participate in the annihilation of the prisoners, made to demonstrate that everything is a weapon, the objects themselves, and with them the fact of civilization, are annihilated: there is no wall, no window, no door, no bathtub, no refrigerator, no chair, no bed.”).

a type of death sentence. Because incarceration is intimately related to, and ultimately relies on, the institution of policing, this Part will at times reference the movement to abolish police in the United States. I will here refer to the ecology of jails, prisons, and policing together as the United States “carceral system.”¹³⁰ It is impossible to understand this carceral system outside the context of the United States’ roots in genocide and chattel slavery,¹³¹ or to dismantle either of the death penalty’s two forms¹³² without first recognizing “the centrality of the death penalty to the persistence of structural racism.”¹³³ Capital punishment is a metaphor for the State’s ability to strip away one’s “life,” the alterity that distinguishes one life from another—it is also a demonstration of the State’s ability to revoke even one’s most basic physiological processes. Absent this relentless display, the State’s authority to discipline and punish in service of “imperialist white supremacist capitalist patriarchy”¹³⁴ is severely undermined. Thus, like the hydra, capital punishment must spawn new heads whenever it is attacked.

LWOP has long staked its claim as a policy alternative to execution. A 2019 Gallup poll found for the first time that the majority of Americans (sixty percent) prefer LWOP to capital punishment¹³⁵—the

¹³⁰ For background on the idea of carcerality, see *Glossary: Carcerality*, PURDUE UNIV., <https://purdue.edu/critical-data-studies/collaborative-glossary/carcerality.php> [<https://perma.cc/VN2K-567A>] (last visited Mar. 29, 2024). See also ‘Prison to Prison Pipeline’: Isis Tha Savior, NPR (Dec. 3, 2020), <https://www.npr.org/2020/12/02/941319607/prison-to-prison-pipeline-isis-tha-saviour> [<https://perma.cc/3KBJ-L2CS>] (arguing that a “prison to prison pipeline” exists which funnels certain people toward and into the carceral system from birth).

¹³¹ See, e.g., ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE* 82 (2016) (“Our understandings of and resistance to contemporary modes of racist violence should thus be sufficiently capacious to acknowledge the embeddedness of historical violence—of settler colonial violence against Native Americans and of the violence of slavery inflicted on Africans.”); ALEXANDER, *supra* note 16.

¹³² This is to say nothing of extrajudicial forms, such as lynching. See *RESEARCH: History of Lynchings Linked to Increased Death Sentencing for Black Defendants*, DEATH PENALTY INFO. CTR. (Mar. 1, 2023), <https://deathpenaltyinfo.org/news/research-history-of-lynchings-linked-to-increased-death-sentencing-for-black-defendants> [<https://perma.cc/3G88-R7LJ>].

¹³³ DAVIS, *supra* note 131, at 85.

¹³⁴ HOOKS, *supra* note 15, at 116 (“Radical visionary feminism encourages all of us to courageously examine our lives from the standpoint of gender, race, and class so that we can accurately understand our position within the imperialist white supremacist capitalist patriarchy.”).

¹³⁵ Jeffrey M. Jones, *Americans Now Support Life in Prison Over Death Penalty*, GALLUP (Nov. 25, 2019), <https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx> [<https://perma.cc/8WLC-5QJK>].

question's framing is revealing, and comports with the majority of State sentencing regimes around first-degree homicide, offering either LWOP, death, or both.¹³⁶ Although LWOP is, relatively speaking, in its infancy, its detractors have offered a number of policy recommendations, perhaps the most common of which is a twenty-year maximum sentence.¹³⁷ Another strategy is to bring the rules of LWOP in line with the rules of capital punishment. Currently, those sentenced to death are afforded certain constitutional protections which those sentenced to LWOP simply are not. For instance, an accused person may receive a mandatory sentence of LWOP;¹³⁸ their sentence will not be arrived at by a jury;¹³⁹ they may be sentenced irrespective of intellectual disability;¹⁴⁰ they need not have committed homicide, or any violent offense;¹⁴¹ and they may even be sentenced as a minor.¹⁴² But to extend capital punishment's constitutional protections to LWOP would certainly not be dispositive—this level of protection does not currently prevent wrongful convictions and legal misconduct in capital cases, and there is no reason to believe it would do so in the context of LWOP. According to the Equal Justice Initiative, for every eight people executed in the United States, one death row inmate is exonerated¹⁴³—and the guilty, though frequently forgotten, are no less worthy of our consideration.

