

IS DEATH DIFFERENT?

Jacob Bronsther[†]

This Article attempts to unite the movements against the death penalty and mass incarceration. The central argument is that many noncapital sentences are in the same category of injury as the death penalty. Thus, whatever the law says (or ought to say) about the legitimacy of the death penalty, it should also say about these noncapital sentences. In this way, I reject the premise of our Eighth Amendment jurisprudence that “death is different.” The Article first considers how exactly the death penalty harms a person, given the fact that everybody is going to die. It argues that the death penalty moves up a person’s death date dramatically, likely by decades. Given the sequential and progressive nature of human existence, such a loss of time grievously interferes with one’s unfolding life as a whole. The early death promised by capital punishment means that one’s life will remain to some awful extent incomplete, without the fruition or redemption that the future years may have had in store. The Article then demonstrates that certain prison sentences—especially but not only decades-long sentences—harm individuals in a similar manner.

[†] Associate Professor of Law, Michigan State University College of Law, J.D., M.Phil., Ph.D. For their incisive comments and discussion, I am grateful to Andrea Armstrong, Rachel Barkow, Kristen Bell, David Blankfein-Tabachnick, Vincent Chiao, James Chen, Alma Diamond, Raff Donelson, Avlana Eisenberg, Sheldon Evans, Lindsay Farmer, Chad Flanders, Charles Fried, Jonathan Gingerich, John Goldberg, Linda Greene, Catherine Grosso, Irene Oritseweyinmi Joe, Erin Kelly, Alexandra Klein, Josh Kleinfeld, Guha Krishnamurthi, Nicola Lacey, Christopher Lewis, Marah McLeod, Erin Miller, Kathryn Miller, Erin Murphy, Carmel Nemirovsky, Alex Platt, Peter Ramsay, Shalev Roisman, Steve Schaus, Amy Sepinwall, Marissa Jackson Sow, Carol Steiker, Victor Tadros, Will Thomas, James Tierney, Robin West, and the participants of presentations at Harvard Law School, the Law and Humanities Junior Scholars Workshop at the University of Pennsylvania, the London School of Economics and Political Science, the Maryland Discussion Group on Constitutionalism, Michigan State University College of Law, the University of Oklahoma College of Law, the AALS Jurisprudence Section’s Works-in-Progress Workshop, the ABA-AALS-Academy for Justice Workshop, the Decarceration Works-in-Progress Workshop, and the Junior Scholars Legal Research Workshop. Thanks also to Timothy Innes for his excellent research assistance, and to Ryan Ming-Yuan Lee and his colleagues at the *Cornell Law Review* for their thoughtful work.

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INTRODUCTION

This Article attempts to unite the movements against the death penalty and mass incarceration. The central argument is that many noncapital sentences are in the same category of injury as the death penalty. Thus, whatever the law says (or ought to say) about the legitimacy of the death penalty, it should also say about these noncapital sentences. In this way, I reject the premise of our Eighth Amendment jurisprudence that “death is different.”¹ An array of procedural and

¹ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 286, 289 (1972) (Brennan, J., concurring) (“Death is a unique punishment”) (“Death . . . is in a class by itself.”); *id.* at 306 (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”); *Gregg v.*

substantive protections applies to capital sentences.² For instance, the death penalty is not permitted for certain categories of defendants, such as those with severe intellectual disabilities and those who were under the age of eighteen at the time of the offense, or for certain categories of offenses, such as nonhomicide offenses.³ However, outside the extremely narrow exception of life without parole for juveniles convicted of nonhomicide offenses,⁴ jurisdictions can constitutionally impose any noncapital sentence they desire so long as they have a “reasonable basis for believing” that the punishment will serve either deterrent, retributive, rehabilitative, or incapacitative goals.⁵ Twenty-five years to life for the “third strike” of stealing three golf clubs, each worth \$399, notoriously met that standard.⁶ So did a life sentence for fraud crimes totaling about \$230,⁷ as well as a life sentence without parole for possession of less than 1.5 pounds of cocaine, which was the defendant’s first offense.⁸ The Court thus believes that death is one thing, and prison is something else entirely. It’s not just the Court, though. The starkest expression of death’s purported difference

Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (“[T]he penalty of death is different in kind from any other punishment”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (“[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing the Court’s “qualitative difference” in jurisprudence for the death penalty); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (“[T]he death penalty is qualitatively different from any other punishment”); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (“It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death.”); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (characterizing the majority opinion as “the pinnacle of . . . death-is-different jurisprudence”); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) (“[T]here is no doubt that ‘[d]eath is different.’” (second alteration in original) (quoting Transcript of Oral Argument at 43, *id.* (No. 01-488))).

² See *infra* Part I.

³ See *infra* notes 43–62 and accompanying text.

⁴ See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that juveniles cannot be sentenced to life without parole for nonhomicide offenses); see also *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that mandatory sentences of life without parole are unconstitutional for juveniles).

⁵ *Ewing v. California*, 538 U.S. 11, 28 (2003) (plurality opinion) (citing *Solem v. Helm* 463 U.S. 277, 297 n.22 (1983)); see also *infra* notes 63–79 and accompanying text.

⁶ *Ewing*, 538 U.S. at 18, 30–31 (plurality opinion).

⁷ *Rummel v. Estelle*, 445 U.S. 263, 265–66, 285 (1980).

⁸ *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991).

can be found in the twenty-three states that have abolished capital punishment.⁹ While those states have absolutely forbidden the death penalty as uncivilized treatment beyond the pale, they accept decades-long prison sentences, often in dirty and dangerous facilities, as a banal, everyday matter of legal administration.

If death is indeed “different” than prison, it will be because it is uniquely harmful, as the Court has argued, not because it alone threatens *irreversible* harm, as the Court has further claimed. Consider that innocent people sent to prison are rarely exonerated, and even when they are, the state cannot reasonably compensate them for their loss. As Rachel Barkow writes: “Those years cannot be brought back.”¹⁰ Thus, to sentence someone to a prison term—just like sentencing someone to death—is to risk a permanent and noncompensable wrong. Leaving the irreversibility issue to the side, then, this Article proceeds by assessing the harm of the death penalty and comparing it to the harm of certain prison sentences.

How, exactly, does the death penalty harm someone? Neither the case law nor the academic literature has ever taken this question seriously, in part—one suspects—because it is deeply philosophical, and lawyers generally are not trained to engage with such issues. To be sure, the answer is complex. For starters, we should distinguish between (a) the harms associated with the lead-up to death and (b) the harms associated with death itself. The former might include a lengthy term of incarceration, often isolated from the “general population” of other prisoners, as well as severe anxiety caused by a looming execution.¹¹ Depending on the method of execution, the list might also include physical pain or agony, as well as feelings of

⁹ See *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/A57B-W6GJ>] (last visited Sept. 18, 2024) (listing states with and without the death penalty); see also DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2024* 7 (2024), <https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2024> [<https://perma.cc/HG2X-DBWA>] (reporting that, at the end of 2024, thirty-four states had either abolished the death penalty or not carried out an execution in more than a decade).

¹⁰ Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1174 (2009); see also Vincent Chiao, *Capital Punishment and the Owl of Minerva*, in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 241, 249 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019) (“Society clearly owes something to those who are wrongly imprisoned, but the currency of that debt is not payable in any currency that modern societies transact in.”).

¹¹ See *infra* notes 98–102 and accompanying text.

humiliation.¹² While precise accountings are impossible in this realm, such “premortem” harm must count for a lot in our assessment of the death penalty. Nonetheless, when we compare the treatment of capital and noncapital defendants, surely the *death part* of the death penalty is most at issue. The reason is that noncapital defendants also experience prison, and they also experience mental and physical pain. Such pains may often be more acute for the capital defendant. But if a death sentence is to be categorically more harmful than a very long prison sentence, it will be because it causes death. As such, in assessing the harmfulness of the death penalty, the primary issue is the harm of death itself.

When you hear that someone has passed, inevitably you might wonder how old they were. It’s a nontrivial consideration, as I argue below, because the harm of death is partly a function of one’s age.¹³ To give the analysis a bit more structure, then, let’s select an age. Imagine—consistent with historical capital punishment trends¹⁴—that the person in question dies at age forty. What, then, is the harm of dying at forty? Relying on the ancient but sporadic philosophical literature on death, I answer this question in three broad steps.

First, it is not as if the state, when inflicting capital punishment, introduces a totally alien and unnatural prospect of death into the narrative of the decedent’s life. Unlike prison, death was always going to come. What capital punishment does, however, is move up your death date dramatically. You were going to die at some vague point in the future, and you planned your existence around that notion. But once the date and time arrive, the death penalty means that you will die *right now*. In this way, death at forty takes away decades of otherwise reasonably anticipated living. And the question then becomes how, and to what degree, losing those years harms one’s life as a whole, in the counterfactual sense that one’s life would have gone better had they not died so young.

To fill in this formula requires some conception of “value,” which the person presumably would have realized more of had they died many years later. At the second step, then, I follow a wide and historical array of writers—from Aristotle to Proust to Agnes Callard—in arguing that human value is not focused on

¹² See *infra* notes 103–07 and accompanying text.

¹³ See JEFF McMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 184 (2002) (“The badness of death . . . varies with a great many factors. But the various factors are strongly correlated with age.”).

¹⁴ See *infra* notes 112–14 and accompanying text.

the bare realization of pleasure or preferences.¹⁵ Rather, given our capacity for agency—that is, our capacity to make plans that connect our past to our present, and our present to our future—human value is naturally and unavoidably wrapped up in the project of constructing a good life through time. That, at least, is the shape or form of human value. It is realized diachronically: through (*dia*) time (*chronos*).

Finally, I argue that this life-building process is centered on the realization of inherently long-term relationships and endeavors, such as cultivating and maintaining families and friendships as well as forms of professional and artistic skill. These essentially long-term or “temporal” goods are the most important types of goods for people. And it is because human existence is organized in this sequential and progressive manner that an early death can be so devastating. Beyond denying one the “momentary” pleasures that they might have enjoyed in the coming years, death at forty radically interferes with the long-term projects—marriages, careers, and so forth—that structure or indeed might have structured one’s unfolding life project. Death at forty thus means that one’s “life” will remain to some awful extent incomplete, without the fruition or redemption that the future years may have had in store.

All that said, to suffer capital punishment is not merely to die. It is to be killed. And that matters when assessing the moral gravity of the sentence. For everything else being equal, it is better to die by natural causes than at the hands of others. One reason is that being killed—in this case, by the state—is a grievous autonomy violation, as one’s life becomes determined to an extraordinary degree by coercive forces beyond the self. Another reason is that being killed entails an element of expressive harm and degradation, especially when the killing is carried out in the name of the law or the community.¹⁶ In this way, the death penalty communicates that the rest of us are “here up high” while the individual killed is “there down below.”¹⁷ Given how an early death interferes terribly

¹⁵ See *infra* notes 151–74 and accompanying text.

¹⁶ See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1509 (2016) (“Law has a special place in upholding the social fact of our worth; it is in a unique position to express and uphold our sociological dignity.”).

¹⁷ See Jeffrie Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 14, 25 (1988) (“[M]oral injuries . . . are ways a wrongdoer has of saying to us, ‘I count but you do not,’ ‘I can use you for my purposes,’ or ‘I am here up high and you are there down below.’”).

with one's personal narrative, the symbolic message of capital punishment is something along these lines: "You're so worthless that your life—more particularly, *your life project*—no longer matters."

When conceiving of the death penalty in this way, as a rejection of one's status as a life-builder, we can begin to appreciate how prison is not so different, especially but not only when considering decades-long sentences. To be sure, the death penalty is almost always worse. But if I am right that the *worst part* of the death penalty is the injury to one's life project, then many prison sentences belong in the same category of punishment, namely: *life-ruining punishment*.

Prison comes in many forms and degrees. But at a minimum, incarceration represents a severe restriction of the freedom of association. It denies people effective access to almost all people in society, including family, friends, neighbors, and co-workers, as well as to new people that they might meet in environments conducive to enjoyable and productive relationships. As the years pass by, this associational limitation gravely endangers one's life in the narrative sense. That is because temporal goods, which are so central to diachronic flourishing, are usually associational in nature. Some temporal goods, like a romantic partnership, are *intrinsically* associational, meaning that the good just is a long-term form of association. Others, like the development of professional expertise, are *instrumentally* associational, such that associating with others is the means of realizing the good. By making it exceedingly difficult to realize either type of good, long-term incarceration represents a slow-moving injury to one's life project.¹⁸ Beyond such associational harms, which even the mildest Norwegian facility promises to deliver over time, American prisons often threaten traumatic physical and psychological harms that can independently wreak havoc on one's life as a whole.

To be sure, it is a matter of degree and risk. Here, incarceration is different than the death penalty. Everyone's life in prison still has meaning. And it is not *impossible* for the long-term incarcerated to flourish, whether in prison or after they are released (if they are released). Many people are extraordinary.

¹⁸ On the concept of "slow" violence, see, e.g., ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (2011) ("By slow violence I mean a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all."); Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 754 (2007).

Nonetheless, by placing someone in an environment so intensely inhospitable to long-term relationships and achievements, and by forcing them to stay there for many years, the state is utterly disrespectful of their capacity to stitch moments together through time as a means of constructing a good life as a whole. Using more legal terminology, we can say that the state is at least *grossly reckless* with respect to ruining one's life, akin to the homicide *mens rea* of "depraved heart."¹⁹ The Article concludes that very long prison sentences—say, fifteen to twenty years without any serious possibility of parole—treat a person as a creature whose life-building capacity either does not exist or does not matter, and thus they inflict the same form of injury as the death penalty. I raise the further possibility that much shorter prison terms, when combined with the collateral consequences of conviction, also qualify as "life-ruining" punishment.

Finally, imagine that I am wrong and that, for some reason not accounted for below, the death penalty is categorically worse than any possible form of imprisonment. In that case, we could *still* single out "life-ruining" punishments for special prohibition or at least special attention, while at the same time holding that the death penalty deserved yet further concern. Put differently, beyond the pale of "life-ruining" punishments there may still be morally consequential borderlines.²⁰

This Article proceeds in four parts. Part I outlines the Court's bifurcated Eighth Amendment jurisprudence by which capital and noncapital sentences receive very different sets of constitutional protections. Part II considers the various harms of the death penalty, and then Part III argues that certain prison sentences impact people's lives in a similar manner. Finally, Part IV provides an array of possible policy implications, from collapsing the Court's "death is different" jurisprudence

¹⁹ See MODEL PENAL CODE § 210.2(l)(b) (AM. L. INST. 2023) (defining a category of murder as killings "committed recklessly under circumstances manifesting extreme indifference to the value of human life"); V.F. Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 378–79 (2002) ("Depraved heart murder is fundamentally about indifference to others. The depraved heart murderer . . . acts in defiance of the consequences of his actions *for others who rightly make an immediate claim on his attentions*. Whether, as was once said, for whim or fancy, or for no reason at all, the depraved heart murderer acts in contempt of his and our shared humanity. His crime is important precisely because he appears to proceed on the assumption that he is the only man in the world." (footnote omitted)).

²⁰ See John Vorhaus, *On Degradation. Part One: Article 3 of the European Convention on Human Rights*, 31 COMMON L. WORLD REV. 374, 394 (2002) (arguing that "inhuman" treatment is yet worse than "degrading" treatment).

to the abolition of all prison sentences. Ultimately, which option or options one finds attractive will depend on their position on the death penalty as well as their belief in the feasibility of prison reform. But assuming they accept my broader comparison, the implications are radical *even for someone who believes that capital punishment is legitimate, and that prison should be miserable*. Presumably, such a person believes that the life-ruining punishment of death is appropriate only in response to the most extreme offenses. Thus, the upshot for them is that life-ruining *prison sentences* would be permissible, but only in those very rare cases in which they believed that capital punishment was a morally acceptable alternative. Even from a pro-death penalty perspective, then, the conclusion that death is *not* always different has radically decarceral implications.

I

LIFE AND DEATH AT THE SUPREME COURT

When assessing whether a criminal sentence is consistent with the Eighth Amendment, the Supreme Court has recognized the importance of both “ordinal” and “cardinal” proportionality considerations.²¹ “Ordinal” proportionality requires the distribution of sentences to reflect the severity of the underlying offenses.²² Punishing a bicycle thief more harshly than a murderer would be disproportionate in the ordinal sense. “Cardinal” proportionality, by comparison, provides that a sentence ought to “fit” the severity of the individual crime.²³ Sentencing a bicycle thief to death would be disproportionate in the cardinal sense. This Part explains how, with respect to both forms of proportionality, the Court has interpreted the Constitution to be dramatically more demanding for capital defendants.

A. Ordinal Proportionality

In 1972, when *Furman v. Georgia*²⁴ invalidated capital punishment as it then existed, the Court provided a one-page

²¹ See William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 75 (2011) (identifying two separate lines of Eighth Amendment case law that establish the importance of “relative” and “absolute” proportionality, respectively).

²² See, e.g., Jacob Bronsther, *Vague Comparisons and Proportional Sentencing*, 25 LEGAL THEORY 26, 38 (2019).

²³ See, e.g., Greg Roebuck & David Wood, *A Retributivist Argument Against Punishment*, 5 CRIM. L. & PHIL. 73, 78 (2011); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 83 (1992).

²⁴ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

per curiam opinion followed by five concurrences in a decision spanning over two-hundred pages. While the Justices presented an array of concerns about the death penalty, they coalesced around the holding that the highly discretionary process by which Georgia (and other states) administered the death penalty was unconstitutional.²⁵ The Court held that the death penalty was *not* per se unconstitutional, but that it was unconstitutional because it was applied unfairly between defendants, which is to say that it was unconstitutional because it violated the demands of ordinal proportionality. The Court recognized several species of distributive unfairness in the death penalty context, the most important of which for the Court was the sheer *randomness* of who received the death penalty and who received a term of years.²⁶ Justice Stewart wrote that among the many thousands of people convicted of equivalently heinous murders and rapes, “the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”²⁷

Given its judgement that states were distributing capital punishment in an arbitrary manner, the *Furman* Court enacted a de facto death penalty moratorium.²⁸ In response, many states amended their capital procedures rather than simply letting the practice wane.²⁹ And only four years later, Georgia was back at the Court seeking constitutional approval for its new regime. In that case, *Gregg v. Georgia*, the Court restored the death penalty for states, like Georgia, that had provided sentencers with a “meaningful basis for distinguishing the few

²⁵ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (plurality opinion) (“Central to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments.”).

²⁶ See *Furman*, 408 U.S. at 293 (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.”); *id.* at 309–10 (Stewart, J., concurring); *id.* at 256–57 (Douglas, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364 (Marshall, J., concurring). Cf. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* ch. 3 (2016) (explaining how racial disparities amongst capital defendants did not motivate the Court’s decision making).

²⁷ *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

²⁸ *Id.* at 316 (Marshall, J., concurring) (noting that the reasoning in *Furman* implicated the approximately 600 other death sentences that had yet to be carried out at the time of the *Furman* decision).

²⁹ See STEIKER & STEIKER, *supra* note 26, at 60–61.

cases in which [the death penalty] is imposed from the many cases in which it is not.”³⁰

Georgia’s new death penalty process effectively required three steps.³¹ First, the individual must be convicted of one of six serious offenses.³² Second, after a separate death sentencing hearing, a jury must find one of ten aggravating circumstances to exist beyond a reasonable doubt (e.g., the defendant committed murder for the purpose of financial gain).³³ While not strictly requiring such a “bifurcated” trial, where death eligibility according to highly specified standards is determined in the second phase, the Court suggested that it was the “best answer” to the ordinal proportionality problem identified in *Furman*.³⁴ Finally, after the imposition of a death sentence at the second phase of the trial, the Georgia Supreme Court was required to determine, among other issues, that the sentence was not “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”³⁵

The Court has since applied *Gregg* to overturn death penalty statutes that inadequately channel sentencing discretion.³⁶ But this line of cases has not delivered perfect ordinal proportionality to the capital process. Far from it.³⁷ Nonetheless, the

³⁰ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)); see also *id.* at 189 (“[D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”). The same day the Court decided *Gregg*, it also ruled on other post-*Furman* death penalty schemes. See *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion) (upholding Texas’s new capital statute); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (plurality opinion) (upholding Florida’s new capital statute); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality opinion) (holding Louisiana’s new capital statute unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (holding North Carolina’s new capital statute unconstitutional).

