

NONFATAL DEATH SENTENCES

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Introduction

This Symposium Essay attempts to unite the movements against the death penalty and mass incarceration. My central argument is that many noncapital sentences are in the same category of injury as the death penalty. Thus, if you believe that the death penalty is impermissibly degrading or otherwise inconsistent with human dignity, then you ought to oppose these noncapital sentences in the same manner.

In this way, I reject the premise of our Eighth Amendment jurisprudence that “death is different.”¹ While an array of procedural and substantive

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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. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Justice Stewart, Justice Powell, and Justice Stevens) (“[T]he penalty of death is different in kind from any other punishment . . .”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Justice Stewart, Justice Powell, and Justice Stevens) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[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” 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, and hence must be accompanied by unique safeguards . . .”); *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) (citation omitted)); *id.* at 614 (Breyer, J., concurring in the judgment) (“[T]he Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”).

protections apply to capital sentences,² jurisdictions can impose any noncapital sentence so long as they have a “reasonable basis for believing” that the punishment will serve either deterrent, retributive, rehabilitative, or incapacitative goals.³ Twenty-five years to life for the “third strike” of stealing roughly \$1,200 worth of golf clubs notoriously met that standard.⁴ So too did a life sentence for fraud crimes totaling roughly \$230,⁵ as did a life sentence without the possibility of parole for possession of 1.5 pounds of cocaine, the defendant’s first offense.⁶ So the Court believes that death is one thing, and prison is something else. I disagree.

The point, however, is not that all punishments, no matter the severity, belong in the same category of moral concern and judicial review. I believe we *should* make a qualitative distinction such that certain punishments are impermissible regardless of our positive justifications of punishment, that is, regardless of how proportionate they might be as a matter of retribution, how effective they might be as a matter of deterrence, and so forth.⁷ But we should draw the line differently. The right question is not whether the sentence ends the offender’s biological existence, but whether it *denies their humanity*. Justice Brennan expressed this general idea in his celebrated *Furman v. Georgia* concurrence, writing that the “true significance” of punishments that violate the Eighth Amendment “is that they treat members of the human race as *nonhumans*, as objects to be toyed with and discarded.”⁸

2. See generally CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016) (providing a critical overview of the Court’s constitutional regulation of the death penalty); *id.* at 227–29 (explaining how some states have undermined substantive protections, such as the ban on executing intellectually disabled people, through onerous procedural requirements).

3. *Ewing v. California*, 538 U.S. 11, 25, 28 (2003). There has been only one case in which a term of incarceration, standing alone, was held to be disproportionate to an otherwise validly defined crime for an adult. See *Solem v. Helm*, 463 U.S. 277, 279–81, 303 (1983) (reversing life without parole sentence for the crime of writing a fake check, Helm’s seventh felony conviction in South Dakota since 1964).

4. *Ewing*, 538 U.S. at 28, 30–31.

5. *Rummel v. Estelle*, 445 U.S. 263, 265–66, 285 (1980) (listing the charges as (1) fraudulently obtaining \$80 of goods or services, (2) forging a check for \$28.36, and (3) acquiring \$120.75 by false pretenses).

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

7. See Jacob Bronsther, *Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 427 (2019) [hereinafter Bronsther, *Torture and Respect*] (“A punishment may be a proportional and parsimonious means of securing retribution or deterrence, while nonetheless being impermissibly degrading.”).

8. *Furman v. Georgia*, 408 U.S. 238, 272–73 (1972) (Brennan, J., concurring) (emphasis added); see also *Brown v. Plata*, 563 U.S. 493, 510 (2011) (“Prisoners retain the essence of

But what does it mean, exactly, to treat someone as “human” or “nonhuman”? This Essay seeks to initiate a broader discussion by suggesting, in concert with Aristotle and an array of contemporary philosophers, that the essentially “human” capacity is the ability to stitch past, present, and future moments together into a good life as a whole.⁹ On this view, humans are fundamentally *diachronic* creatures who live *through* (dia) *time* (chronos).¹⁰ Beyond philosophy, as a matter of cultural concepts and ideals, our society tends to conceive of a normal and valuable “human” life in this general manner, as something that one realizes through essentially long-term associations and achievements, such as maintaining romantic partnerships and old friendships, raising children, building professional expertise, and so forth. Thus, if the state treats offenders as creatures without the ability or right to construct a meaningful life of their own through time—as it does when it kills them or confines them to prison for, say, twenty years—then it treats them as “nonhumans,” whether as a matter of objective or culturally determined values. And if we believe that people do not forfeit their standing as humans when they commit offenses, then we ought not inflict such punishments.