To afford death's protections to life would not be meaningless to a person facing a sentence of LWOP, nor would a maximum sentence of twenty years—but do either of these strategies sufficiently address the underlying violences routinely perpetuated by the carceral system? Punishment and the threat thereof are how the State maintains its

¹³⁶ DEATH PENALTY INFO. CTR., *supra* note 78.

¹³⁷ See, e.g., Liz Komar et al., *Counting Down: Paths to a 20-Year Maximum Prison Sentence*, THE SENT'G PROJECT (Feb. 15, 2023), <https://www.sentencingproject.org/reports/counting-down-paths-to-a-20-year-maximum-prison-sentence/> [<https://perma.cc/3D5U-CQYS>].

¹³⁸ MAUER & NELLIS, *supra* note 6, at 10.

¹³⁹ See Hannah Emory, *Who Decides on Life or Death: Judge or Jury?*, CAMPBELL L. OBSERVER (Mar. 14, 2016), <http://campbelllawobserver.com/who-decides-on-life-or-death-judge-or-jury/> [<https://perma.cc/VU24-WRTK>].

¹⁴⁰ See Anne Wagner Spina et al., *Mandatory Life Imprisonment, Adjudication of Competence to Stand Trial, and Developmental Disability*, 46 J. AM. ACAD. PSYCHIATRY L. 541, 541–43 (2018).

¹⁴¹ ACLU, *supra* note 91.

¹⁴² JUV. L. CTR., *supra* note 99.

¹⁴³ *Death Penalty*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/death-penalty/> [<https://perma.cc/DVU5-K5PN>] (last visited Mar. 29, 2024).

dominance,¹⁴⁴ and death is not the State's only means of demonstrating its ability to revoke life itself, or its willingness to do so in service of maintaining its systems of hierarchy. Permanent incarceration is *also* a revocation of life, *also* a demonstration of willingness to kill. As we have seen, attempts to overturn capital punishment led in part to LWOP's current prevalence,¹⁴⁵ and I argue here that the reverse is also true. LWOP is relatively new, but death, old as time, lies beneath it; the two sentences exist in a sort of counterbalancing structure, and any attempt to weaken LWOP will necessarily strengthen the death penalty. Consider the 1960 trial and execution of Perry Smith and Richard Hickock, depicted by Truman Capote in the nonfiction novel *In Cold Blood*, for an instructive example of the *Furman* problem¹⁴⁶ in reverse:

In making his announcement, the county attorney . . . told newsmen, "If the case goes before a jury, I will request . . . the death penalty. If the defendants waive right to jury trial and enter a plea of guilty before the judge, I will request the judge to set the death penalty. . . . I feel that due to the violence of the crime and the apparent utter lack of mercy shown the victims, the only way the public can be absolutely protected is to have the death penalty set against these defendants. This is especially true since in Kansas there is no such thing as life imprisonment without possibility of parole. Persons sentenced to life imprisonment actually serve, on the average, less than fifteen years."¹⁴⁷

One problem with a twenty-year maximum sentence is this: to remove the mechanism of permanent incarceration calls for alternative methods of disappearance under the mantle of specific deterrence. In other words, eliminating LWOP as a sentencing option would incentivize the State to kill. For this reason, advocates of the twenty-year maximum recommend abolishing LWOP and death simultaneously¹⁴⁸—a strategy posing no shortage of obstacles,

¹⁴⁴ SCARRY, *supra* note 14, at 45 ("[I]t is by the obsessive mediation of agency that the prisoner's pain will be perverted into the fraudulent assertion of power, that the objectified pain is denied as pain and read as power.") (footnote omitted).

¹⁴⁵ Miao, *supra* note 76, at 179.

¹⁴⁶ *Id.*

¹⁴⁷ TRUMAN CAPOTE, *IN COLD BLOOD* 297 (1965).

