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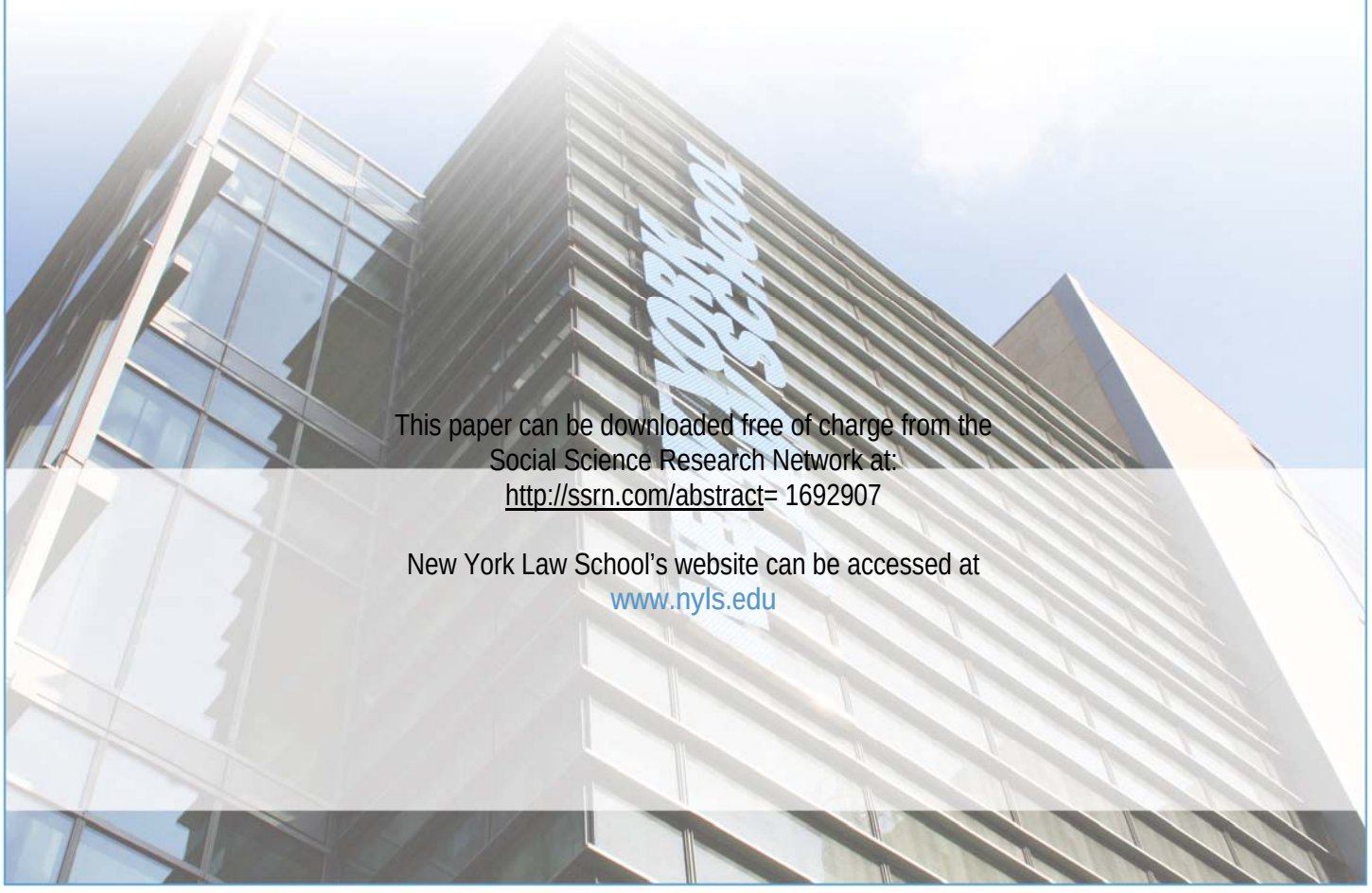

Less than We Might: Meditations on Life in Prison Without Parole

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Today, death penalty opponents—calling themselves abolitionists—often claim life without parole (LWOP) as their genuinely popular substitute punishment for "the worst of the worst." These abolitionists embrace LWOP as cheaper, equally just, and equally effective—a punishment that eliminates the state's exercise of an inhumane power to kill helpless human beings who pose no immediate threat. Furthermore, they insist, LWOP allows the criminal justice system to reverse sentencing mistakes.

So far in the United States, states that abolish capital punishment *substitute* LWOP, whereas death-penalty states offer LWOP as a *supplement*—the second-worst punishment for death-eligible killers who plead guilty, or whom a jury decides to spare.

Thousands of hours in several states, interviewing and observing more than a hundred convicted killers, along with dozens of correctional officers who confine them—from wardens down to line officers—have taught me that LWOP does not substitute for, and suggest that LWOP should not supplement, the death penalty. In those states that reject the death penalty, LWOP may seem the only appropriate punishment for the worst crimes and criminals. And yet, although conflicted and unsure, on balance I believe and will argue here that as presently conceived and practiced, life without parole—more and more the punishment against which all else is measured—ultimately has no place in any criminal justice system worth its name.

The current climate regarding punishment, reflected in the mission statements and professional practices of Departments of Corrections, contributes to the failure of LWOP as substitute or supplement to death. A different concept and practice of punishment—call it permanent punitive segregation (PPS)—*could* supply a morally acceptable substitute to many retributive death penalty supporters while satisfying those abolitionists who recognize that the worst of the worst of the worst do deserve to be punished severely—and forever. Under the banner of PPS—the new life without parole—abolitionists who know that evil exists and that some vicious people may deserve to die, but who can never trust the government to kill its own citizens, could unite with reluctant death penalty advocates, haunted by sentencing mistakes or racial discrimination, who seek a real, deservedly harsh permanent *punishment* short of death that happens to deter more effectively and no more expensively than today's life in prison.

Before imagining a better world, let's see why and how, as presently conceived and practiced, LWOP—an indistinct and disproportional collective response—not only fails as retribution for the most terrible crimes but also fails to act as a superior deterrent to life with parole. Let's see why LWOP succeeds, if at all, only rhetorically with death penalty opponents who claim to support it while they secretly detest it.

I. Retribution

Retribution literally means *payback*. Often in disrepute among jurists and other educated elites, retribution persists, and today again has become the primary justification for punishment. I am a retributivist. We retributivists believe in rewarding goodness and punishing sadistic or callous cruelty. Naturally grateful, we reward those who bring us pleasure. Instinctively resentful, we punish those who cause us pain. We believe in payback.