³¹ *Gregg*, 428 U.S. at 162–68 (plurality opinion).

³² *Id.* at 162–63.

³³ *Id.* at 165 n.9; see also *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (requiring juries to find the aggravating factors necessary for imposing the death penalty).

³⁴ *Gregg*, 428 U.S. at 190–91 (plurality opinion).

³⁵ *Id.* at 167 (quoting Ga. Code. Ann. § 27-2357 (1975)); see also *Pulley v. Harris*, 465 U.S. 37, 43–44 (1984) (holding that the Eighth Amendment requires some form of meaningful appellate review but not necessarily “proportionality” review).

³⁶ See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (finding unconstitutionally vague a Georgia law that allowed for the death penalty in response to “outrageously or wantonly vile, horrible, or inhuman” offenses (quoting Ga. Cod. Ann. § 27-2534.1(b)(7) (1978))).

³⁷ See, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 373–74 (1995); Alexis Hoag, *Valuing Black Lives: A Case*

Court has at least recognized distributive unfairness as a constitutional problem in the capital context.³⁸ By comparison, the Court has not found within the Constitution any special concern for the fair distribution of prison sentences.³⁹ There is simply nothing like *Gregg* for a term of years. Indeed, in *Lockett v. Ohio*, the plurality was explicit that, unlike in capital cases, “legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in non-capital cases.”⁴⁰ In short, the Court demands that states constrain discretion so that only an especially heinous subset of murderers is executed. But it does not particularly care if people who commit the same offenses receive very different prison sentences or if people with very different culpability levels receive the same sentence—whether as a result of, say, prosecutorial discretion, judicial idiosyncrasy, racial bias, or recidivist sentencing enhancements. Moreover, only about fifteen states have sentencing guidelines that might administer a degree of ordinal fairness amongst prisoners,⁴¹ and most of those systems label their guidelines as merely advisory for judges.⁴²

B. Cardinal Proportionality

In 1910, the Court recognized an Eighth Amendment concern with cardinal proportionality: “[I]t is a precept of justice that punishment for crime should be graduated and proportioned

for Ending the Death Penalty, 51 COLUM. HUM. RTS. L. REV. 983, 983 (2020); Catherine M. Grosso, Barbara O'Brien & Julie C. Roberts, *Local History, Practice, and Statistics: A Study on the Influence of Race on the Administration of Capital Punishment in Hamilton County, Ohio (January 1992–August 2017)*, 51 COLUM. HUM. RTS. L. REV. 904, 914 (2020); Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 525 (James R. Acker et al. eds., 3d ed. 2014).

³⁸ See, e.g., *California v. Brown*, 479 U.S. 538, 541 (1987) (“The Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.” (citations omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982).

³⁹ See *Barkow*, *supra* note 10, at 1153 (“While capital statutes must now be drafted with some care to guide discretion, noncapital criminal laws are subject to no similar constitutional requirements.”).

⁴⁰ *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion).

⁴¹ See Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, FED. PROBATION, Sept. 2017, at 28, 28 n.2, https://www.uscourts.gov/sites/default/files/81_2_5_0.pdf [<https://perma.cc/U8AL-PJ9M>] (discussing the fifteen non-federal sentencing systems that “exhibit the strongest characteristics of sentencing guidelines” but noting that five other systems exhibit some such characteristics).

⁴² *Id.* at 36.

to offense.”⁴³ As the twentieth century unfolded, the Court sustained this sentencing ideal, explaining that the Constitution bans those punishments “that are ‘excessive’ in relation to the crime committed,”⁴⁴ and that “a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”⁴⁵ In its application of the principle, however, the Court has treated capital and noncapital sentences radically differently.

In capital cases, the Court has settled on a two-part test when assessing “[w]hether the death penalty is disproportionate to the crime committed.”⁴⁶ First, the Court examines the “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.”⁴⁷ The Court is doing empirical work at this stage about our “evolving standards of decency.”⁴⁸ It looks primarily at whether other states would allow the death penalty for such an offense or such a person, as reflected in statutes and patterns of prosecution.⁴⁹ If there is a consensus or, perhaps, an emerging consensus against the application of the death penalty in this context, that provides authority to find disproportionality.⁵⁰ The Court has explained, however, that “[c]onsensus is not dispositive,” and that the second step is necessary.⁵¹

At the second step, the Court performs an independent proportionality analysis, which is informed somewhat vaguely by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.”⁵²

⁴³ *Weems v. United States*, 217 U.S. 349, 367 (1910). *But see id.* at 409–10 (White, J., dissenting); *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment) (both denying that the Eighth Amendment contains a proportionality principle).

⁴⁴ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

⁴⁵ *Solem v. Helm*, 463 U.S. 277, 290 (1983).

⁴⁶ *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

⁴⁷ *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *see also Enmund v. Florida*, 458 U.S. 782, 788–89 (1982).

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

⁴⁹ *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 313–15 (2002); *Roper*, 543 U.S. at 564; *Enmund*, 458 U.S. at 789–96; *Coker*, 433 U.S. at 593–96 (plurality opinion).

⁵⁰ *Kennedy*, 554 U.S. at 431–33.

⁵¹ *Id.* at 421.

⁵² *Id.* (citations omitted); *see also Enmund*, 458 U.S. at 797 (“[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty”); *Coker*, 433 U.S. at 597–600 (plurality opinion); *Roper*, 543 U.S. at 563.

Centrally, the Court assesses whether the defendant is less deserving of death than a first-degree murderer.⁵³ The Court will also examine whether death would serve the traditional aims of punishment, in particular retribution and deterrence, so as to ensure that the defendant's execution is not the "purposeless and needless imposition of pain and suffering."⁵⁴ If a proposed death sentence fails both steps—such that other legislators and prosecutors, and the Justices themselves, understand death to be an unfitting response to the crime—then the Court will declare the sentence to be unconstitutional for that "category" of offense or offender.⁵⁵

The Court has applied this test to outlaw the death penalty for several types of offenses, such as the rape of an adult⁵⁶ and then, more broadly, any nonhomicide offense.⁵⁷ The Court has also ruled out capital punishment for felony murder when the defendant "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed,"⁵⁸ though it later provided an exception for "major" participants in the felony whose actions evinced "reckless indifference to human life."⁵⁹ Finally, the Court has forbidden capital sentences for people with characteristics that diminish their culpability, in particular, people who were under the age of eighteen at the time of their offense,⁶⁰ the severely mentally handicapped,⁶¹ and the insane.⁶²

For noncapital defendants, by comparison, cardinal proportionality analysis "has become virtually meaningless as a constitutional principle," as Youngjae Lee has argued.⁶³ In *Harmelin v. Michigan* and *Ewing v. California*, the Court developed a highly deferential two-part test which expresses its view that, *as it relates to prison sentences*, the Eighth Amendment

⁵³ See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 689 (2005).

⁵⁴ *Atkins*, 536 U.S. at 319 (quoting *Enmund*, 458 U.S. at 798).

⁵⁵ See, e.g., *Atkins*, 536 U.S. at 319–21.

⁵⁶ *Coker*, 433 U.S. at 592–93 (plurality opinion).

⁵⁷ *Kennedy*, 554 U.S. at 437.

⁵⁸ *Enmund*, 458 U.S. at 797.

⁵⁹ *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

⁶⁰ *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

⁶¹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁶² *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

⁶³ Lee, *supra* note 53, at 695.

“contains a ‘narrow proportionality principle.’”⁶⁴ The first step is a “threshold” test where the Court examines whether the sentence is “grossly disproportionate” to the given offense. However, a sentence is *not* grossly proportionate so long as the state has a “reasonable basis for believing” that the prison term would serve either deterrent, retributive, rehabilitative, or incapacitative goals.⁶⁵ It is a “disjunctive” either/or test, as Lee has emphasized, such that reasonably believing that the sentence will serve *any* of the traditional penal aims will suffice.⁶⁶ Thus, even if the sentence is patently *undeserved* from a retributivist perspective, that poses no problem if the state has some reason to believe that the sentence will prevent future crimes via deterrence or incapacitation.⁶⁷ The state need not establish that the proposed sentence is *narrowly tailored* to achieve crime prevention, only that it is “reasonable” to believe that the sentence will prevent *some* crime.⁶⁸

Almost any conceivable sentence would satisfy this threshold standard. Indeed, the Court has affirmed life without parole for a defendant’s first offense of possessing 672 grams (approximately 1.5 pounds) of cocaine;⁶⁹ two consecutive twenty-year sentences for possession with intent to distribute nine ounces of marijuana and the distribution of marijuana to a police informant;⁷⁰ twenty-five years to life for theft of golf clubs worth approximately \$1,200, when the defendant had four prior “serious or violent” felony convictions;⁷¹ two consecutive sentences of twenty-five years to life for theft of approximately \$150 of videotapes when the defendant had three prior “serious or violent” felony convictions;⁷² and life with the possibility of parole for felony theft of \$120.75 by false pretenses where

⁶⁴ *Ewing v. California*, 538 U.S. 11, 20 (2003) (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in the judgment)); *see also* Lee, *supra* note 53, at 693 (explaining that Justice Kennedy’s concurrence in *Harmelin* “eventually came to assume the status of law”).

⁶⁵ *Ewing*, 538 U.S. at 28, 30 (plurality opinion) (citing *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)).

⁶⁶ Lee, *supra* note 53, at 682.

⁶⁷ *Id.* at 682–83.

⁶⁸ On the cost *ineffectiveness* of prison and mass incarceration as a tool of crime prevention, *see generally* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

⁶⁹ *Harmelin*, 501 U.S. at 961, 996.

⁷⁰ *Hutto v. Davis*, 454 U.S. 370, 370–71, 375 (1982).

⁷¹ *Ewing v. California*, 538 U.S. 11, 18, 20, 30–31 (2003) (plurality opinion).

⁷² *Lockyer v. Andrade*, 538 U.S. 63, 66–68, 77 (2003).

the defendant had two prior felony convictions.⁷³ In only one decision, *Solem v. Helm*, has the Court found a prison sentence without any additional forms of punishment to be unconstitutional, and it is now considered to be a stark outlier.⁷⁴ The putative second step of the noncapital proportionality test—where the Court is meant to compare the prison sentence to other sentences in and outside of the jurisdiction—has become hypothetical and vestigial.⁷⁵ Carol and Jordan Steiker have concluded that the “threshold requirement of gross disproportionality has proven to be an insurmountable hurdle for Eighth Amendment challenges to long prison terms.”⁷⁶ William Berry concurs that prison sentences “face an almost overwhelming presumption of constitutionality.”⁷⁷

The result of the competing cardinal proportionality tests is that none of the substantive protections that apply to the imposition of the death penalty apply to the imposition of prison sentences. There is one historic, albeit very narrow exception, which applies to life without parole for juveniles.⁷⁸ The Court examined that punishment under the two-part test otherwise reserved for capital cases, and found it to be unconstitutional for juveniles convicted of nonhomicide offenses.⁷⁹ Otherwise, when it comes to the imposition of extremely long and burdensome prison sentences—*life-ruining sentences*, as I will argue—a defendant’s youth, mental capacity, and intent to kill do not present special constitutional concerns, even though they may be dispositive in the death penalty context.

⁷³ *Rummel v. Estelle*, 445 U.S. 263, 265–66 (1980).

⁷⁴ See *Solem v. Helm*, 463 U.S. 277, 277–81, 284 (1983) (overturning life without parole as punishment for writing a fake \$100 check, the defendant’s seventh nonviolent felony); Barkow, *supra* note 10, at 1160 (“*Solem* now stands as an outlier.”).

⁷⁵ See *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (“[I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”)

⁷⁶ 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, 186 (2008).

⁷⁷ William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1654 (2021); see also G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), 27 HARV. C.R.-C.L. L. REV. 262, 276 (1992); Sara Taylor, Comment, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810, 1835 (2012).

⁷⁸ See *Graham v. Florida*, 560 U.S. 48, 82 (2010).

⁷⁹ *Id.* at 60–61.

C. Mandatory Sentences

Finally, in its quest to ensure both ordinal and cardinal proportionality for capital defendants, the Court has deemed “mandatory” capital sentences to be inconsistent with the Eighth Amendment’s requirement “that the individual be given his due.”⁸⁰ Being convicted of a particular type of extremely severe offense is not enough. Nor, in and of itself, is having a separate capital sentencing hearing. According to the Court, that hearing must welcome “the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”⁸¹ Moreover, there are “virtually no limits” in terms of what may be introduced as mitigating evidence.⁸² Defendants must be free even to introduce character evidence that lacks any “nexus” to the crime itself.⁸³

By contrast, noncapital defendants are not guaranteed such individualized attention (with the exception of life without parole sentences for juveniles).⁸⁴ Indeed, of those people in federal custody in 2016, a majority were convicted of an offense that carries a mandatory minimum penalty.⁸⁵ When a mandatory minimum is applied, the defendant’s individual circumstances and character are of no legal moment. Mandatory minimums are not unique to the federal system, either. All fifty states and the District of Columbia enforce such laws.⁸⁶

⁸⁰ *Eddings v. Oklahoma*, 455 U.S. 104, 111–12 (1982).

⁸¹ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion); see also *Harry v. Louisiana*, 431 U.S. 633, 637 (1977); *Jurek v. Texas*, 428 U.S. 262, 271–72 (1976).

⁸² *Payne v. Tennessee*, 501 U.S. 808, 822 (1991); see also Barkow, *supra* note 10, at 1153–55.

⁸³ *Tennard v. Dretke*, 542 U.S. 274, 283–86, 289 (2004); see also *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986) (reversing death sentence based on exclusion from evidence of defendant’s good conduct in jail).

⁸⁴ *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that mandatory sentences of life without parole are unconstitutional for juveniles).

⁸⁵ U.S. SENT’G COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017). But see David Bjerk, *Mandatory Minimums and the Sentencing of Federal Drug Crimes*, 46 J. LEGAL STUD. 93, 94 (2017) (“[M]andatory minimums appear to be far from mandatory, with less than half of those who are eligible receiving a sentence consistent with the ostensible mandatory minimum.”).

⁸⁶ BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 19 (2004), <https://www.ncjrs.gov/pdffiles/strsent.pdf> [https://perma.cc/F6X7-JWYX].

D. Severity, not Finality

In sum, there is one set of constitutional protections for capital defendants and another for noncapital defendants. Only certain types of defendants are subject to the death penalty after committing certain types of offenses, after a unique sentencing hearing, and, usually, after special forms of appellate review. However much these protections are ultimately worth for capital defendants,⁸⁷ none applies to individuals facing many years in prison. The situation is *prima facie* baffling, as Rachel Barkow has argued, given that the text of the Eighth Amendment does not recommend any such distinction between capital and noncapital defendants.⁸⁸ And it raises the question of the Court's rationale for this Manichean jurisprudence. The Court's justification, in short, is that "death is different," and therefore capital sentences are entitled to a stricter set of protections.⁸⁹

But *why* is death so different, according to the Court? In his *Furman* concurrence, Justice Brennan provides an answer: "The unusual severity of death is manifested most clearly in its *finality and enormity*. Death, in these respects, is in a class by itself."⁹⁰ By expressing this idea, Brennan "singlehandedly constructed the now-familiar 'death is different' argument," according to Carol and Jordan Steiker—an argument which the Court has repeated time and again.⁹¹ For instance, Justice Stewart echoed Brennan in *Gregg*: "There is no question that death as a punishment is unique in its *severity and irrevocability*. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."⁹² And here is Justice Blackmun in *Spaziano v. Florida*: "Because the death sentence is unique in its *severity* and in its *irrevocability*, the Court has carefully scrutinized the States' capital sentencing schemes"⁹³ Consider also Justice O'Connor in *Thompson v. Oklahoma*: "The Court has . . . imposed a series

⁸⁷ See generally STEIKER & STEIKER, *supra* note 26 (providing a critical overview of the Court's constitutional regulation of the death penalty).

⁸⁸ Barkow, *supra* note 10, at 1147.

⁸⁹ See *supra* note 1 (collecting "death is different" citations).

⁹⁰ *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (emphasis added).

⁹¹ STEIKER & STEIKER, *supra* note 26, at 370.

⁹² *Gregg v. Georgia*, 428 U.S. 153, 187 (plurality opinion) (emphasis added) (citations omitted).

⁹³ *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984) (emphasis added) (citations omitted).

of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such *gravity and finality*.”⁹⁴

However, if death is indeed “different” than prison, it will be because of the Court’s first variable, because it is uniquely “severe,” which is to say because it is uniquely *harmful*—not because it alone threatens *irreversible* harm. The irreversibility worry is fundamentally about the possibility that no matter how robust the appellate and habeas process may be, the state might execute an innocent person and thereby inflict a permanent and noncompensable wrong. However, the same worry applies to prison sentences.⁹⁵ While an innocent person may be exonerated and released from prison, it is not as if they can be reasonably compensated for their loss. As Barkow writes: “Those years cannot be brought back.”⁹⁶ Moreover, there is a very good chance that they will *never* be exonerated. Thus, to sentence someone to a prison term—like sentencing someone to death—is to risk an irrevocable wrong. Vincent Chiao writes: “Regret for serious moral error is an ineliminable part of any criminal justice system, with or without capital punishment.”⁹⁷ In sum, if capital punishment is categorically and emphatically different than, say, twenty years in prison, it will be because death is categorically and emphatically more *harmful*, not because capital punishment alone threatens to irreversibly harm an innocent person. Both punishments do that.

In what follows, this Article will assess the validity of the claim that capital sentences are categorically and emphatically more harmful than noncapital sentences. In so doing, it will assess the legitimacy of the Court’s forked sentencing jurisprudence, as well as the wider legislative and political trend of drawing a thick, qualitative line between the death penalty and even the most extreme forms and terms of imprisonment.

⁹⁴ *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O’Connor, J., concurring) (emphasis added).

⁹⁵ See Barkow, *supra* note 10, at 1174–75.

⁹⁶ *Id.* at 1174; see also Chiao, *supra* note 10, at 249 (“Society clearly owes something to those who are wrongly imprisoned, but the currency of that debt is not payable in any currency that modern societies transact in.”).

⁹⁷ Chiao, *supra* note 10, at 249; see also Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 74 (2008).

II

THE HARM OF THE DEATH PENALTY

How, exactly, does the death penalty harm someone? This is a complex question since the penalty inflicts several distinct types of harm; to focus the inquiry, we need to make several preliminary distinctions. First is the distinction between what we might call (a) *premortem* harms associated with the lead up to execution and (b) *postmortem* harms associated with death itself. We can, in turn, separate premortem harms into (1) *pre-execution* harms and (2) *execution* harms.

Pre-execution harms might include, for instance, a lengthy term of incarceration,⁹⁸ often isolated from the “general population” of other prisoners,⁹⁹ as well as the mental terror or at least severe anxiety caused by a looming execution.¹⁰⁰ Justice Brennan was referring to such pre-execution harms when he observed that “mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”¹⁰¹ Indeed, the California Supreme Court went so far as to say that “the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”¹⁰²

By contrast, execution harms are realized in the very process by which the state kills someone. Depending on the method of execution, such harms might include physical pain or agony and feelings of humiliation.¹⁰³ Given that the Supreme Court has found the death penalty in the abstract to be

⁹⁸ See TRACY L. SNELL, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CAPITAL PUNISHMENT, 2020 - STATISTICAL TABLES 17 (2021) (providing data indicating that the average time between sentencing and execution was 7.9 years in 1990, 11.4 years in 2000, and 18.9 years in 2020).

⁹⁹ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row/> [<https://perma.cc/B4TW-KE7K>] (last visited Nov. 9, 2024).

¹⁰⁰ See generally Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525, 528–31 (2016) (demonstrating the severe harms of death row and arguing that such conditions must be authorized legislatively, not merely as a matter of prison administration); Amy Smith, *Not “Waiving” but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237 (2008).

¹⁰¹ *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) (citing *Ex parte Medley*, 134 U.S. 160, 172 (1890)).

¹⁰² *Id.* (quoting *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972)).