This Essay proceeds in two parts. Part I considers how exactly the death penalty harms a person, given the fact that everyone will eventually die. I argue that the death penalty moves up a person’s death date, likely by decades, and thereby grievously interferes with their unfolding life as a whole. By intentionally harming a person in this manner, the state expresses the conviction that the person’s essentially “human” status as a life-builder either is non-existent or immaterial. Part II argues that decades-long prison sentences objectively and expressively harm individuals in a similar manner.

human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 557 (1998) (arguing that offenders remain “members of the community” who must not be treated “as children or animals”); AVISHAI MARGALIT, *THE DECENT SOCIETY* 143 (Naomi Goldblum trans. 1996) (“Rejecting a human being by humiliating her means rejecting the way she expresses herself as a human. It is precisely this fact that gives content to the abstract concept of humiliation as the rejection of human beings as human.”).

9. See Bronshter, *Torture and Respect*, *supra* note 7, at 465–73; Jacob Bronshter, *Long-Term Incarceration and the Moral Limits of Punishment*, 41 CARDOZO L. REV. 2369, 2376–84, 2405–10 (2020) [hereinafter Bronshter, *Moral Limits of Punishment*].

10. Bronshter, *Torture and Respect*, *supra* note 7, at 428; Bronshter, *Moral Limits of Punishment*, *supra* note 9, at 2380.

While I believe this means that these prison sentences are flatly impermissible, there is a more modest conclusion available that still offers the possibility of radical policy change. That is, if one insisted that the death penalty was permissible, then such sentences would *also* be permissible, but only in those presumably very rare cases in which they believed that capital punishment would be an acceptable alternative. Finally, Part II raises the possibility that shorter prison sentences, when combined with the collateral consequences of conviction, belong in this category of life-crushing punishments beyond the pale.

I. The Harm of Death

There are *contingent* and *non-contingent* reasons to oppose the death penalty. Contingent reasons include concerns about the role of racial animus¹¹ or even sheer randomness¹² in determining who receives the death penalty, or about the efficacy of the death penalty in terms of deterring future offenses.¹³ 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.¹⁴

11. See, e.g., Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519 (1995); Catherine M. Grosso et al., *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. 902 (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).

12. See, e.g., *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”); CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 156, 160 (2d ed., augmented 1981) (discussing the imperfect nature of the administration of the death penalty).

13. 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 . . .”).

14. Another “contingent” argument against the death penalty is that it is irreversible when imposed on someone who is later found to be innocent. For trenchant criticism of the idea that “irreversibility” represents a unique concern in the death penalty context, given the fact that prison sentences are also noncompensable injuries, see Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 10 MICH. L. REV. 1145, 1174–75 (2009) (“[A] sentence of life imprisonment is also irreversible once it has been served, as is any term of years in prison

However, 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*.¹⁵ I suspect that most 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.¹⁶ In any event, in this Essay I will focus only on the non-contingent rationale, that is, the notion that the death penalty harms an offender in a manner that is inconsistent with their humanity. However, in making the non-contingent rationale my focus, I am making no claim as to its relative moral importance vis-à-vis the other rationales (i.e., even if the death penalty in the abstract were humane and permissible, the racist administration of such state violence would still be unspeakably bad).¹⁷

If the harm of capital punishment might be inconsistent with someone's humanity, how, exactly, does the punishment harm someone? This question is much harder to answer than we might expect. There are, I believe, two distinct but interrelated components to the harm. First, there is the "objective" harm associated with the death itself. Second, there is the "expressive" harm

that the defendant has endured that is excessive, arbitrary, or fails to reflect a defendant's individual circumstances. Those years cannot be brought back."); *see also* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 74 (2008) ("The burden of proof at a criminal trial is beyond reasonable doubt, not certainty. Although the matter is complicated, the very existence of such a standard seems to contemplate that mistakes . . . will be made . . .").

15. *See* Bronsther, *Moral Limits of Punishment*, *supra* note 9, at 2376–84 (arguing that "impermissible degradation constitutes a humanity-denying form of disrespect"); Bronsther, *Torture and Respect*, *supra* note 7, 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: ESSAYS IN THE PHILOSOPHY OF LAW 223, 236 (1979) ("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.").

16. *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 offenders retain their "dignity," explain the difference between the harsh American penal regime, on the one hand, and the comparatively mild French and German regimes, on the other).

17. Thanks to Will Thomas for helpful discussion on this point.

associated with the fact that it is the state that has intentionally caused the death. Beginning with objective harm, let's assume that the state executes the person in question at age forty. This assumption narrows our "objective" inquiry: How is it harmful or bad for someone to die at age forty?