Retributively, society intentionally inflicts pain and suffering on criminals *because and only to the extent* they deserve it. Thus, retribution acts to *limit* punishment as much to *justify* it. Critics wrongly equate retribution with revenge. They disparage retributive punishment's essential measure—like for like—as barbaric. Retribution, like revenge, motivates punishment. But retribution also limits it. The Biblical "eye for an eye," originally understood as literally *no more* than an eye for an eye, exemplifies retribution as a *restriction* as much as a justification of punishment. Revenge needs no limit: We may wreak revenge on a whole community for the acts of a single member. But that revenge would be unjust. Thus, it could not be retribution.

Never fully comfortable acknowledging its own retributive thinking, over the past few decades the United States Supreme Court has struck down the death penalty as disproportionally severe for juvenile killers, mentally retarded killers, and all rapists whose victims live. These criminals could not deserve to die.

Until May 2010, the Court had not explicitly employed retribution to limit a state's right to imprison. That changed with *Graham v. Florida*, in which the majority

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acknowledged retribution as "a legitimate reason to punish."[1] Retribution's "heart," the majority observed, connects punishment with the "personal culpability of the criminal offender."[2] But "retribution does not justify imposing the second most severe penalty [LWOP] on the less culpable juvenile nonhomicide offender."[3]

Retributivists disagree among themselves about who deserves what—and why. Kantian retributivists would count only the actor's culpable mental state. The attempted murderer deserves no less punishment because his aim was untrue, or an attending surgeon skillfully removed the near-fatal bullet fired point-blank into the victim's head. Most retributivists, however, also factor in the actual harm willingly caused. Accordingly, all other things equal, murder becomes worse than attempted murder, and thus deserves greater punishment.

The majority in *Graham* seemingly embraced this idea, eliminating LWOP for all juveniles who failed to kill their victims. "What about Milagro Cunningham," demanded the Chief Justice concurring in *Graham*'s result only—this "17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill?"[4] His depraved, vicious, callous attitude coupled with his depraved, vicious, callous actions qualified him at least for the so-called second harshest punishment. Yet, illogically, the majority would have invoked retribution as a *categorical* limit because Cunningham himself was 17 and his 8-year-old victim miraculously lived.

What about 16-year-old Keighton Budder, the dissent in *Graham* protested? Budder "viciously attacked a 17-year-old girl who gave him a ride home from a party, put the girl's head into a headlock and sliced her throat, raped her, stabbed her about 20 times, beat her, and pounded her face into the rocks alongside a dirt road."[5] Again, because the victim miraculously lived, the majority held in *Graham*, somehow retribution could not justify LWOP. No matter that LWOP might incapacitate these dangerous predators more certainly than a life with possibility of parole. No matter that it might more effectively deter others. If that sentence was not deserved, it could not be constitutionally imposed.

Furthermore, as Justice Thomas, joined by Justices Scalia and Alito, pointed out, dissenting in *Graham*, the majority's holding—its "independent judgment" that life without parole was "disproportional" for a juvenile whose victim lived—"centers on retribution—the notion that a criminal sentence should be proportioned to 'the personal culpability of the criminal offender.'"[6] And although retributivists split on how to count the actual harm the victim suffers relative to the vicious attitude of the attacker, all true retributivists oppose greatly disproportional punishment.

II. Proportionality

"Let the punishment fit the crime": People have mouthed this philosophy for millennia, and seemingly still believe it. Originally, like for like, an eye for an eye, *exact* one-to-one reciprocity supplied the simplest and most obvious measure of proportionality. But, early on, Western society adopted less literally reciprocal measures: "If the guilty man deserves to be beaten," Deuteronomy declares, "the judge shall cause him to lie down and be beaten with a number of stripes *in proportion* to his offense"[7] or, in another translation, "according to the measure of his wickedness."[8] In 1215, the Magna Carta continued humankind's commitment to proportional punishment: "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude."

Although several early state constitutions specifically included proportionality principles—"All penalties ought to be *proportioned* to the nature of the offence," declared New Hampshire's in 1784 (emphasis added)—the United States Constitution nowhere explicitly commands proportional punishment. Instead, the Eighth Amendment seems to imply proportionality by adopting the language of the English Bill of Rights (1689) prohibiting "excessive bail," "excessive fines," and "Cruel and Unusual Punishment."

The European Enlightenment embraced liberty and rationality. Instead of beating a person in proportion to the offense, the new punitive proportionality consisted in depriving the criminal of units of freedom. The infant American Republic endorsed this new rational proportionality by building penitentiaries and substituting prison *time* for bodily punishment. The measure of punishment, however, extends beyond the quantity of time in prison. *The reality of each prisoner's punishment consists in the experience of that punishment*—a fact that so many have lost sight of.

In 1892, declaring that the Eighth Amendment was "directed" "against all punishments which *by their excessive length or severity* are *greatly disproportioned* to the offenses charged," Justice Field, dissenting, would have prohibited Vermont from sentencing a seller of unlicensed liquor to fifty-four years *at hard labor*.[9] Such a harsh punishment, "greatly disproportioned to the offense" and "appropriate only for felonies of an atrocious nature," constituted "cruel and unusual punishment."[10]

O'Neil's dissenting Justice was, for a while, alone in requiring proportional prison terms by combining intensity and duration. In 1910, however, in *Weems*, a United States Supreme Court majority struck down as disproportionally cruel a fifteen-year sentence *at hard labor in chains* for falsifying a public document, more because of its severity than its length. *Weems* stood alone until 1983. Without mentioning retribution, which had fallen out of favor, but repeatedly invoking "the longstanding principle that punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged,"[11] in *Solem v. Helm*, the Court struck down a life-without-parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. Thus, constitutionally, either death, or LWOP as its substitute, must not be grossly disproportionate to the crime *and* to the criminal's particular culpability, however measured.

But *Weems* and *Solem v. Helm* were the exceptions. Until this year in *Graham*, aside from capital punishment, the Court has almost always left it to state legislatures to decide which sentence was proportional to which crime. "The Eighth Amendment contains no proportionality guarantee," insisted Justice Scalia, joined by Chief Justice Rehnquist in *Harmelin*, affirming Michigan's right to mandate life without parole for simple possession of a little more than a pound of cocaine while casting serious doubt on the constitutional status of proportionality between crime and punishment: "There is no objective standard of gravity."[12] These two Justices saw proportionality as a pretext for members of the Court imposing their own subjective values.