¹⁰³ See generally Harold Hillman, *The Possible Pain Experienced During Execution by Different Methods*, 22 PERCEPTION 745 (1993) (outlining the physiology and pathology of different methods of capital punishment).

constitutional and has approved most states' procedures for determining which people will receive the punishment, much of the constitutional litigation in recent years has centered on the *method* of execution and the presence of execution harms.¹⁰⁴ The case law has focused especially on the degree of pain caused by the execution—rather than the fact that the person will subsequently die as a result of their punishment.¹⁰⁵

We should not underestimate the gravity of premortem harm. As a means of isolating such harm and appreciating its importance, we might consider a “trick” execution. Imagine that the executioner follows up an injection of painful and otherwise fatal poison with a surprise shot of antidote; they then unspool an official document and read aloud that the court had, in fact and in secret, sentenced the defendant to the experimental punishment of *the near-death penalty*, and that they are now free to go.¹⁰⁶ In that scenario, the individual would have suffered all the premortem harm but none of the postmortem harm. Such an ordeal, from the imposition of the death sentence to the prison term to the near-death experience, would undoubtedly be burdensome and traumatic. So, while precise accountings are impossible in this realm, premortem harm must count for a lot in our assessment of the death penalty, especially when it entails many years of imprisonment on death row, as it almost always does.¹⁰⁷

Nonetheless, when we compare the treatment of capital and noncapital defendants, it is surely the *death part* of the death penalty—the postmortem harm—that is most at issue. The reason is that noncapital defendants often experience their

¹⁰⁴ For examples of this trend, see generally *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion) (holding that the combination of drugs then typically used in lethal injections did not violate the Eighth Amendment); *Glossip v. Gross*, 576 U.S. 863 (2015) (holding that lethal injection of midazolam is a constitutional method of execution).

¹⁰⁵ See, e.g., *Baze*, 553 U.S. at 61 (plurality opinion) (providing that an execution may not be stayed on grounds of its “demonstrated risk of severe pain,” unless the petitioner identifies “known and available alternatives” which are less likely to be severely painful).

¹⁰⁶ For a real-world example of the near-death penalty, consider the case of sixty-nine-year-old Alva Campbell. His death was temporarily called off by Ohio after executioners failed four times to find a suitable vein for a lethal injection. Campbell was otherwise terminally ill and died of natural causes about three months later. Tracy Conner, *Alva Campbell, Inmate Who Survived Execution Try, Dies in Ohio Prison*, NBC News (Mar. 3, 2018), <https://www.nbcnews.com/news/us-news/alva-campbell-inmate-who-survived-execution-try-dies-ohio-prison-n852961> [<https://perma.cc/9ZF4-2WGD>].

¹⁰⁷ See SNELL, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *supra* note 98, at 17.

own version of premortem harm. They may experience lengthy prison terms, sometimes even longer terms than those on death row, which feature some degree of suffering and humiliation.¹⁰⁸ Put simply, noncapital defendants also experience prison, and they also experience mental and physical pain. Such pains may often be more acute for the capital defendant, especially given the pains of execution itself. That is part of the reason why the death penalty is different. But if a death sentence is to be categorically more harmful than a very long prison sentence—as the Supreme Court and abolitionist states believe to be the case—it will be because it causes death. When Brennan writes of the sheer “enormity”¹⁰⁹ of the death penalty, it is presumably this aspect of the penalty—the *death part*—that he has in mind. As such, in assessing the harmfulness of the death penalty, the primary question concerns the nature and degree of such postmortem harm, and so what follows will focus on that issue.

There is one final distinction to make before proceeding. When assessing the postmortem harm suffered by a person who has been executed, we can and should separate (1) *objective* postmortem harm, which is generated by the fact that the person is no longer alive, and (2) *agential* postmortem harm, which is generated by the fact that they are no longer alive because an agent (or group of agents) has chosen to cause their death. The former concerns the fact that they have *died*, the latter that they have *been killed*. All else equal, the amount of objective postmortem harm will be the same whether one dies by natural or unnatural causes—by lightning or by murder—but, nonetheless, it does seem worse usually to die by unnatural causes, and the category of agential postmortem harm seeks to explain why that might be.

A. Death Itself

When assessing the “objective” harm of the death penalty, we are isolating the harm caused by the permanent cessation of consciousness, or however one might define biological death¹¹⁰—again, while ignoring the harms associated with the lead up to the execution or the execution itself. Our object of

¹⁰⁸ See Barkow, *supra* note 10, at 1167–69.

¹⁰⁹ *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring).

¹¹⁰ See generally Robert M. Taylor, *Reexamining the Definition and Criteria of Death*, 17 SEMINARS IN NEUROLOGY 265 (1997).

inquiry in the first instance is the harm of death itself, whatever its cause may be.

When you learn that someone has died, without knowing much else about them, you will naturally wonder or ask how old they were. It's not a matter of idle interest, as I argue below, because the objective harm of one's death is in part a function of their age.¹¹¹ To give the inquiry more structure, then, let's select an age. Imagine that the person in question dies at age forty. Forty is generally consistent with historical capital punishment trends,¹¹² but younger on average than those who were executed in recent years, given that the average time between sentencing and execution has increased from 11.4 years in 2000 to 18.9 years in 2020.¹¹³ For further context, the average age at time of arrest for those on death row in 2008 was twenty-nine.¹¹⁴

What is the objective harm of dying, and, more particularly, the objective harm of dying at age forty? Below, I develop the conceptual resources to reply to this question in three broad steps. First, I argue that, for an otherwise reasonably healthy person, death at forty is harmful in a counterfactual manner, in the sense that one's life very probably would have gone better—that is, it very probably would have exhibited more “value” overall—had they not died at age forty. However, to fill in the blanks of this formula requires some conception of human “value,” which the person presumably would have realized more of over the course of their life had they not died when they did. At the second step, then, I follow an array of theorists in arguing that human value is doubtfully focused on the bare realization of pleasure or preferences, as argued by

¹¹¹ See McMAHAN, *supra* note 13, at 184 (“The badness of death . . . varies with a great many factors. But the various factors are strongly correlated with age.”).

¹¹² See Brendan D. Kelly & Sharon R. Foley, *The Price of Life*, 335 BRIT. MED. J. 938, 938 (2007) (reporting that the average age at the time of execution in Texas in 2007 was thirty-nine and the average time spent on death row was approximately ten years); *Death Row*, FLA. DEP'T OF CORR., <https://www.fdc.my-florida.com/institutions/death-row> [<https://perma.cc/NGS5-AULW>] (last visited Nov. 20, 2024) (reporting that, since 1979, the average age at the time of execution in Florida was 44.9 years).

¹¹³ See SNELL, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., *supra* note 98, at 17 (providing data indicating that the average time between sentencing and execution was 7.9 years in 1990, 11.4 years in 2000, and 18.9 years in 2020); *id.* at 11 (reporting that, as of 2020, the average age of death row inmates nationally was fifty-two years old).

¹¹⁴ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/B4TW-KE7K>] (last visited Nov. 9, 2024).

utilitarians and many economists. Rather, given our capacity for agency—that is, our capacity to make plans which connect our past to our present, and our present to our future—human value is naturally and unavoidably wrapped up in the project of constructing a good life as a whole through time. That, at least, is the shape or form of human value. It is realized diachronically: through (*dia*) time (*chronos*).

Finally, I argue that this life-building process is centered on the realization of inherently long-term relationships and endeavors, such as cultivating and maintaining families, friendships, forms of professional and artistic skill, and so forth. These essentially long-term or “temporal” goods are the most important types of goods for people. Ultimately, it is because human life is progressive and diachronic in orientation that an early death can be so shattering. One loses more than the “momentary” pleasures that were in store. Death at forty radically interferes with, and may “ruin” in some sense, the long-term undertakings—marriages, careers, and so forth—that structure or indeed might have structured one’s unfolding life project, and which define their existence as an agent.

1. *Counterfactual Harm*

The first step in the analysis is the counterfactual nature of the harm of death. This idea emerges as a reply to the Greek philosopher, Epicurus, who argued famously around 300 B.C. that death is not harmful, *at all*, for the person who has died.¹¹⁵ While, to my knowledge, Epicurus never commented on the death penalty, his position entails the counter-intuitive conclusion that the imposition of death is the *least harmful* punishment available. His argument depends on a particular variant of hedonism, which provides that a person’s pleasurable sensations or experiences are the only things that are intrinsically good for her, while her painful sensations or experiences are the only things that are intrinsically bad for her. Given that a person’s death is not an experience that she has, nor does it cause her to have any sensations or experiences, Epicurus concludes that her death is neither intrinsically good nor bad for her (and, thus, people should stop worrying about death).¹¹⁶

¹¹⁵ See EPICURUS, *Epistula ad Menoeceum* [Letter to Menoeceus], in EPICURUS: THE EXTANT REMAINS 82, 85 (Cyril Bailey ed. & trans., Oxford Univ. Press 1926) (c. 300 B.C.).

¹¹⁶ See *id.*; see also PLATO, *The Apology of Socrates*, in SOCRATIC DIALOGUES 29, 64–65 (W.D. Woodhead ed. & trans., Thomas Nelson and Sons 1953) (c. 400 B.C.)

To be sure, if one's death were painful, then that experience of pain will be bad for her, according to Epicurus, but not the death itself.

In the intervening centuries, scholars have developed a reply to Epicurus and his followers (the most influential of whom was the Roman writer, Lucretius, who was born about two hundred years after Epicurus's own death).¹¹⁷ Most incisively, to argue that death may indeed be bad for those who die, Thomas Nagel and others have appealed to what Stephen Luper calls a "comparativist" view, which compares possible lives.¹¹⁸ On this account—which I accept—something that makes one's life as a whole worse than it otherwise would be constitutes a harm to that person, while something that makes one's life as a whole better than it would otherwise be constitutes a benefit.¹¹⁹ That is, a person normatively assesses a past occurrence (e.g., they ate an apple, attended college, lost an arm) in a counterfactual manner, by asking whether they would have realized more or less value over the course of their life were such an occurrence never to have happened.¹²⁰ While some such occurrences might be *intrinsically* harmful, in the sense that to experience them is inherently bad (e.g., because it involves painful suffering), other occurrences might be *extrinsically* harmful, such that they cause or entail a diminishment in value more broadly.¹²¹

(recounting Socrates' argument that death is not harmful because it is either a state of unconsciousness akin to the deepest sleep or a means of transportation to another realm where all the other dead people live).

¹¹⁷ See generally P.H. De Lacy, *Lucretius and the History of Epicureanism*, 79 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N 12 (1948).

¹¹⁸ STEVEN LUPER, *THE PHILOSOPHY OF DEATH* 7 (2009); THOMAS NAGEL, *Death*, in MORTAL QUESTIONS 1, 8 (1979); see also Warren Quinn, *Abortion: Identity and Loss*, 13 PHIL. & PUB. AFFS. 24, 40–48 (1984) (applying the comparativist view to abortion); Fred Feldman, *Some Puzzles About the Evil of Death*, 100 PHIL. REV. 205 (1991) (challenging the Epicurean stance that death is not harmful to the deceased, based on a comparativist view).

¹¹⁹ See LUPER, *supra* note 118, at 7–8; Steven Luper, *Death*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.2 (Edward N. Zalta ed., Fall 2021 ed.), <https://plato.stanford.edu/archives/fall2021/entries/death/> [<https://perma.cc/5KF6-D38T>] (defining "comparativism"); John Broome, *Goodness is Reducible to Betterness: The Evil of Death is the Value of Life*, in THE GOOD AND THE ECONOMICAL 70 (Peter Koslowski & Yuichi Shionoya eds., 1993) (arguing that nothing is good or bad in a noncomparative manner).

¹²⁰ On the truth value of counterfactual propositions such as "If x had not occurred, y would have occurred," see generally DAVID LEWIS, COUNTERFACTUALS (rev. ed. 2001).

¹²¹ See LUPER, *supra* note 118, at 83, 101, 107–09.

Extrinsically harmful events need not be consciously experienced to be harmful.¹²² Nagel writes:

A man's life includes much that does not take place within the boundaries of his body and his mind, and what happens to him can include much that does not take place within the boundaries of his life. These boundaries are commonly crossed by the misfortunes of being deceived, or despised, or betrayed.¹²³

Thus, if someone spreads terrible lies about you, but you never find out about it, that can qualify as a harm on the comparativist view, while not registering at all on the Epicurean account—since you do not personally experience the slander and its consequences. For another example, imagine that, while visiting a friend in the hospital you immediately pass out and are in an unconscious coma in that same hospital for a year. You wake up feeling refreshed, shocked to learn how long it has been, and you walk out wearing the same clothes as before. Even if you don't consciously experience such an event, it can harm you, and we need comparativism to explain why. Presumably, your life as a whole would have gone better had you not been in the coma for a year. Death, even though we do not consciously experience it, can harm us in the same manner.

Analysis of the counterfactual harm of death must be set by certain parameters, as Jeff McMahan has argued.¹²⁴ For instance, when assessing the harm of death at forty, we compare that outcome with the prospect of death at a later point, likely some decades in the future, given normal life expectancy for mortals like us in contemporary society. What we don't do, McMahan explains, is compare it with the possibility of immortality.¹²⁵ Indeed, the role played by mortality in the counterfactual harm analysis becomes a hugely important point in the comparison between the death penalty and prison, as discussed further below. For only some people spend time in prison, but everyone dies. Thus, what capital punishment does—or, at least, what the *death part* of capital punishment does—is accelerate your death date. Your death was to occur at some distant

¹²² See Feldman, *supra* note 118, at 218 (“[A] state of affairs can be bad for a person whether it occurs before he exists, while he exists, or after he exists.”); see also Harry S. Silverstein, *The Evil of Death*, 77 J. PHIL. 401, 420–24 (1980) (arguing that death harms us at no determinate time).

¹²³ NAGEL, *supra* note 118, at 6.

¹²⁴ See McMAHAN, *supra* note 13, at 103.

¹²⁵ *Id.*

future point. And you planned your life with that in mind. But once the appointed time arrives, the death penalty means that you will die *right now*. Death at forty thus takes away decades of otherwise reasonably anticipated living.¹²⁶ And the question then becomes how, and to what degree, losing those years harms one's life as a whole.

Given this analytical frame, comparativism thus requires an assessment of what an individual might have done with the time taken from them by their early death. This presents a challenge, however, because it is impossible to know the answer, given that each of us has an enormous range of possible futures. Most of us will muddle along as before. But sometimes we surprise, of course, perhaps by breaking bad or going good, or maybe rolling random. Avishai Margalit claims that the essential human capacity—essential because it is what justifies respect for humans—“is that of reevaluating one's life at any given moment, as well as the ability to change one's life from this moment on.”¹²⁷ He continues: “Even the worst criminals are worthy of basic human respect because of the possibility that they may radically reevaluate their past lives and, if they are given the opportunity, may live the rest of their lives in a worthy manner.”¹²⁸

Accepting the possibility of such radical change, we might think that the counterfactual harm of death for each person is utterly unknowable. One plausible alternative, however, is to ground the analysis in some sense of probability. Nagel recommends “some limits on *how* possible a possibility must be for its nonrealization to be a misfortune (or good fortune, should the possibility be a bad one).”¹²⁹ For instance, while the person who dies gravely ill at age one hundred might have lived and flourished for another fifty years due to some miraculous sequence of events and scientific discoveries, it's unlikely. And that unlikelihood ought to figure into our assessment of the

¹²⁶ See *Life Expectancy in the U.S. Dropped for the Second Year in a Row in 2021*, CDC (Aug. 31, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/20220831.htm [<https://perma.cc/SUM5-7S6L>] (finding that the life expectancy at birth for American women was 79.1 in 2021, and 73.1 for men).

¹²⁷ AVISHAI MARGALIT, *THE DECENT SOCIETY* 70 (Naomi Goldblum trans., Harvard Univ. Press 1996); see also GIOVANNI PICO DELLA MIRANDOLA, *DE DOMINIS DIGNITATE ORATIO* [ORATION ON THE DIGNITY OF MAN] 7–8 (A. Robert Caponigri trans., Regnery Publ'g, Inc. 1956) (1496) (“It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine.”).

¹²⁸ MARGALIT, *supra* note 127, at 70.

¹²⁹ NAGEL, *supra* note 118, at 9.

harm of their death, and of how the death of, say, an otherwise healthy twenty-five-year-old is very probably more harmful. McMahan presents a credible if still appropriately open-ended solution, whereby the misfortune of death that one suffers is a function of the *best* of their “reasonably possible” futures.¹³⁰ I will return to this issue below, where I argue that an array of criminal sentences that we routinely subject people to make it tremendously difficult for them to develop their futures in creative and unexpected ways.

2. *Human Value*

The idea that we are moving forward with is that death can harm a person counterfactually, insofar as the decedent’s life likely would have contained more “value” had they not died when they did. The second step concerns how we conceive of human “value” in this counting, such that we can make sense of the idea that one possible existence has “more” of it than another.¹³¹ Beyond “value,” synonyms include “wellbeing,” “welfare,” and “the good.” We cannot escape this philosophical analysis because the definition of “value” (or whatever synonym is preferred) will structure the comparison between the harm of death and prison, and, therefore, we need to get the definition right (or at least pointing in the right direction). In the end, we are assessing the degree to which the loss of “value” caused by the death penalty measures up to the loss of “value” caused by certain prison sentences (like, say, twenty years without parole). To be sure, comparativism itself does not offer any help or limitations, given that it is consistent with any theory of value, including Epicurus’s hedonism (i.e., Epicurus might have counterfactually analyzed how much more pleasure one might have enjoyed were they to survive).

As with all these types of questions, the aim is to discover the broad outline of a true answer. Precision will prove elusive, given that the subject matter—what’s “good” or “valuable” for people—seems vague and multidimensional all the way down. Ultimately, I develop what I believe to be a highly plausible and widely shared theory of the human good. I argue that rather than the satisfaction of “momentary” pleasures or preferences,

¹³⁰ McMAHAN, *supra* note 13, at 112, 115.

¹³¹ *Id.* at 98 (“A complete account of the badness of death must therefore incorporate an account of the good life: an account of what it is for a life to go well or badly, what makes some lives better or more worth living than others, and so on.”).

the human good seems to be centered on the pursuit of inherently long-term relationships and endeavors, those which define and structure one's "life" considered as a unified project that one pursues through time. While this theory is "substantive" and "objective" in orientation, it is also very "thin" given the extremely diverse ways in which people might reasonably understand and pursue such long-term goods. To be sure, I do not claim to have definitively proven this theory, and if someone were to disagree, then their understanding of the comparison between capital and noncapital sentences would differ to some extent.

Traditionally, there are three schools of thought on human value: hedonism, desire theories, and "objective list" (or "pluralist") theories.¹³² Hedonists like Epicurus and Jeremy Bentham believe that pleasure, and only pleasure, constitutes the human good, and that pain, and only pain, constitutes the human "bad."¹³³ Desire theorists believe that the good is a function of, and only of, desire satisfaction (and that the bad is a product of frustrated desires).¹³⁴ And objective list theorists believe that certain things (e.g., modes of being or achievements) are objectively good or bad for us, and that their goodness or badness cannot be reduced to the fact that they are pleasurable or that we desire them (or, more modestly, cannot *always* be so reduced).¹³⁵ In what follows, I will quickly reject hedonism and

¹³² Roger Crisp, *Well-Being*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Winter 2021 ed.), <https://plato.stanford.edu/entries/well-being/> [<https://perma.cc/F6PJ-ACCG>]; Thomas Hurka, *On 'Hybrid' Theories of Personal Good*, 31 *UTILITAS* 450, 450 (2019); *but see* Shelly Kagan, *The Limits of Well-Being*, 9 *SOC. PHIL. & POL'Y* 169 (1992) (questioning the standard classification scheme of theories of the good).

¹³³ *See* JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in *THE COLLECTED WORKS OF JEREMY BENTHAM* 11 (J.H. Burns & H.L.A. Hart eds., 1970) (1789) ("Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do . . ."); *see also* Crisp, *supra* note 132, at § 4.1 ("A complete hedonist position will involve also *explanatory hedonism*, which consists in an answer to the following question: 'What *makes* pleasure good, and pain bad?', that answer being, 'The pleasantness of pleasure, and the painfulness of pain.'").

¹³⁴ *See generally* Chris Heathwood, *Preferentism and Self-Sacrifice*, 92 *PAC. PHIL. Q.* 18, 25 (2011) ("One life is better for a subject than another [if and only if] it contains a greater balance of ideal desire satisfaction over frustration than the other . . ."); Chris Heathwood, *Subjective Theories of Well-Being*, in *THE CAMBRIDGE COMPANION TO UTILITARIANISM* 199 (Ben Eggleston & Dale Miller eds., 2014).