Around 300 B.C., Epicurus argued famously that death is not harmful, *at all*, for the person who has died.¹⁸ While, to my knowledge, Epicurus never commented on the death penalty, his position inevitably leads to 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).¹⁹ To be sure, if one's death were painful, then that experience of pain will be bad for her, but not the death that follows.

An ancient but sporadic literature has emerged in reply to Epicurus and his followers. For instance, to argue that death may be bad for those who die, Thomas Nagel and others have appealed to what Steven Luper calls the "comparativist" view, which compares possible lives.²⁰ On this account—which I simply assume to be true for the purposes of this piece—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 otherwise would be constitutes a benefit.²¹ That is, a person normatively assesses a past occurrence (e.g., they ate an apple, attended college, lost an arm) by asking whether they would have realized more or less value over the course of their life were such occurrence never to

18. See EPICURUS, *Letter to Menoeceus*, in EPICURUS: THE EXTANT REMAINS 82, 85 (Cyril Bailey ed., Oxford Univ. Press 1926) (c. 300 B.C.).

19. See *id.* at 85.

20. See STEVEN LUPER, THE PHILOSOPHY OF DEATH 7–8 (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).

21. See Steven Luper, *Death*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (Aug. 25, 2021), <https://plato.stanford.edu/archives/fall2021/entries/death/> (defining "comparativism").

have happened. Importantly, we need not experience an event for it to qualify as a harm on the comparativist account.²² 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.²³

Thus, if someone spreads terrible lies about you, but you never find out about it, that can qualify as a harm on the comparative view, while not registering on the Epicurean account since the slander is not something that you personally experience.²⁴ In this way, even though we may not experience death, it can still harm us, insofar as our lives as a whole would have been better were we to continue living.

Thus, accepting the comparativist account, we should ask how death at age forty might make one's *life as a whole* worse than it would otherwise be, in the sense that the individual would have realized more "value" over the course of their existence had they died at a later point. This leads us to wonder, in turn, what we mean by "value," exactly, and how we might assess whether one possible life exhibits more or less of it than another. I will only be able to sketch some possible (but, I hope, intuitive) replies. First, from the perspective of Epicurus (or Jeremy Bentham²⁵), positive human value is pleasure and negative human value is pain, such that we measure the comparativist harm of death by calculating the likely amount and degree of pleasure that one would have experienced were they to live longer, and then subtract that by the likely amount and degree of pain.²⁶ However, this hedonistic conception of human value seems unnecessarily and inaccurately constrained. For instance, as Robert Nozick argued, 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."²⁷

22. See Feldman, *supra* note 20, 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.").

23. NAGEL, *supra* note 20, at 6.

24. See *id.*; 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).

25. See, e.g., JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT WITH AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Wilfred Harrison ed., Basil Blackwell Oxford 1948) (1789) (developing a utilitarian moral and political philosophy).

26. See EPICURUS, *supra* note 18, at 82–93.

27. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42–45 (1974). But see Adam Kolber, *Mental Statism and the Experience Machine*, 3 BARD J. SOC. SCI. 10, 15 (1994)

Nor, following Donald Regan and David Enoch, does it seem that human “value” is a simple matter of autonomy, such that all free choices exhibit an equal amount of value, no matter their substantive content, just by virtue of their autonomous origins.²⁸ Rather, following Aristotle and a diverse and distinguished array of philosophers, I suggest that autonomy exhibits “value” when expressed in the context of people’s unfolding lives.²⁹ As indicated

(arguing that, were we already hooked up to an experience machine, most of us would choose not to “unplug,” and thus that Nozick’s case does not disprove mental-state utilitarian theories).

28. 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.* 169 (2006) (arguing that a complete account of action and agency is not a complete account of normativity).

29. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, at 3–22 (Roger Crisp ed. & trans. 2000) (c. 350 B.C.) (arguing that a person flourishes “over a complete life,” such that it is premature to judge the quality of one’s life until it is finished); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 50–51 (1989) (“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.”); 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.”); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 216–19 (2d ed. 1984) (arguing that man is “essentially a story-telling animal,” such that the good life is one that unfolds through time with “narrative” unity); 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”—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); JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 179–80 (2002) (“[W]e must also recognize that well-being is multidimensional and that some of its dimensions are relational—in 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.”); SAMUEL SCHEFFLER, *DEATH AND THE AFTERLIFE* (Niko Kolodny ed., 2013) (arguing that what matters to us depends, in significant part, on the continued existence of humanity).

above, humans are *diachronic* creatures who live *through* (dia) *time* (chronos).³⁰ Put differently, humans are capable not only of *enjoying* pleasurable “momentary goods,” like ice-cream cones, but also of *achieving* “temporal goods,” like families, friendships, and careers, which must be cultivated through time to be realized.³¹ Imagine someone terribly addicted to heroin who has alienated their friends and family and descended into depravity and desperation. By understanding them as a creature that realizes value through time, we can appreciate the extraordinary *disvalue* of them shooting up, even though doing so provides them with deep, albeit temporary, pleasure.³² Of course, when viewed as a standalone moment, their pleasure would be of great value, but that is not how we understand (or should understand) our existences, as if we were reborn in every moment.³³