"Courts have not baldly substituted their own subjective moral values for those of the legislature," countered Justice White, joined by Justices Blackmun and Stevens, dissenting in *Harmelin*.[13] Michigan, with no death penalty, could not constitutionally reserve the same punishment for drug possession as it had for first degree murder.

"The Eighth Amendment does not require strict proportionality between crime and sentence," declared Justice Kennedy, joined by O'Connor and Souter, upholding Harmelin's life without parole sentence but occupying the current constitutional middle ground.[14] "Rather, it forbids only *extreme sentences that are 'grossly disproportionate'* to the crime."[15] In *Ewing* (2003), the Supreme Court again split into three factions, a majority (5-4) affirming as not disproportionately long California's popular three-strikes-and-you're-out life sentence for a career criminal whose latest crime was shoplifting three golf clubs.[16]

Except for the death penalty, public officials and commentators have avoided supporting intense punishment. Thus, states have traditionally defined and distinguished greater and lesser crimes by letter (A, B, C, D, E felonies) or number (first degree, second degree, third degree, etc.); then matched to each category maximum sentences described as prison time (life, twenty-five years, fifteen years, etc.); and finally designated prisons as maximum, medium, or minimum security. Such designations supposedly correlate the *future* dangerousness and escape risk of the prisoners with the degree their freedom will be restricted inside—as if the worse the crime and the longer the sentence, the higher the security level and the more punitive the experience. By dividing prisons into security levels, however, the public has emphasized its own safety rather than the punishment or desert of the person punished.

In sum, the modern emphasis on quantifiable and rational proportionality largely has obscured the second dimension of punishment—not only duration but also intensity. Not only how *long*, but *how* long. Retributively, how can state legislatures impose the same intensity of punishment for persistent petit theft or drug possession as for aggravated murder without violating basic standards of disproportionality? Retributively, how can states subject aggravated murderers and perennial thieves to the same prison conditions? How does a Supreme Court tolerate this state of affairs and hold it constitutionally permissible? Only by ignoring retribution as an objective limit on punishment and tolerating all but the grossest disproportionality.

III. LWOP: A Binding Covenant with the Past

Although retributivists disagree among themselves on how to weigh the actual harm produced by the most callous and cruel, all retributivists ultimately subordinate the future costs or benefits of punishment, resting justice—limited, proportional punishment—exclusively on a criminal's *past* moral culpability. Thus, retributivists reject Hobbes's classic utilitarian claim that "the aym of Punishment is not a revenge but terrour."[17] Retributivists dismiss contemporary utilitarians who declare it irrational to cry over spilt blood; they rebut the humane argument that certain punishments are pointless—"What good will it do to inflict more pain?" utilitarians ask—as itself beside the point. Justice, a moral imperative in itself, requires deserved punishment.

The past counts.

Many death penalty abolitionists who claim to support LWOP fail to grasp fully LWOP's retributive core. Condemning us death penalty supporters for our retributivism—our irrational commitment to the past—abolitionists shamelessly promote LWOP as the better option. But on what basis? If a concern with public safety dominates individual justice, surely in some extreme cases where a LWOPer has become physically or mentally disabled, now suffering from an incurable illness that renders him harmless, we as a rational society should be prepared to release him, now that he no longer poses any threat.

Or, suppose that forty years after his imprisonment, this convicted killer demonstrates beyond doubt that he has thoroughly transformed himself. Now genuinely remorseful for his despicable murders, he has long since embraced and maintained a humane value system, helping others, educating himself. Rationally, as forward-looking, compassionate people, we should be prepared to forgive and forget. We should allow him to experience his later life, free in a society whose values he now cherishes.

I have visited with these murderers, sometimes decades after their vicious deeds; too often, hearing their gentle sighs and genuine regrets, I, too, cannot help but wonder "What is the point of punishing these lifers until death?" And yet. . . .

With LWOP, we continue to imprison him until he dies. Like Odysseus at the mast, who made his men swear that they would ignore his future pleas and keep the covenant, when we sentence to LWOP, we irrevocably pledge at this moment forever: We will never let our rage and disgust disintegrate and deteriorate. LWOP creates a binding commitment now and forever never to think differently, or feel different—when the future becomes the present and the present is now past. We guard against our own future passion, not of the rage and disgust that presently move us, but against the rationally anticipated decay of

anger and the sense of forgiveness or mercy that will replace it someday when we would focus exclusively on the living criminal and forget the victim of the past. We determine never to question how it can serve human dignity to continue to cage a changed, nonthreatening, harmless person who seems genuinely to regret his mistakes.

In short, if we mean what we declare by LWOP, we can do so only because we have made a covenant with *that* past—that we shall never forget nor forgive; neither review nor revise—a covenant that we bind ourselves to keep. Thus, we reject the problematic question "What good will it do?" and instead continue to focus on the bad that has been done.

IV. "It's Not My Job to Punish": Why LWOP Fails Retributively

When I began my prison travels, I believed that corrections officers saw their mission as ensuring that more or less serious crimes would receive more or less serious punishments. This thinking seemed almost too obvious to discuss, much less dispute. However imprecisely administered, in theory at least, the punishment would be proportionate to the crime. The public mostly believes this scenario, and I did, too.

The first jolt came from David Roach, warden of Lorton Central Prison, the flagship of Washington D.C.'s prison system. Wandering the 68-acre compound, astounded at the freedom and laid-back lifestyle of convicted killers, I protested to the Warden at one of our first interviews. "These guys have done bad things; they *deserve* to be punished."

"The punishment should not be re-punishment," Roach replied. "The punishment is given in the courtroom. When the judge says 'You have been found guilty; you are sentenced to thus and so,' *that's* the punishment. The judge did not send them here, in my opinion, for me or anyone else to punish them."

That statement astounded me. Here was the warden telling me, a criminal law professor, that a convicted killer had already been fully punished by his sentence, before he even began his life in prison. Nobody's job here inside was to further punish him. Corrections should create an environment conducive to rehabilitation, the Warden had explained. On entering the system, he said, each "resident"—a "ward of the court"—should be thoroughly tested, and professional counselors should fashion for each individual a "treatment prescription. Each resident must attain realistic goals that he sets for himself." The "staff" inside Lorton Central was "paid to supervise" that process, he added. "I don't believe that the officers are merely guards. And I don't think the inmates are merely prisoners," Roach explained. This social services speak really jarred me, because I was coming to grips firsthand with some very vicious killers sentenced to life inside Lorton.