¹³⁵ *See generally* CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 4 (1989) ("So while it may not be judged a moral lapse that I am living a life that is not really worthwhile or fulfilling, to describe me in these terms is nevertheless to condemn me in the name of a standard, independent of my own tastes and desires, which I ought to acknowledge."); DEREK PARFIT, *REASONS AND PERSONS*

desire theories because the most serious objections to these systems remain unresolved. The *diachronic* conception of the human good that I develop below thus belongs in the broad category of an objective list theory.

As to hedonism, two major objections include the possibility of *evil* or *illusory* pleasure. First, imagine that someone derives pleasure from doing what is widely believed to be a very evil deed. Hedonists have an extremely difficult time explaining why “evil” pleasure should not count positively in the moral assessment of net pains and pleasures, given that the feeling of pleasure (and only the feeling of pleasure) is what they are after, and the evil deed feels pleasurable to the wrongdoer.¹³⁶ John Stuart Mill sought to distinguish between “higher” and “lower” pleasures, with the former being more valuable than the latter,¹³⁷ and he might insist that evil pleasure is so “low” as to not count at all. But then whatever property makes a pleasure “high” or “low”—Mill suggests the presence or absence of “nobility,” among other properties—would seem to be the ultimate source of the good, and not the feeling of pleasure itself.¹³⁸ Second, as to *illusory* pleasure, Robert Nozick argued that we don’t believe that a life hooked up to a sophisticated pleasure machine is a good human life overall, and yet the hedonist would be committed to “plugging in.”¹³⁹

Desire theories face the major objections of what we might call *evil*, *manufactured*, and *trivial* desires. The *evil* objection works in the same manner that it does for hedonism. The satisfaction of an evil desire should not count positively, at all, in the overall moral assessment, but desire theorists cannot easily explain why. The *manufactured* objection was raised by Derek Parfit.¹⁴⁰ It seems that, according to the desire theory, you ought to manufacture desires that were easy to satisfy. Indeed, Parfit continues, the theory implies that you ought to develop an overwhelming drug addiction, assuming you had ready access to the drug in question, even if taking the drug

493 (1986); Andrew Moore, *Objective Human Goods*, in *WELL-BEING AND MORALITY: ESSAYS IN HONOUR OF JAMES GRIFFIN* 75 (Roger Crisp & Brad Hooker eds., 2000).

¹³⁶ See Crisp, *supra* note 132.

¹³⁷ JOHN STUART MILL, *UTILITARIANISM* 54 (Roger Crisp ed., Oxford Univ. Press 1998) (1863).

¹³⁸ See Crisp, *supra* note 132; see also ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 63–64 (2d ed. 1984) (arguing that there are different and incomparable forms of pleasure which cannot be uniformly weighed).

¹³⁹ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 42–45 (1974).

¹⁴⁰ PARFIT, *supra* note 135, at 497.

gave you no pleasure and not taking it would cause you to suffer.¹⁴¹ If what's good for you is getting what you want, then you could get more of what you want over the course of your life if you started taking the drug. That you would experience less pleasure overall by doing so is of no moment, given that desire theorists are not hedonists. Since it seems obviously bad for someone to form such a drug addiction, Parfit concludes that the desire theory—at least in this simple form—is very likely false. We could make Parfit's case even more extreme. If well-being is a function (and only a function) of desire satisfaction, why not start taking a widely available drug that is intensely addicting and *causes* intense pain? Perhaps the pain caused by the drug is less than the pain caused by not taking it once the addiction is formed, or perhaps the drug fosters some masochistic pathways in the brain. Either way, you'd be satisfying more desires overall if you started taking the drug.

In reply to such cases, desire theorists often retreat to an "informed" desire account, whereby the satisfaction of desires that one would form were they fully informed is what constitutes the human good.¹⁴² With full information, goes the reply, one would not desire to perform evil deeds or be addicted to drugs of any sort. Perhaps. John Rawls responds with a famous case that we might call the *trivial* desire.¹⁴³ He imagines that a brilliant mathematician, with full information about the relevant options, develops the singular desire to count the blades of grass at Harvard. Desire theorists are seemingly forced to conclude that it's good for her to count the grass, and better for her than doing anything else—or else insist that it is simply impossible to form such a desire with full information. Even if it *were* impossible, the deeper worry that motivates such cases holds. We ought to be able to distinguish morally between desires depending on the quality or goodness of their object. The satisfaction of evil desires should be worth nothing, and the satisfaction of trivial desires should be worth very little. But the desire theory lacks the external resources to adjudicate between desires

¹⁴¹ *Id.*

¹⁴² See generally David Sobel, *Full Information Accounts of Well-Being*, 104 ETHICS 784 (1994); Chris Heathwood, *The Problem of Defective Desires*, 83 AUSTRALASIAN J. PHIL. 487 (2005).

¹⁴³ JOHN RAWLS, A THEORY OF JUSTICE 432 (1971); see also W.T. Stace, *Interestingness*, 19 PHILOSOPHY 233 (1944); Richard Kraut, *Desire and the Human Good*, 68 PROC. AM. PHIL. ASS'N. 39 (1994); THOMAS L. CARSON, VALUE AND THE GOOD LIFE (2000).

substantively.¹⁴⁴ Along these lines, philosophers such as David Enoch, Alasdair MacIntyre, Donald Regan, and Charles Taylor have each explained that human value is not a simple matter of autonomy.¹⁴⁵ That is, not all free choices exhibit a precisely equal amount of value, no matter their substantive content, just by virtue of their autonomous origins.

In sum, when measuring the counterfactual harm of death at forty—that is, when considering how much more “value” someone might have realized over the course of their life had they survived—the analysis should not be focused exclusively on how much more pleasure they would have experienced had they stayed alive, nor on how many more preferences they would have satisfied, whatever the content of those preferences might have been. That situates the analysis within the realm of “objective list” theories of the human good, as suggested above, which then raises the question of what belongs on the list of human goods, exactly.

Contra Aristotle’s belief in the supreme and universal goodness of intellectual and political engagement, and friendship,¹⁴⁶ or Homer’s belief in the goodness of being a great warrior,¹⁴⁷ or the Stoics’ belief in the goodness of wisdom, detachment from bodily urges, and love of the holistic order of the universe,¹⁴⁸ I very much doubt there will be one simple answer for all people, whoever and wherever they might be. Put differently, the list of objective “goods” is extremely long, and it’s *à la carte*, not *table d’hôte*. It’s not a set menu, as Aristotle and others would have it. We get to pick and choose, and it matters what we want.¹⁴⁹

¹⁴⁴ See Crisp, *supra* note 132, at § 4.2 (“[W]e desire things, such as writing a great novel, because we think those things are independently good; we do not think they are good because they will satisfy our desire for them.”)

¹⁴⁵ See Donald H. Regan, *The Value of Rational Nature*, 112 ETHICS 267 (2002) (arguing that rational nature cannot have value where there are no self-standing principles about good states of affairs and activities); Donald H. Regan, *How to Be a Moorean*, 113 ETHICS 651 (2003) (arguing that agents necessarily take a critical stance in relation to their desires and that they can only do so by relying on a conception of the good that is not itself reducible to their desires); David Enoch, *Agency, Shmagency: Why Normativity Won’t Come from What is Constitutive of Action*, 115 PHIL. REV. 31 (2006) (arguing that a complete account of action and agency is not a complete account of normativity); TAYLOR, *supra* note 135, at 19–20, 46–47, 105–06; MACINTYRE, *supra* note 138, at 51–52, 64.

¹⁴⁶ See MACINTYRE, *supra* note 138, at 146; TAYLOR, *supra* note 135, at 13–14, 76; John L. Ackrill, *Aristotle on Eudaimonia*, in ARISTOTLE’S “NICOMACHEAN ETHICS” 33, 49–51 (Otfried Höffe ed., David Fernbach trans., BRILL 2010).

¹⁴⁷ See MACINTYRE, *supra* note 138, at 181–82.

¹⁴⁸ See Julia Annas, *Ethics in Stoic Philosophy*, 52 PHRONESIS 58, 58 (2007).

¹⁴⁹ See PARFIT, *supra* note 135, at 502 (“We might claim, for example, that what is good or bad for someone is to have knowledge, to be engaged in rational activity,

We can travel that far with the desire theorists. And pleasure, at least in certain circumstances, is rightly a best seller—we can travel that far with the hedonists, in turn. But not absolutely *everything* is on the menu, and the challenge is determining what might be on or off it, and what might be the best dishes or sequence of dishes, as it were.¹⁵⁰

As discussed in the following section, the key to a satisfactory (or at least plausible) answer to this substantive moral question depends on the empirical fact that people are agents, and that their agential capacities effectively force them into a diachronic existence centered on developing and executing plans over the course of a single life. The human good, in turn, seems to take the same temporal shape, with the most important things on the “list” being those that rely upon one’s agential capacities to be realized through time (i.e., inherently “long-term” goods like romantic partnerships, families, careers, and hobbies).

3. *Diachronic Harm*

In a brief but incisive passage, Charles Taylor articulates the temporal nature of human agency and value. He argues that humans orient themselves by reference to some (revisable) conception of an “incomparably higher” mode of living, an ideal of the good life toward which they are constantly striving to move closer.¹⁵¹ Such a process is “not an optional extra,” he explains, and is entailed by one’s status as agent who seeks to live well.¹⁵² In effect, Taylor endorses a version of the objective list theory outlined above, but he sees such a theory as infusing an active process: *living well*, or rather, *trying to live well*. Given the dynamism and movement of this process, and its orientation toward an ideal, we understand our existences as a “narrative,” Taylor continues, making sense of our lives

to experience mutual love, and to be aware of beauty, while strongly wanting just these things.”); LUPER, *supra* note 118, at 96 (“We go too far if we deny that our desires play a role in determining our interests.”); Crisp, *supra* note 132 (“One strategy . . . might be to adopt a ‘hybrid’ account, according to which certain goods do benefit people independently of pleasure and desire-satisfaction, but only when they do in fact bring pleasure and/or satisfy desires.”); TAYLOR, *supra* note 135, at 27 (arguing that modern frameworks of the good life are not inherently universal).

¹⁵⁰ See LUPER, *supra* note 118, at 95 (“Objectivists tend to be pluralists, who think that various things are intrinsically good, not just one sort of thing, such as pleasure. And pluralism leaves us with difficult tasks. We will need to identify the list of things that are objectively good. Having done that, we face the question of how to rank the relative values of different goods.”).

¹⁵¹ TAYLOR, *supra* note 135, at 47–48.

¹⁵² *Id.* at 47.

as a story in which we have a notion of “how we have become, and where we are going.”¹⁵³ Along very similar lines, Alasdair MacIntyre writes that “man is . . . essentially a storytelling animal,”¹⁵⁴ where the story is “a quest for *the good*.”¹⁵⁵ MacIntyre continues:

The unity of a human life is the unity of a narrative quest. Quests sometimes fail, are frustrated, abandoned or dissipated into distractions; and human lives may in all these ways also fail. But the only criteria for success or failure in a human life as a whole are the criteria of success or failure in a narrated or to-be-narrated quest.¹⁵⁶

To be sure, the human “narrative” or “quest” is not meant to restart each moment, like it does for a goldfish, or each morning, like it does for the character Phil Connors in the film *Groundhog Day*,¹⁵⁷ or even each year or decade. The ideal is not of *the good moment* or *the good day*, and so forth, but rather of *the good life* understood as a temporal and unified project on which the younger you, current you, and future you are all working together. Taylor writes:

[A]s a being who grows and becomes I can only know myself through the history of my maturations and regressions, overcomings and defeats. My self-understanding necessarily has temporal depth and incorporates narrative. . . . We want our lives to have meaning, or weight, or substance, or to grow towards some fulness, or however the concern is formulated But this means our *whole* lives. If necessary, we want the future to ‘redeem’ the past, to make it part of a life story which has sense or purpose, to take it up in a meaningful unity.¹⁵⁸

Taylor and MacIntyre express a quintessentially Aristotelian perspective on the human good. For instance, Aristotle alludes to the migratory return of the swallows, which marks the beginning of summer: “For one swallow does not make a summer, nor one day. Neither does one day or a short time make someone blessed and happy.”¹⁵⁹ The idea is that the human good is a diachronic achievement, which can be realized

¹⁵³ *Id.*

¹⁵⁴ See MACINTYRE, *supra* note 138, at 216.

¹⁵⁵ *Id.* at 219.

¹⁵⁶ *Id.*

¹⁵⁷ *GROUNDHOG DAY* (Columbia Pictures 1993).

¹⁵⁸ TAYLOR, *supra* note 135, at 50–51.

¹⁵⁹ ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, at 12 (Roger Crisp ed. & trans., 2000).

only “over a complete life,” he writes.¹⁶⁰ Aristotle argues, for instance, that we cannot say that a child has led a “blessed” life:

If he is called blessed, he is being described as such on account of the potential he has, since, as we have said, happiness requires complete virtue and a complete life. For there are many vicissitudes in life, all sorts of chance things happen, and even the most successful can meet with great misfortunes in old age, as the story goes of Priam in Trojan times. No one calls someone happy who meets with misfortunes like these and comes to a wretched end.¹⁶¹

Aristotle maintains that, since the human good is realized in the context of a life as a whole, we cannot say that a child has realized the human good. Such a judgment is premature. Aristotle implies, indeed, that we cannot judge whether someone has realized the human good until his life is complete. Priam, for instance, was King of Troy at the time of its destruction by Agamemnon, with the implication being that an otherwise virtuous or glorious life can end so terribly that it warps or ruins one’s life as a whole. Ronald Dworkin makes a related point in the context of the debate over euthanasia: “We worry about the effect of life’s last stage on the character of life as a whole, as we might worry about the effect of a play’s last scene or a poem’s last stanza on the entire creative work.”¹⁶²

Aristotle goes even further yet to suggest that the quality of one’s life, when understood in this holistic manner, may be altered by *posthumous* events, such as the success or failure of one’s descendants, though he admits that this implication is “odd.”¹⁶³ We need not accept these more dramatic conclusions to appreciate Aristotle’s more general point, which is that humans realize value in the context of a diachronic project: the pursuit of a flourishing life *as a whole*. Furthermore, we can take this point from Book 1 of his *Nicomachean Ethics* without engaging with the remaining Books 2 to 10, which delineate the “virtues” that Aristotle believes are conducive to realizing a flourishing life as a whole.¹⁶⁴ That is, we can accept (1) Aristotle’s basic notion of a diachronic, life-as-a-whole conception of the human good without taking any position on (2) Aristotle’s

¹⁶⁰ *Id.* at 12; *see also id.* at 12–18.

¹⁶¹ *Id.* at 16.

¹⁶² RONALD DWORIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 199 (1993).

¹⁶³ ARISTOTLE, *supra* note 159, at 16–17.

¹⁶⁴ *See id.*

virtue ethics (i.e., the idea that the good or right thing to do is determined by what the “virtuous” person would do in that situation),¹⁶⁵ and while positively denying (3) Aristotle’s belief that what qualifies as a good life—an existence centered on politics, philosophy, and friendship—is the same for all people.¹⁶⁶

Aristotle’s basic idea—that the human good is inherently temporal and centered on one’s life-as-a-whole—is often overlooked, perhaps because it provides the ever-present background context for everything else that we do or desire. It’s so big that it fills the entire frame or horizon and is therefore hard to see as a separate object. Nonetheless, as an intellectual matter, the idea is not especially controversial. First, it seems highly intuitive. Second, beyond Taylor, MacIntyre, and Dworkin, an extremely diverse and distinguished collection of writers have endorsed the framework either explicitly or implicitly—many of whom would not consider themselves to be Aristotelians, and many of whom disagree on other fundamental matters. The list includes such mononymous luminaries as Kierkegaard, Marx, Nozick, Proust, and Rawls,¹⁶⁷ as well as an array of esteemed contemporary theorists.¹⁶⁸

¹⁶⁵ On virtue ethics, see generally STAN VAN HOOFT, UNDERSTANDING VIRTUE ETHICS (2006); Martha C. Nussbaum, *Virtue Ethics: A Misleading Category?* 3 J. ETHICS 163 (1999).

¹⁶⁶ See *supra* note 146 and accompanying text.

¹⁶⁷ See SØREN KIERKEGAARD, EITHER/OR: A FRAGMENT OF LIFE (Victor Eremita ed., Alastair Hannay trans., Penguin Classics 1992) (1843) (contrasting “aesthetic” and “ethical” ways of life, with the former dissolving into a series of present moments, and the latter centered on honoring past commitments such that life becomes a unified whole); KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE (Daniel De Leon trans., 2021) (1852) (presenting an account of human life as a dramatic narrative pursued within social constraints transmitted from the past); NOZICK, *supra* note 139, at 50 (grounding human rights in people’s “ability to form a picture of one’s whole life (or at least of significant chunks of it) and to act in terms of some overall conception of the life one wishes to lead.”); MARCEL PROUST, IN REMEMBRANCE OF THINGS PAST, Vols. 1–3, 144 (C. Moncrieff, T. Kilmartin & A. Mayor trans., 1981) (“Poets claim that we recapture for a moment the self that we were long ago when we enter some house or garden in which we used to live in our youth. But these are most hazardous pilgrimages, which end as often in disappointment as in success. It is in ourselves that we should rather seek to find those fixed places, contemporaneous with different years.”); JOHN RAWLS, A THEORY OF JUSTICE 62, 92–93, 399–416 (1971) (maintaining that a good life consists in the approximate realization of a “rational life plan,” that is, the pursuit of one’s foundational aims, which are grounded in one’s reflective desires, and with the plan’s details filled in over time, in the context of one’s evolving circumstances).

¹⁶⁸ See Connie S. Rosati, *The Story of a Life*, 30 Soc. PHIL. & POL’Y 21, 27 (2013) (“[P]ersons not only attend to their lives from moment to moment; they also take up a view of their lives as a whole, reflecting on themselves and their existence over time.”); McMAHAN, *supra* note 13, at 180 (“[W]e must also recognize that well-being is multidimensional and that some of its dimensions are relational—in

4. *Temporal Goods*

There are stronger and weaker versions of the diachronic theory of the good. The stronger version, which I accept, is that something is good for a person if, and only if, it is good for her life considered as a whole. The question of whether a certain activity or experience is good for me, on this stronger version, is identical to the question of whether it is good for my life considered as a whole.

On this view, then, human value will be centered on the realization of what I call “temporal goods.”¹⁶⁹ Temporal goods are valuable activities and states of being that one can realize only over long periods of time, and which define one’s life when viewed as a holistic project (e.g., building families, maintaining friendships, developing expertise, etc.). The importance of such goods seems to be built into our everyday motivations. Once the necessities for biological existence and basic comfort are guaranteed, the pursuit of inherently long-term goods usually motivates our day-to-day lives, whereby we make sense of how we are spending our efforts today—often in ways that are not enjoyable or pleasant—by reference to some valuable achievement or process that unfolds over a period of years or decades. Given these psychological foundations, it is unsurprising that temporal goods seem central to nearly all human normative systems. That is, all cultures seem to prize temporal goods like families and complex artistic endeavors, and invest

particular those concerned with the meaning that a state or event has within a person’s life.”); MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* 300–02 (1992) (arguing that the value of a life is a Moorean “organic whole”); CLARENCE IRVING LEWIS, *AN ANALYSIS OF KNOWLEDGE AND VALUATION* 498 (1946) (“The characteristic good of willing and achieving is not one found in this or that passing instant merely, nor in an aggregation of the goods thus momentarily and separately disclosed, but in the temporal and relational pattern of a whole of experience whose progression is cumulative and consummatory.”); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 370 (1986) (“The autonomous person is part author of their life.”); HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 43 (2021) (“Our life story is neither a set of unrelated episodes nor a script fully written in advance.”); JOSIAH ROYCE, *THE PHILOSOPHY OF LOYALTY* 23–26, 73 (1908) (arguing that we self-identify and actualize in terms of our life plan); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 24 (1993) (arguing that rational action is governed partly by a norm that “tells a person to act in such a way that over time her actions can be fit into a coherent narrative”); AGNES CALLARD, *ASPIRATION* (2018) (arguing for the rationality of large-scale life changes through which one endeavors to acquire new values); SAMUEL SCHEFFLER, *DEATH AND THE AFTERLIFE* (2013) (arguing that what matters to us depends, in significant part, on the continued existence of humanity).