¹⁴⁸ See *Counting Down Paths to a 20-Year Maximum Prison Sentence*, THE SENT'G PROJECT 4 (2023), <https://www.sentencingproject.org/app/uploads/2023/02/Counting-Down-Paths-to-20-Year-Maximum-Prison-Sentence.pdf> [<https://perma.cc/5GGZ-48MT>] (The full list of recommendations is as follows: "(1) Abolish death and life without parole sentences; (2) Limit murder liability and lower homicide sentences; (3) Eliminate mandatory minimums and reform sentencing guidelines; (4) Expand access to timely parole review; (5) Restrict consecutive sentences and limit sentence enhancements; (6) Give

particularly in retentionist states. And while this is a noble effort at reform, a twenty-year maximum without the threat of execution still leaves unaddressed the concern, at least to abolitionists, that twenty years is simply too long to hold a human being in the Dickensian conditions of the prison. Indeed, even one day is too long to spend locked inside a chamber designed for harm and little else. In the words of human rights activist and political prisoner Sudiata Jawanza, “abolition requires a reimagining of justice itself.”¹⁴⁹ From this abolitionist perspective, reforms to the carceral system are equivalent only to harm reduction—and harm reduction efforts, while perhaps valiant, are ultimately destined to fail in uprooting the thing at its source.

The root issue is, in part, that prisons and police act as arbiters of safety while making us less safe for their existence. A 2017 study by the National Institute of Corrections found that the deterrent effect of incarceration is negligible, and that high rates of incarceration have been observed to actually *increase* crime.¹⁵⁰ Police also fail helplessly in their supposed aim of creating safety. Less than half of murders are solved by police;¹⁵¹ continued efforts to militarize police have led to increased civilian deaths,¹⁵² but as of 2020, twenty-one states do not require their police forces to undergo de-escalation training.¹⁵³ To speak of safety, it is no mistake that so many of those facing the brunt of carceral violence in the United States also struggle to meet basic needs such as food, housing, healthcare, and education.¹⁵⁴ According to Mariame Kaba and Andrea Ritchie in their 2022 book *No More Police*:

everyone a second look; (7) Shift all sentences downward; and (8) Address[] exceptional cases.”).

¹⁴⁹ Sudiata Jawanza, Address at the National Lawyers Guild #Law4thePeople Convention: TUPOCC Then & Now: Visions for the Next 20 Years (Nov. 2, 2024).

¹⁵⁰ Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. JUST. 1, 2 (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [<https://perma.cc/SE8S-4H3S>].

¹⁵¹ Eric Westervelt, *More People Are Getting Away with Murder. Unsolved Killings Reach a Record High*, NPR (Apr. 30, 2023, 7:00 AM), <https://www.npr.org/2023/04/29/1172775448/people-murder-unsolved-killings-record-high> [<https://perma.cc/XQ46-P8AB>].

¹⁵² Casey Delehanty et al., *Militarization and Police Violence: The Case of the 1033 Program*, 4 RSCH. & POL. 2–3 (2017).

¹⁵³ Gracie Stockton, *21 States Still Don't Require De-escalation Training for Police*, AMP REPS. (June 24, 2021), <https://www.apmreports.org/story/2021/06/24/21-states-still-dont-require-deescalation-training-for-police> [<https://perma.cc/3276-8BPX>].

¹⁵⁴ See Muhammad Khalid Anser et al., *Dynamic Linkages Between Poverty, Inequality, Crime, and Social Expenditures in a Panel of 16 Countries: Two-step GMM Estimates*, 9 J. ECON. STRUCTURES 1, 8–11 (2020).