When I first encountered him, I suspected Warden Roach was a strange anomaly with a paternalistic, permissive attitude, at odds with his staff who had to deal with these criminals out on the compound. Yet even old-time supposedly tough officers such as Frank Townshend, the night shift captain at Lorton, were drinking the Kool-Aid. Was the Captain concerned with the seriousness of a prisoner's crime in administering his punishment? "It's none of my business," Townshend insisted. "What a man is like in here is what I'm concerned with. Not what he did out there." And so it was from top to bottom.

In administering punishment, if the staff consciously ignores or remains ignorant of the prisoner's crime, how can LWOP be expected to substitute for the death penalty as a morally adequate, proportional punishment? When I first heard officers articulate these statements, I dismissed them as wildly eccentric. After all, Lorton was the only all-Black prison system in the United States and had no racial conflicts nor serious gang disputes, plus many Lorton officials came up from the same streets as the inmates whose lives they regulated. In two decades of prison research, however, I've found the attitude of Lorton staff nearly universal among corrections officials.

"Our job is just to follow the law," explained Cameron Harvanik, Oklahoma State Penitentiary's good-natured deputy warden, caught in jeans and a baseball cap, a video camera thrust unexpectedly at him one Sunday afternoon. "I mean, the *judge* says that this man's got the death sentence, or the judge says this guy's doing life without," Harvanik continued. "Our job is to make sure he does it. Our job is not to punish."

"These guys have committed the most heinous crimes," I protested. "Killed and raped and murdered children. Is there ever some part of you that says, 'These guys aren't getting what they deserve?'"

"To be honest with you, no. I never really think about it," Harvanik responded.

"So you're not angry?"

"No, I'm not angry."

"No matter what a guy did?"

"When I come to work every day, I flip the switch: 'These people are human beings; it don't matter what their crime is, they're still people. They deserve fair treatment, they deserve a quality of life while they're in here. Their punishment is doing the time.'"

"It's not our job to punish people," concurred Layne Davidson, who had worked nearly every unit of Oklahoma State Penitentiary at the time I interviewed him. "Our job is to house them—the punishment comes when he misbehaves while inside. Being here in itself is not a punishment; it's what the courts say we should do. I don't see this as a punishment. I'm not here—and neither is my staff—to judge what's right and wrong. We're here to do and carry out what the courts have set forth."

"Nothing you did in the past matters," I protested.

"Not true," he corrected me. "Assault on staff with an injury, you're not beyond level two for the rest of your life. If you escape from max, if you get convicted of killing another inmate, you'll never go beyond level two."

So the past could count. But for those who administer the prisons, life begins when life begins—from day one, inside.

In *Discipline and Punish*, Foucault had seen the great transformation in punishment from the direct application of unpleasant sensations on the prisoner's body to "an economy of suspended rights."[18] The next step beyond Foucault—the threat to withdraw privileges—more nearly describes the experience of punishment for LWOPers today. "They earn any privileges based on their behavior," Davidson continued. "If you don't have privileges, if you don't have anything to offer them, you cannot control them short of physical control. I tell you, in here the pen is mightier than any sword. An inmate would rather me come in that cell with a riot baton and beat on him for punishment than write a report for an infraction, because of privileges he's gonna lose."

"I wouldn't call it justice to justify what we do to get them to cooperate," admitted Sgt. Hugh Rushton, officer in charge of security inside Unit 2 of Tennessee's Riverbend Maximum Security Institution. It puts our staff safer. My job is safety, security. My job is not to punish."

"Let me ask Sgt. Rushton, *citizen*. If you weren't involved, would you feel that justice is being done?"

"No sir. As citizen Rushton, it's not justice at all—it's not fair to the families of the victims. As citizen Rushton, he's supposed to suffer. If I were on the street, I'd demand he suffer. But I'm here to protect them."

"The past doesn't count?"

"It counts but you can't let it interfere with what you're doing."

"Sounds like the past counts but you can't count it."

"If I did, I wouldn't be a professional."

For Sgt. Rushton and most of his colleagues, I've discovered, *professional* means devoid of personal anger. The corrections officer imbibes a credo that it is unprofessional to count the past, to connect crime to punishment: "We don't discriminate; we treat everyone the same." Equal protection, of course, is vital and basic to a humane rule of law. Rightly, the criminal justice system rejects and prevents sadistic or racist armed officers from arbitrarily making captives' lives miserable. When officers of the state inflict pain on grounds other than desert, when they discriminate on the basis of race, religion, or identity, they not only violate equal protection but also undermine retribution. Retributive justice itself requires that the quality of life inside match—be proportioned to—the nature of the crime: Let the punishment fit the crime.

On death row, officers rationalize their day-to-day no-punishment credo by noting the ultimate punishment that awaits condemned killers in the execution chamber. With LWOPers who have escaped the death penalty or had their sentences overturned and been released from death row into the general prison population, however, officers could not rationalize punishment by locating it *elsewhere*, at least not inside the prison. "I'm a religious man," explained Layne Davidson. "I believe the ultimate punishment will come at the end of all of our lives. I don't believe it's anybody's job to make their life miserable until that time." But the United States is a constitutional republic based on a separation of church and state. Our Constitution demands the pursuit of justice—in this world, by us.

"My personal opinion—certain crimes, the person should be made to pay every day." At last, a retributivist, I thought, listening to Steve Beck, the warden of Stringtown. "But I'm not here to punish," he added. Steve Beck presided over the *least restrictive* institution in Oklahoma where a capital murderer who has been spared the death penalty could spend the rest of his life.

"A guy commits aggravated murder—rapes, tortures, and kills—and then gets to play softball. Is that right?" I demanded.

"My *professional* opinion is, whatever I'm tasked to do by my superiors in the state of Oklahoma, I'll do. If my task is to tie them to a pole and horsewhip them every Monday morning, they'll be horsewhipped every Monday morning. But that's not what I'm tasked to do."

The mission statements of every Department of Corrections supported the warden's claim: Not one mentions punishment. "A lot of these people," Beck continued, "I know what they're in here for. I have to treat them all as if they're here for the same thing."

"But people who have murdered children have the option to play softball?"

"As long as they meet the criteria, they can play softball."

"Can you understand why I would be appalled at that?"

"I can understand how the parents of that child would be appalled at that."

"You never walk by the field, see them playing softball, and growl to yourself, 'This is wrong. I'm in charge of it and it's wrong?'"

"I've conditioned myself not to."

"You're willing to sacrifice justice."