¹⁶⁹ See Jacob Bronsther, *Long-Term Incarceration and the Moral Limits of Punishment*, 41 *CARDOZO L. REV.* 2369, 2409–10 (2020).

in childhood development as a means of facilitating the broader life projects of young people.

Martha Nussbaum agrees that what I call temporal goods are foundational to human flourishing from an Aristotelian perspective. She writes that a life organized around the pursuit of “nutrition and growth” or “sense-perception” would be “merely an animal life.”¹⁷⁰ “The truly human life, by contrast, is a life organized by the activity of practical reasoning (1098a3-4: *praktike tis tou logon echontos*), in which it is that activity that gives the life as a whole its distinctive shape and tone.”¹⁷¹ Thus, rather than animalistic satisfactions, Aristotelian practical reason seeks out the long-term undertakings and achievements which are distinctly “human” in their diachronic orientation, and which can infuse one’s “life as a whole” with value.

That said, even this stronger version of the life-based perspective on value need not be exclusively forward-looking. We need not become fastidious “life-planners,” and “momentary” goods can still count.¹⁷² These are goods, like enjoying an ice-cream cone, that do not require cultivation over time to be realized, and which are realized entirely in the moment, as it were. While I choose an ice-cream flavor based on years of careful experimentation, each cone fundamentally stands alone as an experience of pleasure. By comparison, each interaction with an old friend forms part of a longer, interdependent chain of interactions that sweeps backward and forward, and which collectively make up our “friendship.” Nevertheless, momentary goods are surely constitutive of a good life. A life without ice-cream cones (or their equivalent) would be worse when considered *as a whole*.

However, not all “momentary” pleasures are valuable on the stronger view. Consider the person addicted to heroin who has wrecked her life-as-a-whole due to her drug abuse, rejecting her personal obligations and descending into depravity and indignity. By viewing her as someone who realizes, and only realizes, value in the context of her broader life, we can appreciate the disvalue of her injecting the drug into her body, her immense and fleeting pleasure notwithstanding. Now, her

¹⁷⁰ See Martha Nussbaum, *Nature, Function and Capability: Aristotle on Political Distribution*, 1988 OXFORD STUD. ANCIENT PHIL. 145, 170 (Supplementary Volume). On the distinction between humans and animals from a diachronic perspective, see *infra* notes 182–83 and accompanying text.

¹⁷¹ *Id.*

¹⁷² See Jacob Bronsther, *Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 470 (2019).

ecstasy would be of great value if viewed as a standalone moment since pleasure abstractly conceived has value. But that is not how humans conceive of, or ought to conceive of, their existence, as if they had no memories, no past or future, and were born in each moment anew.¹⁷³

We can retreat to a more moderate version of this diachronic theory of the good without impacting the overall argument. A more moderate position is that a person can generate value that is purely “momentary” in the sense of being good for them without being good for their life considered as a whole. Perhaps the addict’s pleasure has value in this way, as a momentary experience of *feeling good*, which is valuable even though it detracts from the pursuit of her good life as a whole. David Velleman seems to take this position, writing that “a person has two distinct sets of interests, lying along two distinct dimensions—his synchronic interests in being well-off at particular moments, and his diachronic interests in having good periods of time and, in particular, a good life.”¹⁷⁴ However, I have just argued

¹⁷³ Does this strictly life-based conception of the human good presuppose controversially, *contra* Derek Parfit, that I am identical with the “younger” and “older” people who have looked and who will look out to the world through “my” consciousness? See PARFIT, *supra* note 135, at 199–244, 307–20. Perhaps. But even if we did not share an identity with our past and future selves, that need not vitiate the broader conclusion. The achievement of a “good life” would simply become something of a group project. The teenager and the old man that he becomes could be different people, but nonetheless could be said to be living, and working on, the same “life.” They would be distinct and yet impossibly bonded, perhaps the purest form of family. And we could reasonably maintain that their respective capacities to work together and to honor one another, as it were, were their most essential and valuable capacities.

¹⁷⁴ David Velleman, *Well-Being and Time*, 72 PAC. PHIL. Q. 48, 69 (1991). As evidence of the independence of synchronic and diachronic well-being, Velleman considers two possible lives with the same total amount of synchronic, moment-to-moment well-being. One begins desperately and ends wonderfully, while the other begins wonderfully and ends desperately. Velleman argues that we believe that the former is the better life overall, and that we can make this judgment only if the narrative sequence of events matters. And, he continues, the narrative sequence of events can matter only if diachronic well-being is distinct from synchronic well-being (given that both lives have the same amount of synchronic well-being). While Velleman’s argument has generated much attention, we can maintain that human value is centered on the pursuit of “long-term” goods and a good life as a whole without accepting or rejecting the proposal that the “narrative” or “story” of a life is an independent variable in making a good life. For arguments in favor of the view that a life’s narrative structure matters as an independent variable, see TAYLOR, *supra* note 135, at 50–51; MACINTYRE, *supra* note 138, at 216–19; Daniel C. Dennett, *The Self as a Center of Narrative Gravity*, in SELF AND CONSCIOUSNESS 103 (Frank S. Kessel, Pamela M. Cole & Dale L. Johnson eds., 1992); McMAHAN, *supra* note 13, at 175–80. For criticism of the view, see Stephen M. Campbell, *When the Shape of a Life Matters*, 18 ETHICAL THEORY & MORAL PRAC. 565, 571 (2015); Rosati, *supra* note 168; Galen Strawson, *Against Narrativity*, 17

that “momentary goods” can be constitutive of a good life as a whole, as with the enjoyment of ice-cream cones. As such, Velleman’s distinction is not especially important. It would be relevant only for those purportedly momentary goods that are valuable in the moment but bad for one’s life overall, like the addict’s ecstasy.

In sum, there is an empirical and a normative idea built into this conception of human value. The empirical idea is that, unlike simple animals, we understand that our past gives shape to our present, and that our present gives shape to our future. Further, given our capacity for agency—which involves at least our powers of choice, memory, and imagination—we have the capacity to purposefully act in the present as a means of constructing a more valuable future and life as a whole. The normative idea is that our most important functionings rely upon this diachronic understanding and capacity. Again, we can develop our personalities. We can build romantic partnerships. We can raise children. We can maintain long-term friendships. We can learn complex skills, trades, arts, and hobbies. On this normative view, such “temporal goods” represent our most significant and meaningful achievements. And, unlike eating ice-cream cones, we can realize them only incrementally and progressively over time.

5. *Death and Diachronic Value*

Let us take stock. As a means of assessing the supposed “differentness” of the death penalty, we are assessing the harmfulness of the punishment, more particularly, the “objective” harm of dying at age forty. Again, at this stage, we are ignoring any “agential” harm associated with the fact that the death in question results from state action, rather than natural causes. We began the analysis by observing, *contra* Epicurus, that the objective harm of death is counterfactual, in the sense that the decedent probably would have realized more value if they had not died and thus had several decades more of life. The next step was to examine the nature of human value, as a means of understanding how losing many years of life might result in a person realizing less value than they would have otherwise. Following an array of thinkers, I argued that human value is temporal and progressive, such that people realize

value diachronically in the context of their life-as-a-whole. We can now incorporate this finding into our analysis of the objective harm of death of forty, relying in part on Jeff McMahan's thoughtful work on the ethics of killing.¹⁷⁵

While much of McMahan's discussion concerns the abortion debate and the interests that a fetus might or might not have in life beyond the womb, we can employ other aspects of his analysis for the question of how death at forty impacts one's life as a diachronic whole. For instance, he writes that sometimes the decedent's "future life could reasonably have been expected to bring the story of his life to a satisfying state of completion."¹⁷⁶ The idea is that the person was in the process of realizing certain temporal goods, which were meant to unfold into future years to be developed in full. They were in the middle of achieving certain *ongoing* long-term projects—perhaps a marriage—which their early death renders in some sense unfinished. Along these lines, Steven Luper writes: "By adopting a rational life plan and refining it to maturity, we shape our own interests; we *make* it the case that fulfilling the final aims embedded in our plan is, objectively, intrinsically good for us, and that failing is intrinsically bad for us."¹⁷⁷ Death can be bad for us, in part, because it precludes the realization of such "final aims."

Second, and closely related, McMahan writes that "death may prevent a person from fulfilling projects or ambitions in which she has invested considerable time and effort."¹⁷⁸ If the former category relates to temporal goods that someone was in the process of realizing, but which were meant to develop over longer periods of time, this second category of loss relates especially to temporal goods that remained in the development stage. Imagine that the person who dies had for years prepared for some specialized career in which they never get to practice, or that they were toiling for years on some artistic project that remained in unusable draft form. By losing the future years that were required to complete such endeavors, the prior exertions and investments are rendered, to some degree, futile.¹⁷⁹

Finally, death can be damaging from a narrative perspective when the decedent has "so far gained relatively little from

¹⁷⁵ See generally McMAHAN, *supra* note 13.

¹⁷⁶ *Id.* at 184.

¹⁷⁷ LUPER, *supra* note 118, at 96.

¹⁷⁸ McMAHAN, *supra* note 13, at 176–77.

¹⁷⁹ See *id.*

life,” as McMahan writes.¹⁸⁰ If one’s life story has been marked by frustration and failure, then their death is especially harmful given that they are denied the opportunity to turn their life around, as it were. While one never knows what might have happened, the loss of that opportunity is tragic when viewing the person as someone on a “quest” to build a good life as a whole, to use MacIntyre’s phrase.¹⁸¹ Thus, if there’s narrative harm to a “good” life that remains unfinished, there is also narrative harm to a “bad” life that remains unrepaired. In these general ways, then, death at forty can radically interfere with one’s life as a whole. Death at forty means that one’s life will remain to some awful extent incomplete, without the fruition or redemption that the future years may have had in store.

We can further appreciate the diachronic harm of death, and especially of an early death, by comparing the death of a person with that of an animal. For instance, David Velleman argues that a cow’s life considered as a holistic achievement doubtfully matters, given that, *as far as we know*, the cow “cannot conceive of itself as a persisting individual and consequently cannot conceive of itself as enjoying different benefits at different moments during its life.”¹⁸² He argues that if a subject lacks “the bare capacity” or “the equipment” to care about something, then that thing—in this case, the cow’s life as a narrative or diachronic process—cannot be intrinsically good for the subject.¹⁸³ If this works, it may begin to explain the moral difference between killing a person and a cow (or a simpler animal yet, such as a trout). When you kill a person, you not only deprive her of access to future pleasurable or otherwise valuable standalone moments, as you would with the cow; you have also interfered with and may indeed have ruined the project of her “life,” which is for her (but not for the cow) a conscious process and endeavor.

B. Being Killed

Following the above discussion, we can appreciate the immensity of the “objective” harm of the death penalty. By taking away decades of reasonably expected living, the death penalty radically intrudes upon the decedent’s pursuit of a good life as

¹⁸⁰ *Id.* at 184.

¹⁸¹ MACINTYRE, *supra* note 138, at 219.

¹⁸² Velleman, *supra* note 174, at 169–70; *see also* McMAHAN, *supra* note 13, at 197.

¹⁸³ Velleman, *supra* note 174, at 170.

a whole, either in the sense of frustrating their long-term plans and ambitions, or by forestalling any possibility of redemption. While we could say the same about an early death caused by natural disease, death by capital punishment is a different and seemingly worse outcome, all else equal. For to suffer the death penalty is not merely to die. It also to be killed. Thus, beyond the “objective” harm of death, capital punishment also entails a degree of “agential” harm, which is generated by the fact that another agent or group of agents has willed one’s death. There are at least two forms of agential harm in the death penalty context, one related to autonomy and the other to degradation.

1. *Autonomy*

The autonomy point can be made succinctly by applying a very basic conception of the ideal. Consider John Christman’s definition:

Put most simply, to be autonomous is to govern oneself, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one’s authentic self. Autonomy in this sense seems an irrefutable value, especially since its opposite—being guided by forces external to the self and which one cannot authentically embrace—seems to mark the height of oppression.¹⁸⁴

To be sure, the precise conditions of autonomy and the nature of one’s “authentic self” remain controversial, as does the idea that it is always valuable for people to live autonomously.¹⁸⁵ Nonetheless, we need not delve deeply into those debates to make the unprovocative point that the death penalty seriously damages one’s autonomy. To die at the hands of the state is to have one’s life determined by “by forces external to the self” to some extraordinary degree. While death by natural causes also means that one’s life has been determined by external forces, autonomy is largely an intersubjective achievement, meaning that its realization is usually associated with avoiding the unwanted interferences of *other people* (and, conversely, by maintaining the relationships with other people that one desires).¹⁸⁶ We can appreciate this by reflecting on the

¹⁸⁴ John Christman, *Autonomy in Moral and Political Philosophy*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Fall 2020 ed.), [https://plato.stanford.edu/entries/autonomy-moral/\[https://perma.cc/KFQ2-P9WG\]](https://plato.stanford.edu/entries/autonomy-moral/[https://perma.cc/KFQ2-P9WG]).

¹⁸⁵ *Id.*

¹⁸⁶ See generally MARINA OSHANA, *PERSONAL AUTONOMY IN SOCIETY* (2006).

concept of “oppression.” If oppression is the opposite of autonomy, as Christman indicates, only people can oppress other people. Cancer can kill but it cannot oppress (at least not beyond metaphor). In this way, death at forty via capital punishment infringes upon one’s autonomy in a way that death at forty via cancer does not, with the decisions of other agents marking one’s life to a tremendous degree.

One might object that the choice to offend, when coupled with an awareness that punishment will follow if one is caught, means that one has consented to their own punishment, at least implicitly, such that the punishment reflects rather than impedes their autonomy. There is probably *something* to this idea (which received its most famous defense from Hegel).¹⁸⁷ Autonomy is surely on a spectrum, and the choice to offend means that one’s punishment, *to some degree*, originates in themselves rather than external forces. For instance, the autonomy intrusion inherent to criminal punishment would be even more serious if it turned out that the individual was wrongfully convicted. Nonetheless, we should not take the consent-via-offense idea overly seriously, assuming the individual has not literally chosen to receive punishment (let alone death).¹⁸⁸

2. Degradation

Second, to die because another agent wills it entails an element of expressive harm and degradation. Jeffrie Murphy writes:

One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages*—symbolic communications. They are ways . . . of saying to us, “I count but you do not,” “I can use you for my purposes,” or “I am here up high and you are there down below.” Intentional wrongdoing *insults* us and attempts (sometimes successfully) to *degrade* us—and thus it involves a kind of injury that is

¹⁸⁷ For a contemporary defense of Hegel’s theory, see generally ALAN BRUDNER, PUNISHMENT AND FREEDOM (2009); see also C.S. Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFFS. 289 (1983).

¹⁸⁸ For criticism of consent-via-offense arguments, see ALAN NORRIE, LAW, IDEOLOGY, AND PUNISHMENT 62 (1991); JEFFRIE G. MURPHY, *Kant’s Theory of Criminal Punishment*, in RETRIBUTION, JUSTICE, AND THERAPY 82, 84–90 (Wilfrid Sellars & Keith Lehrer eds., 1979); Alice Ristroph, *When Freedom Isn’t Free*, 14 NEW CRIM. L. REV. 468, 473–74 (2011); T.M. Scanlon Jr., *The Significance of Choice*, 8 TANNER LECTURES ON HUM. VALUES 194, 195–97 (1988).

not merely tangible and sensible. It is moral injury, and we care about such injuries.¹⁸⁹

Capital punishment is surely such a “moral” injury, communicating rather straightforwardly that the rest of us are “here up high” while the individual killed for their wrongdoing is “there down below.” Indeed, for defenders of the death penalty, such degradation may be the very point.¹⁹⁰ In any event, beyond the objective harm of death, capital punishment thus entails a symbolic rejection by society—or at least by “the law” and society’s legal representatives—of one’s basic worth and standing.¹⁹¹ Such degradation qualifies as “premortem” harm, given that conscious awareness of one’s own degradation requires one to be alive. But the harm might register more broadly, insofar as the punishment’s message affects one’s posthumous memory and reputation, which may in turn impact one’s life as a whole (at least on the more ambitious Aristotelean conception of the good life outlined above). By comparison, none of these expressive considerations apply to death via disease. It is not as if cancer embodies the judgment of the community.

The expressive degradation of capital punishment is so clear because it is written on the person’s body. It is not a purely symbolic means of communicating disrespect, like using language to communicate one’s view that another is unworthy in some sense (e.g., “You’re a liar!”). Non-symbolic forms of disrespect, which involve real interferences with the way in which someone exhibits or realizes value, are generally more compelling, as Joseph Raz has argued.¹⁹² For instance, Michael Rosen—who denies that all rights violations are a symbolic matter of “dignity”—must be correct when he writes that “the worst of what the Nazi state did to the Jews was not the humiliation of herding them into cattle trucks and forcing them

¹⁸⁹ Murphy, *supra* note 17, at 25; see also Jean Hampton, *Forgiveness, Resentment, and Hatred*, in FORGIVENESS AND MERCY, *supra* note 17, at 35, 43–44.

¹⁹⁰ See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686–87 (1992) (while not defending the death penalty, providing a theory of punishment centered on expressive devaluation of a wrongdoer as a means of restoring their victim’s value).

¹⁹¹ See Kleinfeld, *supra* note 16, at 1509 (“Law has a special place in upholding the social fact of our worth; it is in a unique position to express and uphold our sociological dignity.”).

¹⁹² JOSEPH RAZ, VALUE, RESPECT, AND ATTACHMENT 167 (2001); see also Bronshter, *supra* note 172, at 462–64.

to live in conditions of unimaginable squalor; it was to murder them.”¹⁹³

But there is nonetheless a connection between the symbolic and the physical, between a willingness to profoundly humiliate and a willingness to murder. Often, symbolic and non-symbolic forms of disrespect are interwoven. For instance, to herd people into any truck against their will is a non-symbolic form of disrespect, insofar as it represents a physical interference with their ability to realize value. However, using a cattle truck adds a symbolic component, implying with cultural cues that they are equivalent to animals.¹⁹⁴ Regardless, both forms of disrespect—the symbolic humiliation and the non-symbolic murder—derive from the same denial of the victims’ value. Both are forms of expression, even if murder is the more emphatic statement. Thus, given the complete degree to which death physically hinders one’s capacity to realize value, capital punishment is an unequivocal means of communication (even if there are means of execution that are yet more degrading than others for purely symbolic reasons). No matter its method, the death penalty “says” in plain terms to the person killed that they are “there down below,” that they and their “life” in diachronic sense do not matter. And it says this by way of act that makes it physically impossible for them to ever come back up.

III

THE HARM OF PRISON

When conceiving of the death penalty in this way—as an objective and expressive rejection of one’s status as a life-builder—we can begin to appreciate how prison is not so different, especially but not only when considering decades-long sentences. Now, the death penalty is almost always worse. But if I am right that the *worst part* of the death penalty is the injury to one’s life narrative, then many prison sentences belong in the same category of punishment, namely: *punishments that treat someone as if their capacity to build a good life through*

¹⁹³ Michael Rosen, *Dignity Past and Present*, in JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 79, 97 (Meir Dan-Cohen ed., 2012).

¹⁹⁴ See John Vorhaus, *On Degradation Part Two: Degrading Treatment and Punishment*, 32 COMMON L. WORLD REV. 65, 79 (2003) (“Doubtless treatment that represents a threat to dignity often does so partly by virtue of what it causes to happen, but, however we choose to describe the nature of the threat, it is important not to lose sight of the many ways in which dignity is impinged upon by the symbolic nature of much ill-treatment.”).

*time no longer exists or matters.*¹⁹⁵ For short, we can refer to such punishments as *life-ruining punishments*.