There is evidence that organizations focused on meeting community needs and securing structural change have a greater impact on creating safety than increasing numbers of police—even when safety is measured according to the limited metrics of crime data. One study of the three hundred largest cities in the U.S. found that “every 10 additional community nonprofits in a city with 100,000 residents leads to a 12 percent reduction in the homicide rate, a 10 percent reduction in violent crime, and a 7 percent reduction in the property crime rate.” Community nonprofits were defined as organizations focused on crime prevention, neighborhood development, substance abuse prevention, job training and workforce development, and recreational and social activities for youth. In other words, adding twenty-four community nonprofits per 100,000 residents led to a 29 percent decline in the murder rate, a 24 percent decline in the violent crime rate, and a 17 percent decline in the property crime rate.¹⁵⁵

If punishment created safety, we would live in the safest society in the history of the world. Instead, we live in a country with the highest number of prisoners,¹⁵⁶ but also the highest number of serial killers,¹⁵⁷ and fifty-seven times more school shootings than all other major industrialized nations combined.¹⁵⁸ The carceral system does not fight crime, but *invents* it; “crime” as such is only a cultural fiction, and people labeled “criminals” are those who find themselves unable, for any number of reasons,¹⁵⁹ to live successfully in an utterly hostile society. Once bearing the label of “criminal,” one finds oneself relegated to what Michelle Alexander calls an “*undercaste*—a lower caste of individuals who are permanently barred by law and custom from mainstream society.”¹⁶⁰ The carceral system indeed relies on this illusion of criminality—that it is a moral sickness treatable only by

¹⁵⁵ MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE: A CASE FOR ABOLITION 65–66 (2022) (footnote omitted).

¹⁵⁶ INCARCERATING US, *supra* note 3.

¹⁵⁷ Michael G. Aamodt et al., *Radford/FGCU Annual Report on Serial Killer Statistics: 2020*, RADFORD UNIV. 1, 15 (2020), https://www.researchgate.net/profile/Michael-Aamodt-2/publication/342501023_RadfordFGCU_Annual_Report_on_Serial_Killer_Statistics_2020/links/5ef75a6492851c52d6007c8c/Radford-FGCU-Annual-Report-on-Serial-Killer-Statistics-2020.pdf.

¹⁵⁸ Chip Grabow & Lisa Rose, *The US Has Had 57 Times as Many School Shootings as the Other Major Industrialized Nations Combined*, CNN (May 21, 2018, 5:08 PM), <https://www.cnn.com/2018/05/21/us/school-shooting-us-versus-world-trnd/index.html> [https://perma.cc/PGE7-6LEJ].

¹⁵⁹ See, e.g., ALISA ROTH, *INSANE: AMERICA’S CRIMINAL TREATMENT OF MENTAL ILLNESS* (2018) (exploring the prison’s modern role as a repository for the mentally ill); BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND AND BODY IN THE HEALING OF TRAUMA* (2014) (exploring the role of unresolved trauma in decision-making and arguing that trauma is a hidden epidemic in the United States).

¹⁶⁰ ALEXANDER, *supra* note 16, at 13.

banishment—to conceal the fact that crime is a direct result of unmet needs.¹⁶¹ Mercy, on the other hand, demands that we commit to understanding the personal histories and motivations of others, including how those inner lives intersect with the State’s vested interest in preserving its schema of hierarchy and disadvantage.¹⁶² As Victor Hugo wrote in 1862, “[i]f the soul is left in darkness, sins will be committed. The guilty one is not he who commits the sin, but he who causes the darkness.”¹⁶³

CONCLUSION: THE INVENTION OF LANGUAGE

Upon entering the prison, one feels as if they have traveled deep into the center of the earth. Cement walls block light and ricochet noise, creating a vacuum of spatial and temporal distortion—one loses one’s relation to the outside, or experiences that relation as profoundly disrupted. Even the street on which the prison is situated ceases to exist inside this *carcer*, or “enclosed space.”¹⁶⁴ Yet one need look no further than the innovation of the incarcerated to see the wholeness of the human being inside: From cheesecake made from coffee creamer to tattoo inks made from soot, these “attempts to fill needs that the restrictive environment of the prison tries to suppress”¹⁶⁵ are a testament to the excellence, intelligence, and sincerity that we on the outside have locked away from ourselves—voices which all too often we refuse or forget to hear.