"We're not sacrificing justice because *we're* not defining it."

"You're administering it. Or not," I shot back.

"We're administering the sentences given by the courts."

"The courts only give them a number. You could have them walking in circles, you could have them dig holes and fill them up again. That would be exercise. It would be very punitive exercise because it would be purposeless, and not designed to give them pleasure. Whereas softball is designed to give them pleasure."

"At the s.h.u. [segregated housing unit], they walk around in a circle in a cage. That's all they get to do. Is that what you want everybody to do? We'll need a lot of cages."

Sometime later, Warden Beck's own righteous indignation broke through: "This guy goes and kills a man and his wife and drags them out in the field and sets them on fire. Go hang him from a tree."

"You *can't* hang him from a tree," I protested. "The courts won't let you."

"Exactly!"

"But don't let him play softball and eat ice cream."

"What am I going to do with him?"

"Make life as unpleasant as you can, legally. Even if your staff becomes slightly more endangered, and the inmates become slightly less controllable. Pay a price, to do justice. Because if you're not, nobody's going to do it. You're the executive. Execute punishment."

Warden Beck seemed to enjoy my retributive attack on his professional persona: "As Steve Beck, I'm encouraging you. As the Warden, I'm unconcerned. As Steve Beck, if I had my way, we'd have a lot of ropes hanging on trees. As the Warden, I'll have them climb the ropes for exercise."

Perhaps Lee Mann, warden's assistant at the Oklahoma State Penitentiary summed up best the indiscriminate immorality of life in prison: "We want to make the time for them as easy as we can, because it makes it easy for us if it's easy for them."

V. Abolitionist Rhetoric: "Death By Incarceration"

"A better name for this sentence [LWOP] might be 'Death by incarceration,'" declared Professor Robert Johnson,[19] trying to heighten the hyperbole of those who use artful but misleading rhetoric to support the substitution of life without parole for the death penalty. True, almost all aggravated murderers sentenced to LWOP will die *in* prison. But almost none will die *because* of prison. We all live, condemned to die, somehow, somewhere. Some of us will die in old age in our sleep, or watching television, or taking a bath. Should we call these closing scenes "death *by* sleep," "death *by* television," "death *by* bathing?" Or is it simply about *where* we die? "Death by home, death by hospital, death by bowling alley. Death by incarceration." The rhetoric obscures the reality.

The question of justice—whether LWOP can morally substitute for the death penalty—depends not on where these vicious killers die, but on *how they live* before they die.

If the tortured victim could somehow watch what happens to her rapist-murderer, spending his life in prison without parole, would she feel satisfied that justice was being done? Read the testimony of abolitionists, and you'd conjure up perpetual misery in dungeons where the LWOPers never see the light of day. But then why does the prison commissary sell lifers suntan lotion with an SPF factor of thirty?

"Here in the valley, suddenly yesterday, dark heavy clouds rolled in," recounted Sarah Mitchell to a friend and fellow murderer.[20] "That lightening put on quite a show!" After killing, dismembering, and lighting her sister on fire, Ms. Mitchell planned to impersonate her murdered sister and then withdraw money from trust accounts. Convicted of that aggravated murder and sentenced to LWOP, Mitchell candidly described her daily life in her new digs:

> We are eating Good! Bananas, whole tomatoes, grapefruits, oranges, apples, pears—galore. For breakfast it alternates between bagels cream cheese with boiled eggs, coffee, raisen bran, milk & juice—to two fried eggs, 3 link sausages, toast, jelly, oatmeal, coffee—to thick-thick French toast (3 slices) syrup, cream of wheat & milk, coffee—To Denver omelletes 3 pieces of crisp bacon, grits, a piece of fruit, coffee, milk or tea, toast etc.
>
> The dinner menus are like restaurants—enchaladas, cheeseburgers. Stroganoff, chef's salad, 1/4 chicken, tater tots, cheesecake, brownies, apple pie, cherry cobbler, ambrosia, spaghetti, greens, ice cream (cups & drumsticks!) pepsi, cr[eam] soda, grape ne[ctar], baked potatoes, fruitbars, burritos, roast beef with gravy, pepperoni, raviolis, <u>good</u> fish, sloppy Joes, corn dogs. The veggies, desserts & side dishes are very good. We get relish packets and <u>real</u> mayonnaise!!! It just feels so much better eating this "real" healthy faire.

My video camera has recorded LWOPers playing softball—in uniforms, baseball uniforms—on baseball fields with chalked base paths, swinging for the fences (albeit topped with barbed wire), and rounding the bases to the cheers and high-fives of teammates and buddies.

"Never see the light of day . . . a fate worse than death," abolitionists argue with straight faces. The U.S. Supreme Court rejects this empty rhetoric: "The second most severe penalty" the majority in *Graham* calls LWOP.[21] "A life sentence is *of course far less severe* than a death sentence," the Chief Justice concurred.[22]

If a state or the federal government abolishes the death penalty and substitutes life without parole, the problem of proportionality hardly disappears. Would multiple killers who rape and torture children receive proportional punishment by spending the rest of their lives in prison, no longer under a sentence of death? Would they get what they deserve? Any legislature considering abolishing or restoring the death penalty must face this question. We retributivists detest arbitrary punishment. We disavow disproportionate punishment—punishing too much or too little.

VI. An Alternative to Death and LWOP: Permanent Punitive Segregation (PPS)

For the worst of the worst of the worst, retributively, life itself should be a punishment beyond a permanent loss of liberty. Life should be painful and unpleasant, every day. Perhaps the United States *could* constitutionally maintain a system of justice in which defining and administering a life in prison can be morally substituted for the death penalty. What would it feel like?

Imagine PPS, permanent punitive segregation, reserved only for the worst of the worst of the worst—rapist-murderers of children, for example—specially convicted and, in a separate penalty phase, specially condemned by a jury to suffer this fate. Those condemned to PPS would be housed in a separate prison. They would be permanently subjected to the harshest conditions the Constitution allows. Specifically, their food would be nutraloaf—a tasteless patty, nutritious enough not to foreshorten their lives.

Visits would be kept to the minimum and none would be *contact* visits, ever. These aggravated murderers would never touch another human being again. They would labor daily and purposelessly—digging holes to fill them up. Other exercise would be Spartan—running in circles. They would be provided no radios or TV and, of course, no Internet. They would get one brief, lukewarm shower a week. Photos of their victims would adorn their cells—in their faces, but out of reach, reminding these condemned killers daily of their crimes.