Whether a punishment is “life-ruining,” on my definition, is a matter of *ex ante* respect for one’s life-building capacity rather than *ex post* harm. For instance, imagine that, unbeknownst to anyone else, a person on death row has an incurable and debilitating disease.¹⁹⁶ In that case, the death penalty would *in some respects* be good for their life as a whole, insofar as it represents a form of euthanasia that mitigated the damage to their life narrative caused by a painful and undignified “final chapter.”¹⁹⁷ Nonetheless, their execution would still evince a profoundly disrespectful attitude toward their life-building capacity, given that its pain-relieving function is not a motivating reason for its administrators and—if they knew about it—would likely even be a source of regret.¹⁹⁸

“Life-denying” is perhaps a more precise term, then, but “life-ruining” clarifies the stakes. The point is that a punishment can be “life-ruining” without *necessarily* destroying one’s life project, just like a gunshot can be “lethal” or “deadly” given its potential to cause death. For instance, imagine that the only legal method of execution (say, a painless poison) provided people with some small chance of survival (say, five percent of people had a natural immunity). That would not significantly change the meaning or permissibility of a capital sentence.¹⁹⁹ Along these lines, and especially in the prison context, the relevant life-denying attitude can be expressed through punishments that *severely risk* ruining one’s life as a whole—akin to the *mens rea* of gross recklessness or, in the murder context, “depraved heart.”²⁰⁰ To be sure, the analysis is less focused on how a sentence might interfere with one’s *current* life project, with its very particular players and plans, than on how it might

¹⁹⁵ See Bronsther, *supra* note 169, at 2384 (“Punishment is impermissibly degrading when it denies an offender’s standing as a human; and punishment denies an offender’s standing as a human when it rejects the presence or worth of his capacity for practical reason . . .”).

¹⁹⁶ See *supra* note 106 (discussing the case of Alva Campbell, who was terminally ill while on death row).

¹⁹⁷ See DWORKIN, *supra* note 162, at 199.

¹⁹⁸ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–32 (2000) (arguing that state intentionality matters for courts when assessing the message expressed by harmful state action).

¹⁹⁹ Thanks to Erin Miller for helpful discussion on this hypothetical.

²⁰⁰ See *supra* note 19.

interfere with one's ability to lead a good human life of any sort more generally.

This Part will outline three types of prison harms which tend to negatively impact one's life as a whole. First, there is "associational harm" related to the fact that even the mildest prison facility will constrain one's ability to associate with other people in society. This limitation, in turn, restricts one's ability to realize the many temporal goods which are associational in nature. Second is "physical harm," and third is "psychological harm." The combined impact of these three forces reveals that, in many cases, prison belongs in the same category of injury as the death penalty or, put differently, that a choice to impose either type of punishment reflects a substantially similar attitude toward the value of the individual's life in the narrative sense. This conclusion is yet easier to reach when we consider the impact of collateral consequences upon release from prison.

A prison sentence need not be life without parole to reach the "life-ruining" threshold. Scholars and activists have established the very important point that life without parole—*prison until you die*—is like a "slow" death penalty.²⁰¹ The Court itself has recognized this argument in the narrow context of life without parole for juveniles.²⁰² My argument, however, is broader, and concerns how even *nonfatal* punishments (nonfatal in the sense that the punishment ends before the subject dies) can be like fatal punishments in terms of the degree to which they

²⁰¹ See generally *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); CHRISTOPHER SEEDS, *DEATH BY PRISON: THE EMERGENCE OF LIFE WITHOUT PAROLE AND PERPETUAL CONFINEMENT* (2022); Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315 (2021); Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 VA. L. REV. 1123, 1146 (2018) ("The almost grotesque inhumanity of long-term solitary confinement may not be better than death, and life without parole may entail equally inhumane conditions in order to prevent prisoner violence."); see also Yvonne Jewkes, *Loss, Liminality and the Life Sentence: Managing Identity Through a Disrupted Lifecourse*, in *THE EFFECTS OF IMPRISONMENT* 366, 367 (Alison Liebling & Shadd Maruna eds., 2005) (recognizing similarities between people sentenced to indeterminate life sentences and people facing incurable illnesses, and arguing that both groups exist in "liminal" social spaces, and that, paradoxically, both situations offer special opportunities for expression of autonomy and humanity).

²⁰² See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (applying the standard of review previously reserved for the death penalty to hold that juveniles cannot be sentenced to life without parole for nonhomicide offenses); *id.* at 69 ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences."); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that mandatory sentences of life without parole are unconstitutional for juveniles).

respect one's status as a life-builder. That is, a punishment can destroy one's "life" in the diachronic or narrative sense without necessarily destroying their "life" in the biological sense. For a simple example, consider a Sleeping Beauty punishment where someone is injected with a chemical that forces them into a coma for thirty years; otherwise, they would be perfectly healthy, and they would be released when upon awaking.

A. Associational Harm

What is the punishment of imprisonment? What is the deprivation or set of deprivations that unite the many varieties of prisons, such that each inflicts a punishment within the same linguistic or sociological category? The array of deprivations inherent to a given carceral institution will always be a matter of creative list making, as one is limited in their ability to start a business, to take a shower in full privacy, visit their grandmother, see a movie in a theater, etc. Some of these deprivations will be complete—like, say, the ability to visit a theme park—while others will be a matter of degree—like, say, the ability to eat good food. As I have argued previously, however, one deprivation is essential to a term of incarceration, meaning that, as a linguistic or sociological matter, it must be included on all such lists. This is the denial of the "freedom of general association."²⁰³ The various institutions that qualify as "prison" are united in their remove from the broader society. Whatever else they do, prisons quarantine—severely depriving people of access to a great percentage of others in society.

Beyond the many people one knows already—spouses and romantic partners, parents and children, old friends, cousins, coworkers, party members, etc.—prison also limits one's ability to interact with strangers. Consider all the *new people* that we meet in modern society: on the street, in the store or coffee shop, in a work setting, friends-of-friends, and so forth. The opportunity to mix with them is enormously valuable, mostly as a source of future partnerships—*new* friends or colleagues or interlocutors or group members or lovers—but also for the fellowship and sometimes entertainment that comes with everyday interactions.²⁰⁴

²⁰³ Bronsther, *supra* note 169, at 2400.

²⁰⁴ There is concerted engagement in the sociological literature regarding chance interactions with the unfamiliar in society, including encounters between strangers. See generally LYN H. LOFLAND, *A WORLD OF STRANGERS: ORDER AND ACTION IN URBAN PUBLIC SPACE* (1973); ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF*

The degree to which prisons will deprive people of the freedom of association will nonetheless vary, with the variables being how much access one has to other incarcerated people, guards, visitors, and non-visitors. Access to non-visitors would involve internet communication, letters, phone calls,²⁰⁵ and possibly forms of temporary release.²⁰⁶ Video calls are a promising opportunity in this vein (assuming that they are affordable and not meant to replace in-person contact).²⁰⁷ Further, as revealed by prison ethnographies, prisons contain complex internal societies and cultures.²⁰⁸ Unless one is living in solitary confinement, they will certainly interact with other

THE PUBLIC ORDER (1971); GEORG SIMMEL, *The Stranger*, in *ON INDIVIDUALITY AND SOCIAL FORMS* 143 (Donald N. Levine ed., 1971); Patricia Simões Aelbrecht, 'Fourth Places': *The Contemporary Public Settings for Informal Social Interaction Among Strangers*, 21 J. URB. DESIGN 124 (2016). In addition to preexisting and new forms of "personal" association, prison also limits one's ability to engage in "political" forms of association, like party organizations and political debates. See Peter Ramsay, *A Democratic Theory of Imprisonment*, in *DEMOCRATIC THEORY AND MASS INCARCERATION* 84, 91 (Albert W. Dzur, Ian Loader & Richard Sparks eds., 2016); Peter Ramsay, *Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy*, 16 CRITICAL REV. INT'L SOC. & POL. PHIL. 421, 425 (2013).

²⁰⁵ Many U.S. prisons charge extortionate rates for phone calls, sometimes more than one dollar per minute. See *Global Tel*Link v. FCC*, 866 F.3d 397, 404 (D.C. Cir. 2017).

²⁰⁶ See generally Alison Liebling, *Temporary Release: Getting Embroiled with Prisons*, 28 HOW. J. CRIME & JUST. 51 (1989) (arguing for the wider use of temporary release).

²⁰⁷ Bernadette Raboy & Peter Wagner, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prison and Jails*, PRISON POLICY INITIATIVE (Jan. 2015), <https://www.prisonpolicy.org/visitation/report.html> [<https://perma.cc/SU7U-3LWM>] (discussing the promise and pitfalls of visitation via video call). Were we to reach the stage where "online" society provided the immediacy, depth, and opportunities for advantage of the present-day "real world" society—and were prisoners afforded generally unmitigated and unmonitored access to such a society—then that would dramatically alter our conclusions regarding the injury of prison. Thanks to Nicola Lacey and Guha Krishnamurthi for helpful discussion on this point.

²⁰⁸ See, e.g., DONALD CLEMMER, *THE PRISON COMMUNITY* (1940) (theorizing the process by which individuals are socialized into inmate values); GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* (1958) (examining the system of values and norms that guide prisoner behavior and define typical social roles across diverse prison populations); Gresham M. Sykes & Sheldon L. Messinger, *The Inmate Social System*, in *THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON* 5 (1960) (theorizing prison culture as a collective means of coping with the deprivations of prison); John Irwin & Donald R. Cressey, *Thieves, Convicts and the Inmate Culture*, 10 SOC. PROBS. 142 (1962) (arguing that inmate society is formed through the importation of "external" subcultures); JOEL HARVEY, *YOUNG MEN IN PRISON: SURVIVING AND ADAPTING TO LIFE INSIDE* (2007); BEN CREWE, *THE PRISONER SOCIETY: POWER, ADAPTATION AND SOCIAL LIFE IN AN ENGLISH PRISON* (2009); REBECCA TRAMMELL, *ENFORCING THE CONVICT CODE* (2012); DAVID SKARBK, *THE SOCIAL ORDER OF THE UNDERWORLD: HOW PRISON GANGS GOVERN THE AMERICAN PENAL SYSTEM* (2014).

incarcerated people, people who become familiar over time—perhaps as partners in coping and survival or as simple friends²⁰⁹—and “new people” as well. But the environment is much less welcoming to meaningful and healthy forms of collaboration by comparison to life in free society, as Sharon Dolovich and others have demonstrated.²¹⁰

This bare minimum of associational deprivation can wreak havoc on one’s diachronic existence. The reason is that most “temporal” goods—which, as I have argued, are so central to a good human life as a whole—are also *associational* goods. We can realize these valuable forms of functioning only by associating with other people over time. Some temporal goods, like a marriage, are *intrinsically* associational, meaning that they just are long-term forms of association. Others, like developing a form of expertise, are *instrumentally* associational, such that associating with others is the means of realizing the good. Amy Gutmann argues, along these lines, that human association is central to human flourishing, enabling people “to create and maintain intimate relationships of love and friendship, which are valuable for their own sake,” she writes, “as well as for the pleasures that they offer.”²¹¹ She continues that association “is increasingly essential as a means of engaging in” an array of what I would call temporal achievements and processes, such as “charity, commerce, industry, education, health care, residential life, religious practice, professional life, music and art, and recreation and sports.”²¹² Meanwhile, Nussbaum writes that of her list of ten “central human capabilities,” which are constitutive of “fully human” living, the capability of *affiliation* (in addition to *practical reason*) stands out as being of “special importance,” since it “organize[s] and suffuse[s] all the others.”²¹³ She writes:

²⁰⁹ See generally Timbre Wulf-Ludden, *Interpersonal Relationships Among Inmates and Prison Violence*, 36 J. CRIME & JUST. 116 (2013).

²¹⁰ See Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 1002–07 (2012) (arguing that general population units in the L.A. County Jail have an inmate culture that requires “hypermasculine” posturing, which in turn suppresses qualities associated with “femininity,” such as emotional expression, sensitivity, and kindness); John Wooldredge, *Prison Culture, Management, and In-Prison Violence*, 3 ANN. REV. CRIMINOLOGY 165, 171 (2000) (collecting studies demonstrating the decline of a uniform “convict code” which applied to all groups in prison and the concomitant rise in the 1970s of violent prison gang cultures).

²¹¹ Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3, 3–4 (Amy Gutmann ed., 1998).

²¹² *Id.* at 4.

²¹³ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 70, 74, 82 (2000).

"To plan for one's own life without being able to do so in complex forms of discourse, concern, and reciprocity with other human beings is . . . to behave in an incompletely human way."²¹⁴ Kimberley Brownlee concludes that people have a positive human right to "minimally adequate access to decent human contact and connection,"²¹⁵ and she recognizes that institutions separated from the public—such as prisons, hospitals, and immigration centers—especially imperil such a right.²¹⁶

In sum, given the limitation on the freedom of association inherent to any prison term *and* the fact that most temporal goods are associational, we can understand how, say, twenty years of incarceration in even the mildest prison makes it profoundly more difficult to realize a wide array of the most important temporal goods: maintaining a family, a marriage, a home, and long-term friendships; developing a profession; participating meaningfully in a political movement; and so forth.²¹⁷ Given how central such temporal goods are to realizing one's life project, we can conclude that long-term incarceration in even the mildest facility represents a severe risk of ruining one's life as a whole.

Again, the argument is not that it is impossible for the long-term incarcerated to realize their autonomy and construct a good life. Everyone's life in prison has meaning. And many people have found a way to flourish during or after very long sentences. But it is exceedingly hard to be one of these people. Their stories are sometimes so amazing that they read like heroic fiction.²¹⁸ And that is the point. That is, just in virtue of the associational harm of prison, incarcerating someone for many years forces them to confront enormous obstacles to human wellbeing, severely limiting their ability to craft the

²¹⁴ *Id.* at 82. On the idea that having the capability of forming meaningful and enjoyable relationships is a fundamental requirement of justice, see MARTHA C. NUSSBAUM, *CREATING CAPABILITIES* 148 (2011); JONATHAN WOLFF & AVNER DE-SHALIT, *DISADVANTAGE* 159 (2007).

²¹⁵ KIMBERLEY BROWNLEE, *BEING SURE OF EACH OTHER: AN ESSAY ON SOCIAL RIGHTS AND FREEDOMS* 1 (2020).

²¹⁶ *Id.* at 172.

²¹⁷ Unsurprisingly, sociological research indicates that a term of imprisonment is associated with a host of negative personal and economic outcomes. See Bruce Western, *Inside the Box: Safety, Health, and Isolation in Prison*, 35 J. ECON. PERSPS. 97, 98 (2021) (collecting studies).

²¹⁸ See, e.g., Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650 (2019); SHAKA SENGHOR, *WRITING MY WRONGS: LIFE, DEATH, AND REDEMPTION IN AN AMERICAN PRISON* (2013); CHRISTIAN L. BOLDEN, *OUT OF THE RED: MY LIFE OF GANGS, PRISON, AND REDEMPTION* (2020); CHRIS WILSON, *THE MASTER PLAN: MY JOURNEY FROM LIFE IN PRISON TO A LIFE OF PURPOSE* (2019); ANTHONY RAY HINTON, *THE SUN DOES SHINE: HOW I FOUND LIFE AND FREEDOM ON DEATH ROW* (2018); DAMIEN ECHOLS, *LIFE AFTER DEATH* (2012).

associational long-term projects that represent the foundation of a self-determined and valuable life as a whole. Put differently, whether or not it is feasible to have a good day or month or even year in prison, it is extraordinarily difficult and rare to have a good decade or two in prison, with goodness defined by the person themselves within the very broad objective constraints discussed above.²¹⁹ Such a sentence is therefore utterly disrespectful of one's life-building capacity.²²⁰ As suggested above, we can conclude at a minimum that such sentences are *grossly reckless* with respect to ruining one's life, akin to the "depraved heart" *mens rea* for murder.

These considerations do not result in a mathematical formula that can pop out a specific number of years. There will be a vague middle ground between those sentences that are grossly reckless toward destroying one's life as a whole—evincing a "depraved heart" toward one's life-building capacity—and those that are not. We can conclude simply that the longer the sentence, the greater the relevance of these concerns. Beyond the number of years, it might also matter *which* years are spent behind bars.²²¹ For instance, spending one's early adulthood—say, one's twenties—in prison may be especially damaging to one's life in the narrative sense, given that, at least in our culture, such years are crucial for developing the relationships and skills that are meant to structure future decades.²²²

Even if the *how long?* question might admit a precise answer, it seems that, following Jeremy Waldron, we ought not seek one out—keeping far away from the "life-ruining" threshold. Waldron argues that we should give wide berth to vague but prohibited realms like "domestic violence" and "torture," not trying to get as close to the "line" as possible.²²³ Thus, just

²¹⁹ Thanks to Carol Steiker for helpful discussion on this point.

²²⁰ Patricia Williams' concept of "spirit-murder" registers in this context. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

²²¹ Thanks to Irene Oritseweyinmi Joe for helpful discussion on this point.

²²² See Amanda Klonsky, *The Right to Be Young: Entering Adulthood in American Jails* 39 (2018) (Ed.L.D. dissertation, Harvard University) ("For youth of color, to be jailed or to receive adult charges in the period of emerging adulthood can have life-ruining consequences."); Conor Murray, *'Can't Hack the Whack': Exploring Young Men's Gendered Discourses on Time in Prison*, 21 CRIMINOLOGY & CRIM. JUST. 705, 705–06 (2021) (providing an ethnographic study of men aged 18–24 serving prison terms); cf. *Graham v. Florida*, 560 U.S. 48, 70 (2010) ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005))).

²²³ Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1701 (2005).

as in our wartime interrogations we should not be anywhere close to “torture,” in our domestic punishments we should not be anywhere close to “life-ruining.” Waldron writes incisively: “*There are some scales one really should not be on*, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go.”²²⁴ Nonetheless, as I will discuss further in Part IV, the broader argument has critical implications even without Waldron’s important point. For there are sentences that I believe are *clearly* outside the zone of vagueness—as suggested above, twenty years in even the mildest prison—which would dramatically alter our sentencing code were they deemed equivalent to the death penalty as a matter of law and culture.

The associational harm of prison would be different if we were immortal, or if we had many centuries of reasonably expected life. But we have only a few decades to realize temporal goods en route to realizing our conception of the good life. As such, even twenty years in arguably the mildest prison on Earth—the Bastøy, the quiet Norwegian penal island where there are beaches, bicycles, and flocks of sheep²²⁵—would represent a severe risk of ruining one’s life project.²²⁶ Imagine being forced to farm day after day, month after month, year after year on a small, isolated island, living with about one hundred other people not of your choosing (people who are presumably socially maladjusted to some degree), sleeping alone in your little private room, with only a few hours each week with your gradually aging family, assuming they still go to the trouble of taking the ferry to the island to visit you as the years pass on. Presumably, you would be comfortable in the Bastøy during your twenty years, and you could thus realize certain *momentary* goods. But your ability to realize an array of *temporal* goods, like the functionings of *being a good parent* or *being a good spouse* or *providing a valuable service to others*, would be very limited. And when you return to society much older, without much of any professional experience, you will have to

²²⁴ *Id.*

²²⁵ See Erwin James, *The Norwegian Prison Where Inmates Are Treated Like People*, THE GUARDIAN (Feb. 25, 2013), <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people> [<https://perma.cc/45JF-UJZH>]; John D. Sutter, *Welcome to the World’s Nicest Prison*, CNN, <https://edition.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/index.html> [<https://perma.cc/2JT4-9UMX>] (last updated May 24, 2012).

²²⁶ See Sophie Angelis, *Limits to Prison Reform*, 13 U.C. IRVINE L. REV. 1, 3 (2022) (arguing that “there are limits to how humane any prison can be” and using Norwegian prisons as a test case).

“start over,” as it were.²²⁷ To be sure, decades in the Bastøy might mesh with the very rare person’s conception of the good life. But in the absence of any special knowledge that the defendant has such an unusual disposition, sentencing someone to twenty years in the Bastøy—like sentencing them to capital punishment—treats them as if their autonomous life project no longer matters.

This conclusion holds even if the individual in question was leading a desperate existence outside of prison, such that the prospect of them flourishing at any level was already remote. For there is an important difference between one’s life in the decades before prison and the decades during prison. Before prison, their life bore the mark of extreme governmental neglect, presumably. During prison, however, their life bears the mark of extreme governmental *intervention*. The state has positively imposed itself upon them, presenting huge official hurdles to their construction of a good life as a whole, and as such, the state bears special causal and moral responsibility for the ultimate state of their existence. In any event, that someone was leading a desperate existence before prison does not change the fact that decades in prison is not treatment appropriate for a life-builder. Being forced to live in the Bastøy for twenty years might be very respectful treatment for a farm animal—but not for a human being.