¹⁶¹ KABA & RITCHIE, *supra* note 155, at 42 (“Policing neither prevents, interrupts, nor offers satisfactory resolution to the vast majority of violence that takes place in our communities. Even though the U.S. spends over \$100 billion a year on policing, a figure that has been increasing steadily over the past half century, the U.S. continues to experience some of the highest rates of violence across all industrialized countries. . . . Longitudinal studies indicate that markers of resource deprivation—lack of sufficient income, health care, etc.—are critical factors in heightened violent crime rates. Yet, bottomless police budgets capture a growing share of our collective resources, and programs proven to reduce, prevent, intervene in, and help survivors heal from violence are starved of nutrients.”).

¹⁶² See, e.g., ALEXANDER, *supra* note 16, at 25 (explaining the link between chattel slavery and the prison industrial complex).

¹⁶³ VICTOR HUGO, *LES MISÉRABLES* 14 (1862).

¹⁶⁴ *Carceral*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/carceral> [<https://perma.cc/6SCD-YNH6>] (last visited Mar. 29, 2024) (explaining the root of “carceral” from the Latin “carcer,” meaning “prison, jail; starting place in a race course, enclosed space”).

¹⁶⁵ *Prisoners’ Inventions*, TEMPORARY SERVS., <https://temporarieservices.org/served/projects-by-name/prisoners-inventions/> [<https://perma.cc/PRH5-DBWB>] (last visited Mar. 29, 2024).

As William Blake wrote that we can “see a [w]orld in a [g]rain of [s]and,”¹⁶⁶ we can see the world in the enclosure of the prison, in the collective worlds of its unwilling participants. These worlds and the voices thereby produced may be distinguished by the alterity of the voice’s grain, what Roland Barthes calls “*the encounter between a language and a voice*. . . . [t]he ‘grain’ is the body in the voice as it sings, the hand as it writes, the limb as it performs.”¹⁶⁷ The voice and the body through which passes language are mutually inclusive: As Jacques Derrida wrote in *Speech and Phenomena*, “[D]e jure and by virtue of its structure, no consciousness is possible without the voice. The voice is the being which is present to itself in the form of universality, as consciousness; the voice *is* consciousness.”¹⁶⁸ To be without voice is thus to be without oneself and, as we have seen, pain fundamentally interrupts this relationship:¹⁶⁹

To witness the moment when pain causes a reversion to the pre-language of cries and groans is to witness the destruction of language; but conversely, to be present when a person moves up out of that pre-language and projects the facts of sentience into speech is almost to have been permitted to be present at the birth of language itself. Because the person in pain is ordinarily so bereft of the resources of speech, it is not surprising that the language for pain should sometimes be brought into being by those who are not themselves in pain but who speak *on behalf of* those who are.¹⁷⁰

The voice, free to do so, summons language through a consciousness which is the body; a lifetime of imprisonment, however, is antithetical to the entire organism and all its processes. All incarceration is violent, but permanent incarceration has the unique ability to destroy the world it creates in that it is an abject suffering which lasts forever. Thus, the work of abolition is this: In refusing to abandon the incarcerated, the abolitionist becomes present at the invention of language, which is also the invention of the world.

As discussed in Part III, the work of destroying LWOP is necessarily coextensive with the work of total carceral abolition.¹⁷¹ The ways

¹⁶⁶ William Blake, *Auguries of Innocence*, in *POEMS* (Dante Gabriel Rossetti ed., 1863).

¹⁶⁷ Roland Barthes, *The Grain of the Voice*, in *THE SOUND STUDIES READER* 505–09 (Jonathan Sterne ed., 2012).

¹⁶⁸ JACQUES DERRIDA, *SPEECH AND PHENOMENA, AND OTHER ESSAYS ON HUSSERL’S THEORY OF SIGNS* 79–80 (1973).

¹⁶⁹ SCARRY, *supra* note 14, at 47.

¹⁷⁰ *Id.* at 6 (introducing an understanding of the lawyer, among other professions, as an “inventor of language”).