PPS should cost no more to keep society safe. And, while satisfying society's need to justly condemn and punish, might PPS also act as a more effective deterrent than life in prison today?

A. Deterrence

Of course the death penalty deters some people. As the Royal Commission (1948–1953) observed in its lengthy and thoughtful report, "We can number its failures, but we cannot number its successes."[23] We can never know how many people who would have otherwise committed murder stopped themselves only because society threatened death as punishment. The deterrence question, really, is not whether the death penalty deters—sometimes it surely does—but whether, on balance, it deters more effectively than life without parole. A state that substitutes life without parole for death, or life for LWOP, ought to ask whether the harsher LWOP deters more effectively than ordinarily life.

Abolitionists produce statistical studies to show that the death penalty does not act as a deterrent superior to LWOP. Death penalty advocates counter with other equally sophisticated studies showing execution's superior deterrent effect.

Human nature and common sense, however, buttress the claim that LWOP fails to deter as effectively as death. "No other punishment deters men so effectually from committing crimes as the punishment of death," proclaimed Sir James Fitzjames Stephen, the great nineteenth-century English judge and a leading historian of criminal law.[24]

> This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. . . . "All that a man has will he give for his life." In any secondary punishment, however terrible, there is hope: But death is death.[25]

LWOP offers no hope of release, abolitionists counter; that's its strength.

True, but long mandatory minimum sentences such as seventy to life for drug crimes and repeating offenders, where the prisoner must serve the front number before becoming eligible for parole, blurs if it does not obliterate all distinction between life with and without the possibility of parole. A society determined to maximize the deterrent power of life without parole would rarely impose it and clearly separate it from life with possible parole.

Life without parole may effectively deter would-be criminals by threatening no real prospect of release from prison short of death. LWOP as currently practiced, however, softens the threat by offering life's pleasures and releases day to day, inside.

While robbing a middle-level cocaine dealer in Virginia, "Joe" and his partners discovered their robbery victims also possessed kilos of heroin. With his victims tied up and duct-taped, Joe decided to kill them, he recalled. But at the last moment he changed his mind. Why had he let them live? "When I was doing time in Richmond, I used to see the electric chair when I swept the hall. And what flashed in my mind was that chair, and I didn't want that. I couldn't handle that. So I let them live."

This anecdote shows only how the death penalty deterred this one killer at this one moment. It does not demonstrate the more important point that sometimes *only* the death penalty can deter, whereas the prospect of life in prison will not. But Joe continued, telling me of a similar situation in Washington, D.C., which has no death penalty. "I killed them," he explained matter-of-factly. "Because I could face life inside this joint. I had done time here before, and I knew I could do it again. But that chair, man. That's something else."

Common sense, human nature, logic, and anecdote strongly support what many recent studies suggest—death generally deters more effectively than life without parole. Common sense, human nature, and logic suggest that an especially harsh, permanently hopeless life inside prison, PPS, *could* more effectively deter than LWOP does now—and perhaps deter as effectively, or more effectively, than the death penalty itself.

For killers like Joe, only a life inside *qualitatively* worse—a life that he could not have experienced before and might only imagine—could possibly act as a marginally greater deterrent. No one sentenced to PPS will have served it before—no one will know s/he can do it again. When measured against all other life imprisonment, PPS will truly be something different. Although no anecdote yet supports this untried punishment, analogy supports its deterrence claim. Officers and prisoners agree that, inside prison, the threat of punitive segregation generally deters lifers from acting up. So, too, PPS can easily be imagined as deterring would-be repeating killers and other serious street criminals from aggravated murder, because and only because they face PPS.

If a state abolishes the death penalty, and rape or robbery gets a repeat offender natural life, what's the incentive to leave your victim as a living witness against you? A prospect of PPS supplies that deterrent against killing the victim, because it would be reserved only for the most heinous murderers and attempted murderers.

B. Emotional Cost of Not Doing Justice

Today, in death penalty states, first degree murderers often plead guilty and accept life without parole. Each guilty plea saves U.S. citizens hundreds of thousands of dollars, and the victims' families decades of cruel suspense and false assurances.

Some abolitionists, such as Reverend Cathy Harrington, whose daughter was stabbed to death, successfully sought to avoid these additional emotional costs by convincing the prosecutors to accept LWOP in lieu of death. Championing abolitionism, Rev. Harrington has gone public with her story, urging LWOP as far better for the victims' families. But only the threat of death as punishment produced this preferred outcome. Her daughter's killer would never have pled guilty without that quid pro quo.

Substitute LWOP for the death penalty, and this incentive disappears. Substitute PPS for the death penalty, and the incentive to plead guilty and accept ordinary life with or without parole to avoid PPS reappears. The duration of punishment won't do it; the intensity will.

Today, abolishing the death penalty—retributively, sometimes the only proportional punishment—abolishes justice. Cathy Harrington imagined her daughter's killer suffering until the day he died as a lifer, and worried that she had consigned him to a fate worse than death. Little did she realize that he would ask to be put into the special needs unit, which freed him from gang violence, assured him of four hours of recreation a day, and allowed him to watch the Winter Olympics and play cards with his fellow inmates.

With the death penalty's drawn-out cycle of appeals, the victim's family becomes embittered. Their frustration grows from the false promise of justice held by a death penalty regime that delays and delays the execution of its sentence. On the other hand, what cost to parents who realize their child's rapist-murderer now lives in prison playing basketball, or watching the World Cup on color TV? What toll to contemplate the person who tortured your child to death now lying on a prison bed, lost in a first-run movie or a good book?

Death penalty opponents traditionally ignore the emotional costs of *not doing justice*—a retributive question cloaked as a financial one. Their insensitivity increases with LWOP as presently administered. The victim's family's bitterness and frustration intensifies from the false promise of justice. The current system will never deliver on that promise.

If the U.S. criminal justice system embraces permanent punitive segregation—where life itself constitutes punishment—the victim's family will realize that the killer never experiences anything they would have wished for their loved one. No participating or watching sporting events. No pleasure of good food. No joys of human contact—no hugs or kisses, ever.

Some readers may protest. Genetic predispositions and early childhood abuse or neglect have formed and deformed these criminals, they insist. Why should anybody be subjected to sustained, inhumane, pointless cruelty, for behavior or a personality they did not freely choose? But the argument proves too much. If a rapist child killer does not deserve at least PPS, why should anybody—always subject to influence beyond their control—ever be punished (or rewarded) for anything?