B. Physical Harm

Prison deprives people of more than the freedom of general association. It is not *just* a form of quarantine. While it depends significantly on the quality of the facility, prison often endangers one’s narrative life for the straightforward reason that it threatens their long-term physical and psychological health. Just as people need to be able to associate with others over time to realize a life project, they also need a reasonably well-functioning body and mind. Along these lines, Judith Resnik has uncovered an “anti-ruination” principle within Eighth Amendment case law requiring that “governments ought not aim to undermine a person’s physical and mental capacities,” especially in the prison conditions context.²²⁸ In this and the

²²⁷ See generally BRUCE WESTERN, *HOMeward: Life in the Year After Prison* (2018) (examining the tumultuous first year after release from state prison experienced by individuals in Massachusetts).

²²⁸ Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People’s “Ruin,”* 129 *YALE L.J.F.* 365, 369 (2020);

following subparts, I will outline several ways in which prison threatens to violate this principle by inflicting long-term physical and psychological harm.

Prison is dangerous, with much higher rates of physical assault, including sexual assault, than the general population.²²⁹ Estimates of sexual violence vary dramatically—from about one to twenty percent—depending on the facilities under study, reference period, and survey methodology (e.g., relying on official statistics versus self-reporting).²³⁰ For its part, the Department of Justice estimates that between 149,200 and 209,400 incidents of sexual victimization occur in prison and jails annually.²³¹ While young people in and outside of prison are more likely to be involved in violence, Bruce Western reports that even the *age-adjusted* rate of violence in prison is more than five times higher than in the wider community.²³² Though, in part because incarcerated people do not have access to firearms, the homicide rate is lower.²³³ Prison does, however, have significantly higher suicide rates.²³⁴

see also *id.* (“[G]overnments are not supposed to use their punishment powers to debilitate people . . .”).

²²⁹ See generally LEE H. BOWKER, PRISON VICTIMIZATION (1980); SYKES, *supra* note 208, at 76–78 (describing the loss of security as one of five “pains of imprisonment”); Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, 26 CRIME & JUST. 205 (1999); MARGARET NOONAN, U.S. DEP’T OF JUST. BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS, 2000–2007 (2010); Nancy Wolff, Cynthia L. Blitz, Jing Shi, Jane Siegel & Ronet Bachman, *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588 (2007).

²³⁰ Western, *supra* note 217, at 107; see also Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 383 (2000) (reporting a rate of coerced sexual activity of 210 per 1,000); Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman & Jane A. Siegel, *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 841 (2006) (reporting a rate of coerced sexual activity of 15 per 1,000 for males and 32 per 1,000 for females); Gerald G. Gaes & Andrew L. Goldberg, *Prison Rape: A Critical Review of the Literature* 32–33 (Nat’l Inst. Just., Working Paper, NCJ 213365, 2004) (analyzing studies and estimating a conservative “average” estimate of prison sexual assault at 1.9%); Peter L. Nacci & Thomas R. Kane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 FED. PROB. 31, 35 (1983) (reporting a rate of coerced sexual activity of 90 per 1,000).

²³¹ Sheryl Pimlott Kubiak, Hannah Brenner, Deborah Bybee, Rebecca Campbell & Gina Fedock, *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, 19 TRAUMA, VIOLENCE & ABUSE 94, 94 (2018).

²³² Western, *supra* note 217, at 107.

²³³ *Id.* at 106.

²³⁴ See Alison Liebling, *Prison Suicide and Prisoner Coping*, 26 CRIME & JUST. 283, 341 (1999) (“Fear, anxiety, loneliness, trauma, depression, injustice, powerlessness, violence, rejection, and uncertainty are part of the experience of prison[.]” in which “[s]uicide is perhaps its most dramatic outcome.”).

Beyond immediate threats of violence from other incarcerated people or guards, prison is also “bad for people’s health,” as Rabia Belt writes.²³⁵ Prisons are often overcrowded and unsanitary,²³⁶ which may explain why incarcerated people have higher rates of infectious diseases.²³⁷ Prison is also correlated with increased risk of hypertension, asthma, and arthritis;²³⁸ cardiovascular disease;²³⁹ respiratory health problems;²⁴⁰ nutrient deficiencies, with diets lacking in essential vitamins and minerals;²⁴¹ long-term sleep disorders;²⁴² chronic pain;²⁴³ infectious skin conditions;²⁴⁴ musculoskeletal problems;²⁴⁵ and traumatic injuries,²⁴⁶ among other conditions. The experience of solitary confinement presents its own set of long-term

²³⁵ Rabia Belt, *The Fat Prisoners’ Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785, 803 (2022).

²³⁶ See *Brown v. Plata*, 563 U.S. 493, 502 (2011) (upholding order to decrease California prison population on grounds that overcrowding is the primary cause of continuing violations of prisoners’ constitutional rights to adequate health care).

²³⁷ See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007); Jacques Baillargeon, Sandra A. Black, John Pulvino, & Kim Dunn, *The Disease Profile of Texas Prison Inmates*, 10 ANNALS OF EPIDEMIOLOGY 74, 74 (2000).

²³⁸ I.A. Binswanger, P.M. Krueger & J.F. Steiner, *Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the USA Compared with the General Population*, 63 J. EPIDEMIOLOGY & CMTY. HEALTH 912, 914 (2009).

²³⁹ *Id.* at 912.

²⁴⁰ See generally Emily A. Wang & Jeremy Green, *Incarceration as a Key Variable in Racial Disparities of Asthma Prevalence*, 10 BMC PUB. HEALTH art. 290 (2010).

²⁴¹ See AMY SMITH, NAT’L RSCH. COUNCIL, HEALTH AND INCARCERATION: A WORKSHOP SUMMARY 8 (2013).

²⁴² See generally Nia Sheppard & Lee Hogan, *Prevalence of Insomnia and Poor Sleep Quality in the Prison Population: A Systematic Review*, 31 J. SLEEP RSCH. 13677 (2022).

²⁴³ See generally Beth D. Darnall & Elizabeth Sazie, *Pain Characteristics and Pain Catastrophizing in Incarcerated Women with Chronic Pain*, 23 J. HEALTH CARE FOR THE POOR & UNDERSERVED 543 (2012); Brie A. Williams et al., *Pain Behind Bars: The Epidemiology of Pain in Older Jail Inmates in a County Jail*, 17 J. PALLIATIVE MED. 1336 (2014); Emily A. Wang et al., *Engaging Individuals Recently Released from Prison into Primary Care: A Randomized Trial*, 102 AM. J. PUB. HEALTH e22, e26 (2012).

²⁴⁴ See generally Kyle J. Popovich et al., *Frequent Methicillin-Resistant Staphylococcus aureus Introductions into an Inner-City Jail: Indications of Community Transmission Networks*, 71 CLINICAL INFECTIOUS DISEASES 323 (2020).

²⁴⁵ See generally Daniela Barreto Rocha, Daniela Sanchez, L. Christopher Grandizio, Hemil Hasmukh Maniar & Daniel Scott Horwitz, *Traumatic Orthopaedic Injuries in the Prison Population*, 4 J. AM. ACAD. ORTHOPAEDIC SURGEONS: GLOB. RSCH. & REVS. art. e20.00031 (2020); Baillargeon, Black, Pulvino & Dunn, *supra* note 237.

²⁴⁶ See SMITH, *supra* note 241, at 9.

physical risks.²⁴⁷ The increased stress of life behind bars can exacerbate pre-existing chronic health conditions.²⁴⁸ And prison healthcare can be substandard.²⁴⁹

Leaving prison presents its own dangers, too, as institutional structures are abruptly pulled away and people are forced to confront personal and health challenges in the face of onerous collateral consequences.²⁵⁰ Evelyn Patterson analyzed survival rates of people released on parole from 1989 to 1993 in New York State, following them through to 2003.²⁵¹ She discovered that every year of imprisonment increased the odds of death by 15.6%, meaning that *every year in prison takes two years off of someone's life expectancy*.²⁵² Five years in prison thus equated to "a loss of approximately 10 years in the expected life expectancy at age 30 years."²⁵³ With access to longitudinal panel data, Sebastian Daza, Alberto Palloni, and Jerret Jones concluded that having spent time in prison translates into a loss of between four and five years of life expectancy at age forty, whether as a result of increased mortality in or after prison.²⁵⁴

All that said, some research pushes in the other direction, indicating that prison may actually *increase* people's life expectancies, given how vulnerable disadvantaged people are *outside* of prison.²⁵⁵ For instance, a recent study using administrative

²⁴⁷ See generally Justin D. Strong, Keramet Reiter, Gabriela Gonzalez, Rebecca Tublitz & Dallas Augustine, *The Body in Isolation: The Physical Health Impacts of Incarceration in Solitary Confinement*, PLOS ONE (Oct. 9, 2020), <https://doi.org/10.1371/journal.pone.0238510> [<https://perma.cc/XBT3-XYGW>].

²⁴⁸ SMITH, *supra* note 241, at 8.

²⁴⁹ See Belt, *supra* note 235, at 803, 803 n.118 (collecting studies on health-care in prison).

²⁵⁰ See generally Ingrid Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157 (2007); Jakov Zlodre & Seena Fazel, *All-Cause and External Mortality in Released Prisoners: Systematic Review and Meta-Analysis*, 102 AM. J. PUB. HEALTH 67 (2012).

²⁵¹ Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 AM. J. PUB. HEALTH 523, 523 (2013).

²⁵² *Id.* at 526.

²⁵³ *Id.*

²⁵⁴ Sebastian Daza, Alberto Palloni & Jerret Jones, *The Consequences of Incarceration for Mortality in the United States*, 57 DEMOGRAPHY 577, 591 (2020); see also Christopher Wildeman, *Incarceration and Population Health in Wealthy Democracies*, 54 CRIMINOLOGY 360, 370 (2016) (comparing the increase in life expectancy within developed countries from 1981 to 2007, and concluding that the U.S. life expectancy as a whole would have been 1.5 years longer if not for mass incarceration).

²⁵⁵ See, e.g., Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 479 (2011).

data from Ohio between 1992 and 2017 found that the long-run survival of defendants who were sent to prison was significantly higher than *defendants who were charged but not incarcerated*—mainly as a result of lower rates of homicide, overdose, and suicide.²⁵⁶ Even if this line of research is confirmed, that people would have low life expectancies outside of prison does not mitigate the state's special responsibility for the challenges such people face as a result of being forced to live in institutions run by the state itself, as suggested above.²⁵⁷ It is no defense in criminal or tort law, for instance, that a victim would have been injured by someone else in the absence of the defendant's own intervention. Finally, it is important to keep the diversity of prisons in mind. Certain facilities, such as the Alabama Men's Prisons found to be unconstitutionally dangerous by the Department of Justice in a recent report—rife with horrific knife violence, rape, and extortion—are places of true peril.²⁵⁸

C. Psychological Harm

While prison houses many people with mental illness—approximately 20% of people in jails and 15% in state prisons²⁵⁹—it has also been found to positively cause and exacerbate mood disorders such as major depressive disorder and bipolar disorder.²⁶⁰ Predictably, overcrowding only worsens the psychological toll, being correlated with increased depression

²⁵⁶ Samuel Norris, Matthew Pecenco & Jeffrey Weaver, *The Effect of Incarceration on Mortality*, 106 REV. ECON. & STAT. 956 (2024).

²⁵⁷ See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“[The Constitution] requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’” (quoting *DeShaney v. Winnebago Cnty. Dep’t of Social Servs.*, 489 U.S. 189, 200 (1989))).

²⁵⁸ C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN (2020), https://www.justice.gov/d9/case-documents/attachments/2020/07/22/al_excessive_force_findings_final_to_gov_ivey_7.23.20_0.pdf [<https://perma.cc/4QHD-MJSX>].

²⁵⁹ OFF. OF RSCH. & PUB. AFFS., TREATMENT ADVOC. CTR., SERIOUS MENTAL ILLNESS (SMI) PREVALENCE IN JAILS AND PRISONS (2016), https://www.tac.org/reports_publications/serious-mental-illness-prevalence-in-jails-and-prisons/ [<https://perma.cc/8KFC-PHFB>].

²⁶⁰ See Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> [<https://perma.cc/HL4Y-LHBL>] (collecting studies).

and hostility,²⁶¹ and suicide.²⁶² The lack of control over one's day-to-day activities in any context has been associated with declining mental health,²⁶³ and feelings of aimlessness and boredom in prison have been linked to stress, anger, and frustration (and to substance abuse as a coping mechanism).²⁶⁴

Both the associational and physical harms of prison feed into its psychological aspects. As to the former, research indicates that, in general, social support and positive family relationships are correlated with psychological wellbeing.²⁶⁵ It is no surprise, then, that people imprisoned more than fifty miles from home were more likely to experience depression,²⁶⁶ and that most incarcerated mothers describe "an intense focus on feelings of distress, depression, or guilt" at being away from their children.²⁶⁷ As to the latter, being a victim of prison violence is significantly correlated with "aggressive and antisocial behavioral tendencies as well as emotional distress."²⁶⁸ Merely witnessing violence in prison can lead to long-lasting trauma, too.²⁶⁹

The psychological profile of prison is nonetheless complex, and there is evidence that people adapt to carceral life over time in terms of their reported happiness levels.²⁷⁰ If that were

²⁶¹ Timothy G. Edgemon & Jody Clay-Warner, *Inmate Mental Health and the Pains of Imprisonment*, 9 SOC'Y. & MENTAL HEALTH 33, 33 (2019).

²⁶² See Meredith P. Huey & Thomas L. McNulty, *Institutional Conditions and Prison Suicide: Conditional Effects of Deprivation and Overcrowding*, 85 PRISON J. 490, 490 (2005).

²⁶³ Gary W. Evans, *The Built Environment and Mental Health*, 80 J. URB. HEALTH: BULL. N.Y. ACAD. MED. 536, 544 (2003).

²⁶⁴ Jo Nurse, Paul Woodcock & Jim Ormsby, *Influence of Environmental Factors on Mental Health Within Prisons: Focus Group Study*, 327 BRIT. MED. J. 480 (2003).

²⁶⁵ See generally R. Jay Turner, *Social Support as a Contingency in Psychological Well-Being*, 22 J. HEALTH & SOC. BEHAV. 357 (1981).

²⁶⁶ Edgemon & Clay-Warner, *supra* note 261, at 33.

²⁶⁷ Julie Poehlmann, *Incarcerated Mothers' Contact with Children, Perceived Family Relationships, and Depressive Symptoms*, 19 J. FAM. PSYCH. 350, 353 (2005); see also Jewkes, *supra* note 201, at 368–70 (arguing that, due to internalized gender stereotypes, male prisoners on average feel more distressed at their lack of productive work, while female prisoners feel more distressed about disrupted family obligations); Christine H. Lindquist & Charles A. Lindquist, *Gender Differences in Distress: Mental Health Consequences of Environmental Stress Among Jail Inmates*, 15 BEHAV. SCI. & L. 503 (1997).

²⁶⁸ Paul Boxer, Keesha Middlemass & Tahlia Delorenzo, *Exposure to Violent Crime During Incarceration: Effects on Psychological Adjustment Following Release*, 36 CRIM. JUST. & BEHAV. 793, 793 (2009).

²⁶⁹ *Id.*

²⁷⁰ See generally John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1046–49 (2009).

universally true, that would mitigate the relevance of psychological harm but not of my wider argument. John Vorhaus writes succinctly:

Familiarity and adjusted expectations may go some way towards alleviating levels of fear, anguish and humiliation, but the degrading status of ill-treatment cannot be said to grow or diminish according to the extent to which prisoners successfully accommodate themselves to the brutality of the regime.²⁷¹

In any event, there is contrary research showing that long sentences cause lasting psychological damage. Researchers have even suggested that the trauma of prison life creates a discrete psychological syndrome: “Post-Incarceration Syndrome.”²⁷² A study of people released from prison after serving life terms—people who had served nineteen years on average, and who had been released 6.5 years on average before the first interview²⁷³—revealed that they suffered from a “specific cluster of mental health symptoms.”²⁷⁴ Symptoms included posttraumatic stress disorder;²⁷⁵ “institutionalized personality traits,” such as paranoia, distrust of others, difficulty maintaining relationships, and indecisiveness;²⁷⁶ “social-sensory disorientation,” including a very poor sense of direction and difficulty judging people’s intentions;²⁷⁷ and feelings of “alienation,” both from social settings and from one’s own life outside of prison, which many felt was temporary and vulnerable to being taken away.²⁷⁸

The mental harm of solitary confinement can be especially acute.²⁷⁹ Stuart Grassian evaluated over 200 people in solitary

²⁷¹ Vorhaus, *supra* note 194, at 69; see also R.A. Duff, *Punishment, Dignity and Degradation*, 25 OXFORD J. LEGAL STUD. 141, 150–51 (2005).

²⁷² See Marieke Liem & Maarten Kunst, *Is There a Recognizable Post-Incarceration Syndrome Among Released “Lifers”?*, 36 INT’L J.L. & PSYCHIATRY 333 (2013).

²⁷³ *Id.* at 334.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 335.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 336.

²⁷⁹ A recent study estimated that at least 122,840 people are locked each day in solitary confinement for twenty-two hours or more. SOLITARY WATCH, CALCULATING TORTURE 8 (2023), <https://solitarywatch.org/calculating-torture/> [https://perma.cc/EV5K-834M].

confinement.²⁸⁰ Among other symptoms, he found that more than half of the people “reported a progressive inability to tolerate ordinary stimuli,” like the clanking of a cell door; almost a third experienced auditory hallucinations, often in whispers and saying frightening things; over half experienced severe panic attacks; almost half reported the emergence of entirely unwelcome and uncontrollable revenge fantasies with regard to prison guards; and almost half reported paranoid and persecutory fears.²⁸¹ He concluded that solitary confinement causes a discrete syndrome with characteristic symptoms, one “strikingly unique” by comparison to other psychiatric illnesses.²⁸²

D. Being Incarcerated

In sum, the physical and psychological harms of prison represent independent threats to one’s diachronic existence, risking long-term, debilitating trauma of various kinds. When combined with the inherent associational deprivation of prison, these harms further enable the conclusion that long prison terms severely risk ruining one’s life as whole, and thus reside in the same category of injury as the death penalty. Both forms of punishment gravely impact one’s “life” in the narrative sense, even if they generate that life harm through very different means. The conclusion is stronger yet when we incorporate the collateral consequences of a prison term into the harm analysis, as suggested by Evelyn Patterson’s research on people’s life expectancy on parole.²⁸³

Finally, the “agential” harm of the death penalty, which results from the fact that the punishment entails not only a *death* but also a purposeful *killing*, would apply in the same general manner to life-ruining prison sentences. As argued above, the death penalty diminishes one’s autonomy and is degrading because the punishment interferes so aggressively into

²⁸⁰ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006).

²⁸¹ *Id.* at 335–36.

²⁸² *Id.* at 337.

²⁸³ On collateral consequences, see generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014); AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014); Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627 (2014); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

one's diachronic existence. It is the objective harmfulness of the punishment, *when combined with the state's intention to inflict the punishment*, that generates these additional "agential" aspects. Thus, given that life-ruining prison sentences entail the same general type of objective harm, and given the fact that the state inflicts the punishment intentionally, incarcerated people will also be diminished in these additional ways. Put differently, I argued above that being killed by the state has negative implications beyond dying by natural causes. We might imagine, in parallel, that being incarcerated by the state for twenty years impacts one's autonomy and dignity in ways that being "naturally" incarcerated for the same amount of time does not—say, because one's plane has crash-landed on a deserted island, and it takes twenty years to be rescued.