¹⁷¹ DAVIS, *supra* note 131.

many experts suggest we address LWOP are inadequate because they rarely agree that incarceration itself is an inexcusable form of harm. Reformists want reforms; they want to craft the prison into an ideal site of social and moral rehabilitation. Often considered aspirational to the reformer is Halden, one of Norway's largest prisons, with capacity for only 227 incarcerated persons.¹⁷² The entire operation of Halden is structured around the goal of rehabilitation, with help from Norway's relatively lenient sentencing laws—there is no outright sentence of LWOP available,¹⁷³ and Norway amended its constitution in 2014 to reflect that “[a]ny human being has the right to life,”¹⁷⁴ comporting with its decision in 1979 to abolish the death penalty nationwide.¹⁷⁵ Halden's occupants live in comfortably furnished dorms and are afforded broad freedoms such as cooking one's own meals and enjoying outdoor recreation in an area conspicuously free of razor wire-topped fences.¹⁷⁶ Most telling perhaps is this: No prisoner in the facility's history has ever attempted to escape from Halden.¹⁷⁷ Norway's recidivism rate is one of the lowest in the world—this is due, again, to the overwhelming emphasis placed on rehabilitation.¹⁷⁸ Norway's thirty-year maximum sentence¹⁷⁹ is similar to that recommended by prominent LWOP abolitionists in the United States;¹⁸⁰ in fact, Norway's prison system once bore a striking resemblance to ours, including a much higher recidivism rate, and

¹⁷² Anita Chabria, *CO Visits High-Security Prison in Norway, Hopes to Import Scandinavian Model of Incarceration in Calif.*, CORRECTIONS1 (Nov. 9, 2023, 9:08 AM), <https://www.corrections1.com/treatment/co-visits-high-security-prison-in-norway-hopes-to-import-scandinavian-model-of-incarceration-in-calif> [https://perma.cc/H8BD-Q93E].

¹⁷³ Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, NYT (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html>. Although there is no formal sentence of LWOP, as the article states, Norway does employ a preventive detention statute which may function as a method of permanent incarceration. Those sentenced to preventive detention are given sentences of no more than twenty-one years, after which an incarcerated person's case is reviewed every five years, a process which may ostensibly play out forever. See Norway Penal Code cited *infra* note 179.

¹⁷⁴ KONGERIKET NORGES GRUNNLOV [CONSTITUTION] May 14, 2014, Sec. 93 (Nor.).

¹⁷⁵ *Norway and the Death Penalty*, PARLIAMENTARIANS FOR GLOB. ACTION, <https://www.pgaction.org/ilhr/adp/nor.html> [https://perma.cc/3998-ALHM] (last visited Mar. 29, 2025).

¹⁷⁶ Benko, *supra* note 173.

¹⁷⁷ *Id.*

¹⁷⁸ *What We Can Learn from Norway's Prison System: Rehabilitation & Recidivism*, FIRST STEP ALL. (Jan. 3, 2022), <https://www.firststepalliance.org/post/norway-prison-system-lessons> [https://perma.cc/EV8F-SBTS].

¹⁷⁹ NOR. PENAL CODE Part 1, Chapter 7, § 43 (2005).

¹⁸⁰ Komar et al., *supra* note 137.

widespread violence occurring within prison walls.¹⁸¹ There is no reason to believe, however, that simple imitation of these policies will solve the problems we face here in the United States.

While we may take valuable lessons from Halden, the reality is this: The Norwegian “prison” and the United States “prison” are only contronyms. Rehabilitation is not on the table for us; while Halden’s goal is to return people to society, this only works because there *is a society to return to*. In the United States, even if we were to focus all our efforts on rehabilitation, those efforts would be wasted. One cannot be rehabilitated to live successfully in a society which has gorged for all its history on the blood of the oppressed,¹⁸² a society in which one thrives only by accident of birth or circumstance.¹⁸³ Reforms aimed toward rehabilitation in the United States can never work absent a total overhaul of our understanding about the State’s obligations to meet the needs of its people, including the need for housing, healthcare, education, food and water, and above all the need for dignity. Furthermore, the United States prison is capable of doing irreparable damage to a person’s body and spirit in the span of thirty years, twenty years, or even one year. Trying to replicate Halden’s policies or Norway’s sentencing scheme cannot be enough; even just emptying all the prisons tomorrow would not be enough. What we need is a process of truth and reconciliation by which the State makes amends with those who have violated its laws, admits its long history of violence and wrongdoing, and begins the work necessary to meet the needs of its most vulnerable people: the incarcerated. This work necessarily coincides with the fight for reparations¹⁸⁴ and the Land Back movement,¹⁸⁵ and begins with an acknowledgement by the State of its role as a self-interested inventor of this thing we call criminality.