C. Incapacitation

LWOP proponents claim their preferred sentence equals the death penalty in its incapacitative effect. Death penalty advocates point out, however, that a future governor may later commute any LWOP sentence. A legislature may decide to follow Europe's lead and abolish life without parole. Once released, a killer may kill again, whereas, of course, an aggravated murderer, once executed, will never kill again. And even while incarcerated, an LWOPer may kill fellow prisoners, staff, or visitors. Of course, so, too, may a condemned killer on death row, although officers and the condemned routinely tell me that the level of violence is much lower on death row than in the general prison population.

Ultimately, however, these arguments are beside the point. Prison life could be designed and administered so that convicted killers cannot kill again. Overall, the death penalty cannot be humanely chosen over LWOP on the basis of incapacitation alone. Besides, the United States Supreme Court has held that to pass constitutional muster, the death penalty must serve as deterrence or retribution.

Adopting PPS as a harsher supplement to LWOP strips its critics of the plausible but specious argument that LWOPers have nothing to lose in prison—that without hope of parole, they will kill again at will, knowing nothing more can be done to them. My research confirms what the scant literature on this topic reflects: Lifers have the most to lose and are often the best behaved inside. Often they have the best jobs and the easiest lifestyles, earned over years. Although retributively unjust, these incentives to avoid transfer or punitive segregation keep lifers well behaved.

With the threat of PPS readily apparent to prisoners and public alike, no one would claim that only the death penalty could keep a lifer in check. And with PPS, the absence of human contact would ensure that those confined to perpetual punitive segregation could not kill again.

D. Mistake

Abolitionists often urge the substitution of LWOP for the death penalty, arguing that mistakes are inevitable and death is irreversible. Innocent people have certainly been condemned to death. Most probably one, or more, has been executed in the modern era—although the abolitionists cannot yet prove that.

Utilitarian supporters of the death penalty have countered that innocent victims of condemned killers released from death row into the general population or free society who kill again should offset innocents the state may execute.

On balance, these utilitarian death penalty supporters argue, life-life tradeoffs suggest that with its greater deterrent force, even counting mistakes, the death penalty will save more innocent lives than will life without parole.[26]

The death penalty much more sharply focuses our attention on our own mistakes. The thought of executing an innocent person sobers us. Expensive lawyers with abolitionist convictions offset their $1,000-an-hour billing habit with pro-bono capital appellate work. Law-student volunteers rush to provide research assistance and support to the condemned. Pen pals and groupies clamor to visit. But who champions the cause of lifers who claim their innocence?

On balance, although the consequence of a single mistake is more tragic with the death penalty, the number of mistakes will multiply should LWOP be substituted for death as punishment.

Adopt PPS, and the thought of an innocent person exposed to a lifetime of such suffering will make us shudder. With PPS, we can expect the same passion and zeal pro-bono death penalty opponents bring to their capital defendants. Substitute PPS for LWOP, and lifelong mistakes should dramatically decrease.

E. The Polls: The Public Choice

"*For cases of murder*, do you prefer the death penalty or life in prison *without the chance* of parole?" Note the fallacy of that standard poll question—how it doubly distorts.

First, discriminating, informed, retributivist advocates reserve the death penalty only for *aggravated* murder—the worst of the worst of the worst. We agree with the United States Supreme Court and every death-penalty jurisdiction in the United States that the vast majority of murderers do not deserve to die. Do we "prefer" death or life without parole "*for cases of murder*"? Should we retributivist advocates of capital punishment who oppose the death penalty for most cases of murder allow the polls to count us as abolitionists?

Second, consider the last part of the standard question: "*without the chance of parole*" or Gallup's "with absolutely no possibility of parole." Abolitionists delight in emphasizing that we who sometimes favor death cannot be absolutely certain that an innocent person will never be executed. Thus, they insist, the penalty should be abolished rather than take an infinitesimal if inescapable risk. Yet the very same opponents who would disable us from acting on near-certainty blithely assure their fellow citizens that LWOP carries no chance of parole.

Furthermore, most citizens polled will equate "absolutely no possibility of parole" with "no possibility of release." Few people factor in executive clemency. And, although a parole board may almost never release a convicted mass murderer, even after he has aged and now seems gentle and no longer any threat to anyone, a future legislature may simply abolish life without parole wholesale and apply its new policy retroactively. *Europe has mostly abolished life without parole*, even for genocide and crimes against humanity—although you'd be hard pressed to discover this fact via leading media news outlets, whose abolitionist editorials favor substituting LWOP for death while otherwise urging the United States to follow Europe's lead.

The standard poll question further distorts and elevates support for LWOP while artificially diminishing support for the death penalty by making the aggravated murder itself little more than an abstract event. Polls discourage respondents from matching a concrete punishment to a specific crime. Of course, abolitionist pollsters shy away from asking even the abstract question directly: "Do you favor the death penalty for the *worst* murderers—for example, a serial killer who rapes and tortures children?" Once made aware of the victim's suffering and the killer's viciousness, what punishment will the overwhelming majority match to torturing and killing children? That question (Do you favor the death penalty for the worst murderers?—the real question) abolitionist pollsters scrupulously avoid.

Beyond obscuring from the public the nature of the *crimes* that might bring these punishments, the polls distort the nearly even split between those who seem to prefer LWOP to death by obscuring the nature of the *punishment* itself. The public widely assumes that an aggravated murderer serving life without parole feels the sting of punishment most severely. The abolitionist media aids and abets this public fraud. Thus, abolitionists dismissed as "abstract" the support of 70 percent of Californians for the death penalty in the latest Field Poll, pointing out that 42 percent of registered voters said they prefer LWOP and 41 percent said they prefer death for first degree murderers.[27]

Let the public become aware of the actual lifestyle of Lifers, or let states substitute PPS for today's LWOP, and reveal the real split between those who favor life and those who favor death as the ultimate punishment.

F. Retribution

Satisfying, popular, and persistent as an idea, retribution fundamentally fails in the actual administration of punishment. Every Department of Corrections in the United States officially rejects retribution, declaring public safety and rehabilitation as its primary mission. Thus, prison administration throughout the United States today largely severs the connection between crime and punishment on which retribution essentially rests.

As noted previously, corrections officers proclaim that "what a man did out there is none of my business. How he acts inside determines how he'll be treated here." And although the more heinous crimes generally do carry *longer* prison sentences, in fact the most vicious criminals serving life sentences for the worst crimes often have the best jobs, best hustles, and easiest lifestyles. In short, largely unnoted even by retributivists themselves, inside prisons, daily life mocks retribution: Those who deserve it most suffer least.