IV

IMPLICATIONS

This Part develops the policy implications of the conclusion that the death penalty is not qualitatively different than prison sentences that severely risk ruining one's life as a whole. The nature and extent of these implications depend, of course, on which sentences belong in this "life-ruining" category. I was hesitant above to suggest a specific length of time in part because of Waldron's admonition that we ought not be anywhere close to such prohibited realms, but also because sentence length is not the only variable, and shorter sentences might pass the threshold if the facility were especially threatening physically or psychologically (or if the collateral consequences upon release were especially debilitating). Further considerations include the degree of access to therapeutic and rehabilitative programming in prison as well as the legal possibility and actual likelihood of parole—all of which have fallen precipitously in recent decades.²⁸⁴ However, I did venture that twenty years in even the mildest, safest, cleanest prison would certainly be above the relevant threshold, with the implication

²⁸⁴ See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002); FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 *LAW & SOC'Y REV.* 33 (2011); Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL'Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [<https://perma.cc/44JU-D2WW>].

being that sentences that are to some degree shorter would qualify were the facility significantly worse.²⁸⁵

We can proceed with that very general framework in mind, but also with the understanding that people can reasonably disagree over where and how to draw the line, with some wanting to draw it higher and some lower. For instance, in the latter direction, one could reasonably ask whether *any* prison sentence represented a severe risk of ruining one's life, given how disruptive and dangerous the experience can be, and how much stigma is associated with being an "ex-con."²⁸⁶ I am very skeptical that the argument on its own goes *that far*, but it strikes me as at least a reasonable line of inquiry (one which, if it bears out, probably leads to prison abolition). Nonetheless, even a relatively circumspect interpretation of the argument has radical implications. We can appreciate this by asking the following question: What are the policy implications of the conclusion that, say, fifteen years in a maximum-security prison without the possibility of parole severely risks ruining one's life, and is therefore in the same moral category as the death penalty?

A. "Life" Defendants and the Eighth Amendment

The first implication is the collapse of the Court's death-is-different jurisprudence. Following Rachel Barkow and Vincent Chiao above, we explained that the death penalty's "irreversibility" cannot generate a qualitative distinction with prison sentences, given that both punishments risk inflicting permanent and noncompensable wrongs. That left us with the "severity" variable, which, as we have now argued at length, cannot generate such a distinction either, since both the death penalty and extreme prison sentences severely risk ruining one's life in the diachronic sense. The result is that the various procedural and substantive protections that the Court has applied to capital defendants ought to be extended to the wider class of defendants who are facing "life-ruining" sentences. Instead of "capital" defendants, we might call this broader group "life"

²⁸⁵ On the relevance of confinement conditions for determining a proportional sentence, see Lisa Kerr, *How the Prison Is a Black Box in Punishment Theory*, 69 U. TORONTO L.J. 85, 92-93 (2019); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 409-19 (2004); RICHARD L. LIPPKE, *RETHINKING IMPRISONMENT* 104-28 (2007).

²⁸⁶ See Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 566 (2018) (discussing the harm of being branded a "felon").

defendants, taking advantage of the ambiguity in the word “life” between its biological and diachronic meanings.

Thus, all “life” defendants ought to be granted the special bifurcated trial recommended by *Gregg* to ensure ordinal proportionality.²⁸⁷ If a state wants to impose “life-ruining” sentences, it is a constitutional imperative that the group of people facing such sentences are chosen fairly, without the impact of racial or class bias, or sheer randomness. The Court’s two-part cardinal proportionality test ought to apply to all “life” defendants, too. Crucially, that means that a defendant cannot face a life-ruining prison sentence for a nonhomicide offense,²⁸⁸ nor for felony murder when they did not intend to kill and are not otherwise a “major” participant whose actions evince “reckless indifference to human life.”²⁸⁹ Further, life-ruining sentences could not be applied for certain categories of defendants with diminished culpability: people who were under the age of eighteen at the time of their offense,²⁹⁰ the severely mentally handicapped,²⁹¹ and the insane.²⁹² Finally, *mandatory* life-ruining sentences would also be unconstitutional. All “life” defendants would be entitled to a sentencing hearing that welcomes “the character and record of the individual offender and the circumstances of the particular offense,”²⁹³ with “virtually no limits” in terms of what may be introduced as mitigating evidence.²⁹⁴

While *Graham* and *Miller* were limited to juvenile life without parole—holding that only homicide could warrant such a punishment²⁹⁵ and that it must never be mandatory²⁹⁶—the cases stand for the abstract idea that certain prison sentences can be deserving of the death penalty’s constitutional protections. Indeed, *Graham* suggested that juvenile life without parole warrants such scrutiny because, like the death penalty, “the sentence alters the offender’s life by a forfeiture that is irrevocable.”²⁹⁷ The argument presented here thus extends the

²⁸⁷ *Gregg v. Georgia*, 428 U.S. 153, 191 (1976) (plurality opinion).

²⁸⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

²⁸⁹ *Tison v. Arizona*, 481 U.S. 137, 138 (1987).

²⁹⁰ *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

²⁹¹ *Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002).

²⁹² *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

²⁹³ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

²⁹⁴ *Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

²⁹⁵ *Graham v. Florida*, 560 U.S. 48, 82 (2010).

²⁹⁶ *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

²⁹⁷ *Graham*, 560 U.S. at 69.

constitutional logic of *Graham* by clarifying the nature of such an injury to one's life project, and by explaining how sentences far beyond juvenile life without parole inflict such injuries and thus ought to be sheltered within the death penalty's Eighth Amendment.

B. Death and Decarceration

While these Eighth Amendment implications alone would have a profound impact on American criminal justice, this Article has implications beyond constitutional interpretation. The argument impacts how one conceives of morally legitimate sentencing more generally, irrespective of Constitutional constraints (which, even if the above logic is perfectly simple, may nonetheless vary from Court to Court). However, the extent of this second set of implications depends on one's view on the legitimacy of the death penalty.

Let us first consider those individuals and jurisdictions that believe that the death penalty is morally legitimate. Let us assume that these people accept the general thrust of my argument, understanding life-ruining prison sentences to belong in the same class of punishment as the death penalty. Even for this pro-death penalty group, the implications would be dramatically decarceral. The reason is that, presumably, they believe that the death penalty is morally permissible only in response to the most extreme and horrible offenses. In that case—regardless of what the Eighth Amendment might provide—this group would accept the moral permissibility of life-ruining sentences, *but only in response to those extreme offenses for which the death penalty would be a legitimate alternative*. That would thus radically limit the distribution of prison years even in death penalty jurisdictions, given that they currently dole out life-ruining sentences to huge numbers of people who have committed far less serious crimes.²⁹⁸

Meanwhile, the implications for those who believe that the death penalty is morally *impermissible* may depend to some degree on why they oppose the death penalty. There

²⁹⁸ That said, the argument that certain nonfatal but nonetheless "life-ruining" punishments belong in the same category as the death penalty supports a pro-death penalty argument coming from the other direction: namely, that certain nonfatal but nonetheless "life-ruining" offenses belong in the same category of injury as first-degree murder. Cf. *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (holding that the Eighth Amendment bars the imposition of the death penalty for all nonhomicide offenses, including the rape of a child). Thanks to Marah McCleod for suggesting this implication of the argument.

are *contingent* and *non-contingent* reasons to oppose the death penalty. Contingent reasons include *Furman*-style concerns about the fairness of the distribution in terms of who receives the death penalty, as well as concerns about the efficacy of the death penalty in terms of deterring future offenses.²⁹⁹ From this perspective, the death penalty *could* be justified were it distributed in a non-racist or non-random manner, or were it an efficient means of general deterrence. While such concerns about distribution and efficacy apply to *all* criminal sentences, the argument is that these concerns are *especially* worrisome in the death penalty context, given the punishment's extreme harmfulness and the availability of less harmful sentences. Following this logic, life-ruining prison sentences ought to be impermissible as well, given their similarly extreme harmfulness and the availability of less harmful sentences. For completeness, however, imagine the situation were different and these "contingent" concerns applied more acutely in the death penalty context; say, the death penalty but not life-ruining prison sentences were distributed in a manner that was so racist as to preclude its application on that ground alone. In that case, from a singularly "contingent" perspective, life-ruining sentences would then be permissible—but, again, only in the extremely narrow circumstances that the death penalty would be a permissible alternative were it distributed fairly.

Non-contingent reasons to oppose the death penalty have a different structure. They foreclose the death penalty regardless of how fairly it might be distributed and, more broadly, regardless of what the traditional justifications of punishment might have to say about its infliction. The idea is something like this: *Even if* retributive proportionality demands capital punishment, and *even if* capital punishment were a wonderfully efficient means of deterrence and social norm maintenance, *you cannot do that to a human being*.³⁰⁰ I suspect that most

²⁹⁹ See, e.g., John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) ("We find that the existing evidence for deterrence [by the death penalty] is surprisingly fragile . . .").

³⁰⁰ See Bronshter, *supra* note 172, at 430 (considering sentencing limitations that represent "external" constraints on the pursuit of our positive penal objectives); JEFFRIE G. MURPHY, *Cruel and Unusual Punishments*, in RETRIBUTION, JUSTICE, AND THERAPY, *supra* note 188, at 223, 236 ("Even when proportionality is satisfied, however, we shall not use a certain punishment if it is intrinsically degrading to the humanity of the criminal—e.g. we shall not torture the torturer."); Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 617 (2013) ("[W]hether or not a respect for human dignity entails

capital punishment abolitionists endorse both non-contingent and contingent rationales, whatever their respective merits as a matter of law and politics in the American context.³⁰¹ From the non-contingent perspective, this Article's policy implications are straightforward. *Any life-ruining sentence is inconsistent with a defendant's humanity and is thus flatly impermissible.*³⁰²

C. A Dangerous Exception

One objection to this scheme concerns the "dangerous" person. If the maximum available penal sentence is, say, fifteen years, would a liberal society be powerless to protect itself against extremely violent individuals beyond that point? Given that the vast majority of people "age out" of violent crime, this

abolishing the death penalty is not something that can be answered from within any theory of punishment, even retribution.")

³⁰¹ See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (arguing that cultural and ideological differences, especially related to the question of whether people convicted of offenses retain their "dignity," explain the difference between the harsh American penal regime and the comparatively mild French and German regimes); NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008) (examining political-economic, institutional, and cultural determinants of penal severity in Western states); Nicola Lacey, David Soskice & David Hope, *Understanding the Determinants of Penal Policy: Crime, Culture, and Comparative Political Economy*, 1 ANN. REV. CRIMINOLOGY 195 (2018) (analyzing four paradigmatic determinants of penal policy—crime rates, cultural dynamics, economic structures and interests, and institutional differences—and considering the impact of race as an independent determinant of U.S. penal policies).

³⁰² This sentencing limit would be yet stronger than the "right to hope" guaranteed by the European Court of Human Rights (ECtHR), which held that life sentences without the possibility for parole are "inhuman or degrading" in violation of article 3 of the European Convention on Human Rights. See *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317; *Trabelsi v. Belgium*, 2014-V Eur. Ct. H.R. 257. The judges were concerned, mainly, to prevent prisons terms that, given the person's degree of rehabilitation, were no longer justifiable by reference to a member state's penal rationale (deterrence, retribution, etc.). *Vinter*, 2013-III Eur. Ct. H.R. at 346. However, the court also gestured toward a more robust limit on the pursuit of penal rationales that would guarantee incarcerated people the opportunity for release as a matter of their "human dignity." See *id.* at 347; see also *id.* at 358 (Power-Forde, J., concurring) (introducing the concept of "the right to hope"). For thoughtful discussion of *Vinter*, see Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 952–55 (2016). However, the most recent case, *Hutchinson v. United Kingdom*, limited the "right to hope" dramatically. *Hutchinson v. United Kingdom*, App. No. 57592/08 (Jan. 17, 2017), <https://hudoc.echr.coe.int/eng?i=001-170347> [https://perma.cc/T26B-MEAT]. The European Court of Human Rights concluded that a life term would be legal, so long as there was some chance, *even an extremely remote chance*, of releasing a person upon their rehabilitation, as set out in advance by relatively clear procedures.

issue is not especially pressing.³⁰³ Regardless, I would hesitatingly venture that continued confinement in a preventative facility could, *in the rarest of cases*, be consistent with the above argument, so long as three demanding conditions were met. These conditions ensure that the state is not punishing the individual—that it does not see harming them as an intrinsic or instrumental reason for action—and acts only out of a concern with proportionate social defense in parallel to a quarantining authority.³⁰⁴

First, the state must establish that the individual poses a threat of very serious future crime, such that confinement is a proportional means of social defense. To be sure, such an evidentiary process is rife with the possibility of error for even well-meaning fact-finders,³⁰⁵ as well as the possibility of naked abuse of the presumption of innocence.³⁰⁶ Nonetheless, it seems likely that on the rarest of occasions the state will be able to meet its burden of proof—presumably “beyond a reasonable doubt.”³⁰⁷ Consider a serial killer who insists that they will try to kill again.³⁰⁸ Second, assuming the state meets

³⁰³ See generally Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 377 (Kevin M. Beaver, J.C. Barnes, & Brian B. Boutwell eds., 2014).

³⁰⁴ On incapacitation as a form of self-defense, see generally Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141 (2011); Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265 (1999).

³⁰⁵ See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 126 (1996); David J. Cooke & Christine Michie, *Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice*, 34 L. & HUM. BEHAV. 259 (2010).

³⁰⁶ See generally PETER RAMSAY, *THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW* (2012); BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007); Kimberly Kessler Ferzan, *Preventive Justice and the Presumption of Innocence*, 8 CRIM. L. & PHIL. 505 (2014); MIKE REDMAYNE, *CHARACTER IN THE CRIMINAL TRIAL* 65-66 (2015).

³⁰⁷ Compare Carol S. Steiker, *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls*, in *PREVENTION AND THE LIMITS OF THE CRIMINAL LAW* 194, 202 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013) (“The degree of procedural reliability that is required increases with the intrusiveness of the preventive intervention at issue, with long-term confinement requiring the greatest assurances of reliability.”), with Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventative Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 793-94 (1996) (arguing that the burden of proof ought to be lower for preventive detention than for backwards-looking punishment, because inaccuracy in the former case has greater costs, in the form of people harmed by those we ought to have detained).

³⁰⁸ For real-world examples rather close to this, see Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 1 (2003).

its burden, it must provide the individual with extensive rehabilitative and therapeutic resources, with the facility featuring a non-punitive ethic of care.³⁰⁹ Third, the state must provide the individual with regular opportunities to demonstrate their rehabilitation,³¹⁰ say, every six to twelve months, with the state bearing the burden on each occasion to prove that they are sufficiently likely to commit very serious offenses in the future.³¹¹

If, against odds, the state can meet these three requirements, then preventative confinement can, in the most special of cases, treat someone as a person with a life of their own to live. In those cases, the state would not be throwing away an individual's life. Rather—like a quarantining authority—it would be proportionally and non-punitively defending people from a demonstrably and seriously threatening person, while at the same time working earnestly to rehabilitate and treat that person so that they can rejoin everyone else and lead a decent life as a whole. At no point would the state declare, as it does when it long-term incarcerates for reasons of retribution, deterrence, or vengeance: “Go away from free society for twenty or thirty years.” It says: “Come back to the tribunal in six to twelve months.” There is thus not the same process or moment of seeing the individual's life as a whole and then deciding to effectively erase a large portion. All that said, I am keenly aware of the “dangerousness” of legitimating any form of incapacitation, even one administered in an extremely narrow manner outside the normal criminal justice system, lest it become the

³⁰⁹ Compare Case of M. v. Germany, 2009-VI Eur. Ct. H.R. 169, 215 (“[P]ersons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible.”), with *Kansas v. Hendricks*, 521 U.S. 346 (1997) (approving Hendrick's confinement under Kansas's “Sexually Violent Predator” law, even though the State had failed to provide him with therapeutic resources). See also Slobogin, *supra* note 308, at 16.

³¹⁰ See Steiker, *supra* note 307, at 198; Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 McGEORGE L. REV. 903, 928 (2016); Paul Robinson, *Life Without Parole Under Modern Theories of Punishment*, in *LIFE WITHOUT PAROLE*, *supra* note 201, at 138, 144 (arguing that a rational system of prevention would operate like current civil commitment systems and periodically revisit the underlying determination of present dangerousness).

³¹¹ California's “Sexually Violent Predator” law used to require an application for extension every two years, at which point it would have to be determined at trial beyond a reasonable doubt that the incarcerated person fulfilled the criteria for confinement. However, after Proposition 83 (“Jessica's Law”) passed in 2006, the statute now leads to an indefinite term of confinement. Cal. Proposition 83 § 27 (2006); see CAL. WELF. & INST. CODE § 6604 (2007).

exception that swallows the rule—misinterpreted and metastasized out of racism, hatred, convenience, and fear.³¹²

CONCLUSION

This Article has argued that many prison sentences belong in the same moral category as the death penalty, and thus, that we ought to upend the “death is different” jurisprudence and ideology that structure all American sentencing schemes. The argument was centered on the idea that humans are *life-builders* who realize value progressively and sequentially, primarily by building and maintaining “temporal” goods that one can realize only over time—romantic partnerships, families, friendships, careers, hobbies, and so forth.

With such an understanding of the “diachronic” nature of human existence, the Article was able to explain the immense harmfulness of the death penalty. By taking away decades of reasonably expected living, the death penalty radically intrudes upon one’s pursuit of a good life as a whole—frustrating long-term relationships and ambitions, and forestalling any possibility of redemption. Beyond the harm of an early death, capital punishment also involves various types of “premortem” harm such as a potentially painful execution as well as the autonomy and dignity costs associated with *being killed* rather than dying by natural causes. The Article thus concluded that the death penalty embodies the judgment that the defendant’s life project, and their status more generally as a life-builder, no longer matters.

Next, through an analysis of the harms of prison, the Article argued that certain prison sentences express the same idea. Most “temporal” goods are associational in nature, such that being in prison for many years—and therefore being away from most people in society for many years—poses an enormous obstacle to leading a good life as whole. Beyond such “associational” harm, the Article demonstrated that prison also endangers one’s long-term physical and mental health. The combined result of these carceral harms is that, over a long enough period, a prison sentence—just like the death penalty—gravely disrespects and imperils one’s life in the narrative sense.

Finally, the Article considered the legal and policy implications of the idea that the death penalty is not categorically

³¹² Thanks to Erin Murphy for helpful discussion on this point.

and qualitatively more severe than all prison sentences. First, the substantive and procedural protections that the Court has provided to capital defendants should also apply to people confronting life-ruining prison sentences. For instance, that means that a life-ruining sentence would be constitutional only in response to a homicide. Second, for those who accept the legitimacy of the death penalty, life-ruining sentences would be morally permissible, but only in response to the most extreme offenses (for which the death penalty itself would be an acceptable alternative). Third, for those who reject the death penalty on “contingent” grounds related to ordinal proportionality and efficient crime prevention, life-ruining sentences would also be impermissible assuming such “contingent” concerns applied in that context as well. Finally, and most straightforwardly, for those who believe that the death penalty is impermissible because it is inhumane, life-ruining sentences would deserve the same flat prohibition. Thus, while it depends on how one defines a “life-ruining” sentence and on one’s *ex ante* view of the death penalty, from nearly any perspective this Article has radically decarceral implications.

The fact that we Americans still kill our own as a form of punishment is appalling and richly deserving of the extraordinary amount of time and attention that people have spent on death penalty defense and abolition. It does not matter that 2024 marked the tenth consecutive year that fewer than thirty people were executed and fewer than fifty people were sentenced to death.³¹³ One death is too many. Nonetheless, two is worse than one, so to speak. And there are approximately 750,000 people in prison serving sentences of ten years or longer,³¹⁴ and approximately 200,000 people serving “life” sentences (defined as life terms with or without parole and sentences that are fifty years or longer).³¹⁵ Given that these prison sentences,

³¹³ DEATH PENALTY INFO. CTR, *supra* note 9, at 3, 30.

³¹⁴ Nazgol Ghandnoosh & Ashley Nellis, *How Many People Are Spending Over a Decade in Prison?*, SENT’G PROJECT (Sept. 8, 2022), <https://www.sentencingproject.org/policy-brief/how-many-people-are-spending-over-a-decade-in-prison/> [<https://perma.cc/6VSG-826Q>].

³¹⁵ Ashley Nellis & Celeste Barry, *A Matter of Life: The Scope and Impact of Life and Long-Term Imprisonment in the United States*, SENT’G PROJECT (Jan. 8, 2025), <https://www.sentencingproject.org/reports/a-matter-of-life-the-scope-and-impact-of-life-and-long-term-imprisonment-in-the-united-states/> [<https://perma.cc/94GM-UFUS>]; see also Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Sentences*, SENT’G PROJECT 4 (Feb. 17, 2021), <https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/> [<https://perma.cc/6USQ-75AH>] (finding that the number of people

like a death sentence, deny people their most basic status as someone with a life of their own to lead, the anti-death penalty movement ought to encompass the full array of “life-ruining” sentences, and, more generally, the movement against mass incarceration should take advantage of the ideas and emotions heretofore reserved for opposition to capital punishment.

serving life sentences in 2021 exceeded the total number of people serving any prison sentence in 1970).