Some may find this idea repugnant because there are so many in the United States who have unmet needs and are not in prison; some may struggle not to view the incarcerated as evil or inherently flawed, a vast

¹⁸¹ FIRST STEP ALL., *supra* note 178.

¹⁸² *See, e.g.*, 13TH (Netflix 2016) (exploring the roots of the war on drugs in chattel slavery); DUNBAR-ORTIZ, *supra* note 16.

¹⁸³ *See, e.g.*, Juliana Menasce Horowitz et al., *1. Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/8XK8-ZRK9>].

¹⁸⁴ *See, e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (Jun. 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/ML3W-BREX>].

¹⁸⁵ *See, e.g.*, LANDBACK, <https://landback.org> [<https://perma.cc/3HDF-V3AW>] (last visited Mar. 29, 2024).

collection of failed persons from which we on the outside must be protected. All people, however, are consubstantial: If we forget the incarcerated, we forget ourselves. As Bryan Stevenson urges in the conclusion of *Just Mercy*:

[F]ear and anger are a threat to justice; they can infect a community, a state, or a nation and make us blind, irrational and dangerous. . . . [M]ercy is just when it is rooted in hopefulness and freely given. Mercy is most empowering, liberating, and transformative when it is directed at the undeserving. The people who haven't earned it, who haven't even sought it, are the most meaningful recipients of our compassion.¹⁸⁶

“Criminality” is convenient insofar as it excuses the desire of the “lawful” to turn away from that which is unsettling. However, to allow oneself to remain settled is not always in the best interest of the individual, of others, or of society. If in forgetting the incarcerated we forget ourselves, then in returning to the incarcerated we also return to ourselves.

One final note about Norway: When asked about his approach to the work of managing a prison system, Ragnar Kristoddersen, an instructor at the Correctional Service of Norway Staff Academy, stated:

You have to be aware—there's a logical type of error which is common in debating these things That is, you shouldn't mix two kinds of principles. The one is about: How do you fight crimes? How do you reduce recidivism? And the other is: What are the principles of humanity that you want to build your system on? They are two different questions.¹⁸⁷

The United States also approaches the prison in this way; the difference is only in which fundamental principles we have chosen. The principles of punishment, retribution, and control—principles which have led us to the near-thoughtless way we currently regard LWOP—were never intended to end crime or to lower recidivism. The prison is a weapon which functions exactly as intended.

To borrow the title of Joseph Beuys's 1962 sculpture, “*Wenn Du Dich schneidest, verbinde nicht den Finger sondern das Messer*”—or, “when you cut your finger, bandage the knife.”¹⁸⁸ In order to end the harms of incarceration, we cannot focus our efforts only on responding to the wounds of its victims; we must also bandage the knife and take

¹⁸⁶ BRYAN STEVENSON, *JUST MERCY* 313–14 (2014).

¹⁸⁷ Benko, *supra* note 173.

¹⁸⁸ Joseph Beuys, *Wenn Du Dich schneidest, verbinde nicht den Finger sondern das Messer* (sculpture) (1962).

away its ability to wound. This includes the knife of the mind which is trained to view the “criminal” as disposable. To bandage the knife means addressing not crime, but the conditions which create it; to bandage the knife means seeking justice for the guilty. We must abolish the carceral system and all its constituent parts, especially those which work to create the daily realities of social and economic disadvantage.¹⁸⁹ Another term for LWOP, and one from which this Comment takes its name, is *life with no mercy*: We must, then, have mercy. We must “enter into the chaos of others” with a willingness to be affected by what we encounter there.¹⁹⁰ Only then can we in the United States realize our mutual survival, and invent a future in which the humanity, worth, dignity, and existence of all persons is rendered inviolable.

¹⁸⁹ See HOOKS, *supra* note 15.

¹⁹⁰ Neary, *supra* note 10, at 52.