The adoption of PPS could sustain that connection between crime and punishment. Every corrections official working in PPS should be required to read a description of the crime of every LWOPer punished with PPS. We should tolerate no abuse of these prisoners, no beatings or sadism on the part of officers guarding them. But no conviviality, either. Officers would be instructed to be proper, but distant and cold. For PPS, Corrections' mission should be punishment. Those most vicious predators punished by perpetual punitive segregation would receive no better food, housing, or medical care than that offered to innocent poor outside.

As it connects crime and punishment, PPS clearly separates LWOP from ordinary life sentences. This hopeless, bleak experience should be reserved only for the worst of the worst of the worst. No "three strikes and you're PPS." No "drug kingpin and you're PPS." PPS should never be a default sentence, as LWOP has become in states such as Florida, which abolished parole. Only if you deserve PPS by your cruelty should you receive it.

PPS should never be inflicted because a person, juvenile or adult, is found incorrigible—not subject to change or development. The perpetually dangerous must be incapacitated, but PPS should be reserved only for the deserving. PPS constitutes a retributive sentence, plain and simple—an unbreakable covenant with the past.

G. Denunciation

For twenty-five centuries at least, Western culture has specially denounced and distinguished the worst killings. Yet with a greater variety of crimes, especially narcotics offenses carrying ridiculous mandatory minimums, the line between life with and without parole has blurred. "Three strikes and you're out" compounds the problem. In short, those too long and too common sentences undercut that special denunciation which ought to attach only to the worst criminals.

Although the majority in *Graham* subsumed denunciation under retribution,[28] denunciation sometimes separately justifies a special *sentence*, even if that sentence may never be carried out. States such as New Hampshire, which executes nobody, tenaciously cling to the death penalty, probably from a need to ritually denounce and condemn killers whom the state will never in fact execute.

In its capital jurisprudence, the Supreme Court has repeatedly declared that death is different. PPS, too, should constitute a separate sentence, clearly distinguished from all others, requiring a special penalty trial.

If PPS were adopted, perhaps then the death penalty could be justly abolished, although some of us retributivists would still insist death sometimes constitutes the only just response. In any case, states that have abolished the death penalty might adopt PPS, but use it very, very sparingly.

Meanwhile, states that retain the death penalty should reconfigure their death rows to replicate the conditions of PPS.

H. Conclusion: The Moral Illogic of LWOP Without PPS

But we don't have PPS. We have supermaxes that keep prisoners safely confined, largely in isolation, and we have temporary punitive segregation units that punish prisoners briefly for prison infractions. We have a death penalty in most states, and LWOP in all.

At first glance, the underlying logic of life without parole seemed plausible enough: "The greater includes the lesser." The community's greater power to kill its worst offenders necessarily included a lesser, but still awesome, power to imprison them for life without possibility of release.

Life without parole, however, is a very strange sentence when you think about it. And the more you *do* think about it, the less stable becomes its moral support. Although it may represent the jury's unanimous *second* choice—of those who would condemn the killer to die, and others who would leave open a possibility of redemption from a life spent inside a prison—today the sentence itself seems at once too little or too much.

If a sadistic or extraordinarily cold, callous killer deserves to die, then why not kill him? We ought to keep our covenant with the past, steel ourselves against counting all potential *future* rehabilitation or remorse of the most vicious killers. The past cries out and demands it.

But if we are unwilling to extinguish the personality of the condemned and the body that houses it, why should we—like Odysseus at the mast—forever place it outside of our own power to reassess? Why should we ignore the rich, mature, constructive, vital human being that even the most heinous killer may become? If we keep the killer alive, why strip him of all hope?

Increasingly, conventional wisdom seems to reject the death penalty and substitute LWOP. It seems to me better to reject LWOP and refine capital punishment, reserving it for only the worst of the worst of the worst.

So, absent PPS, although LWOP may be the closest moral approximation that states without a death penalty can reach, although LWOP may often be the only unanimous compromise verdict a bitterly divided jury can reach, and although LWOP may be the ultimate sanction abolitionists recommend, still, when all is said and done, it doesn't feel right.

True, by one logic, the greater includes the lesser. But then, too, sometimes, morally, by doing less than we might we do more than we may.

Notes

1 130 S. Ct. 2011, 2028 (2010).
2 *Id.* at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).
3 *Id*.
4 *Id.* at 2041 (Roberts, C.J., concurring).
5 *Id.* at 2051 (Thomas, J., dissenting).
6 *Id.* at 2054 (Thomas, J., dissenting) (quoting *Tison,* 481 U.S. at 149).
7 *Deuteronomy* 25:2 (English Standard) (emphasis added).
8 *Deuteronomy* 25:2 (Darby).

[9] O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (emphasis added).

[10] *Id.* at 364.

[11] Solem v. Helm, 463 U.S. 277, 285 (1983).

[12] Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

[13] *Id.* at 1016 (White, J., dissenting).

[14] *Id.* at 1001.

[15] *Id.*

[16] Ewing v. California, 538 U.S. 11 (2003). *See also* Lockyer v. Andrade, 538 U.S. 63 (2003).

[17] Thomas Hobbes, Leviathan 175 (Cosimo Books 2009) (1651).

[18] Michel Foucault, Discipline & Punish: The Birth of the Prison 11 (Alan Sheridan trans., Vintage Books 2nd ed. 1995).

[19] *See* Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration*, 88 Prison J. 328, 328 (2008); Testimony of Robert Johnson at Public Hearing Before N.J. Death Penalty Study Comm'n, July 19, 2006.

[20] This quotation and the following excerpts come from Sarah Mitchell's letter from prison, a copy of which is in the author's possession.

[21] *Graham*, 130 S. Ct. at 2016 (quoting *Harmelin*, 501 U.S. at 1001).

[22] *Id.* at 2038 (Roberts, C.J., concurring) (emphasis added).

[23] Royal Comm'n on Capital Punishment, 1949–1953 Report 20 (1953).

[24] *Id*. at 753 (citing James Fitzjames Stephen, *Capital Punishments*, Fraser's Magazine, June 1864).

[25] *Id.*

[26] *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703 (2005).

[27] Bob Egelko, *Field Poll finds 70% support death penalty*, S.F. Chron., July 22, 2010, *at* http://articles.sfgate.com/2010-07-22/bay-area/21992975_1_death-penalty-focus-capital-punishment-sentence (quoting Stefanie Faucher, associate director of Death Penalty Focus).

[28] *Graham*, 130 S. Ct. at 2028 (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).