There is an empirical and a normative idea built into this diachronic 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 powers of autonomy, value recognition, memory, and imagination, we have the capacity to purposefully act in the present as a means of constructing a more valuable future and more valuable life as a whole.³⁴ The normative idea is that our most important and valuable functionings rely upon this diachronic understanding and capacity.³⁵ 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, and arts. On this view, such “temporal goods” represent our most significant and meaningful achievements. Unlike eating ice-cream cones, we can realize them only incrementally and progressively, usually in association with other people.³⁶

30. See *supra* notes 9–10 and accompanying text.

31. Bronshter, *Torture and Respect*, *supra* note 7, at 428; Bronshter, *Moral Limits of Punishment*, *supra* note 9, at 2381.

32. Bronshter, *Torture and Respect*, *supra* note 7, at 468; see also Bronshter, *Moral Limits of Punishment*, *supra* note 9, at 2381.

33. Bronshter, *Torture and Respect*, *supra* note 7, at 469; Bronshter, *Moral Limits of Punishment*, *supra* note 9, at 2381.

34. Bronshter, *Moral Limits of Punishment*, *supra* note 9, at 2407; see also Bronshter, *Torture and Respect*, *supra* note 7, at 470 n.210 (arguing that our personal identity retains sufficient integrity over time, such that “we” will still be there in the future, to some very significant degree, to reap the costs or benefits of our present decisions).

35. Bronshter, *Moral Limits of Punishment*, *supra* note 9, at 2407.

36. See *id.*; see also *id.* at 2410 (arguing that many temporal goods are associational in nature).

We can use this brief analysis of diachronic human value to make more sense of the “objective” harm of the death penalty on the comparativist view. On this view, death at forty is harmful insofar as it denies us the everyday “momentary” pleasures of continued living, but more importantly, because it denies us the opportunity to continue maintaining, developing, arranging, and balancing the temporal goods that constitute, or might constitute, our good life as a whole. Much more so than the person who dies at a very old age in a frail state, the person who dies at forty will have unfinished life projects.³⁷ Their essentially “human” undertaking, that is, the story of their life as a whole, will be unceremoniously and unexpectedly over. Many of the chapters of their story will remain unwritten and, for the person who has committed a heinous offense, there will be no redemption narrative. Ronald Dworkin makes a related point in the context of euthanasia, writing about a person who has become “permanently sedated or incompetent”:³⁸ “We worry about the effect of his life’s last stage on the character of his 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.”³⁹

But what about the fact that our stories are going to end anyway, in the sense that we’re all going to die at some point? This is a crucial question for understanding what the death penalty does to someone. Indeed, with this question in mind, we can appreciate how the death penalty is, I think, fascinatingly different from noncapital sentences. We’re all going to die, but we aren’t all going to spend time in prison. Thus, what the death penalty does, essentially, is *to move up* your death date dramatically. You were going to die at some vague point in the future, and you planned your diachronic 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 decades away from otherwise reasonably anticipated living. And given the sequential and progressive nature of human existence, this deprivation of time grievously interferes with one’s project of building a good life as a whole.

Now that we have some grasp of the “objective” harm of the death penalty—or, at least, of one plausible conception of that harm—we can

37. See Kai Draper, *Disappointment, Sadness, and Death*, 108 PHIL. REV. 387, 397–98 (1999) (“[T]he discovery that an unlikely death at an advanced age will deprive one of several additional years of life is apt to be less disappointing than the discovery that one will suffer a comparable deprivation of life at an early age.”).

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

39. *Id.*

incorporate “expressive” harm into the analysis. The expressive harm is generated, in part, by the fact that it is the state that carries out the killing. To die of disease at forty is one thing; to die from state violence is another. The state, in its capacity as representative of the people, expresses public meanings and valuations relatively clearly. Further, with capital punishment, the state kills with intention and premeditation, seemingly *endorsing* and *desiring* the individual’s death, as evidenced by the enormous amount of time and resources that the state spends between the moment of arrest and the moment of death.⁴⁰ Albert Camus argued that even intentional crimes like murder cannot match the heavy purposiveness and deliberateness of the criminal process leading to the death penalty.⁴¹

State intentionality matters when assessing the message expressed by harmful state action, as Elizabeth Anderson and Richard Pildes emphasize in their expressivist theory of constitutional law.⁴² For instance, when assessing regulations that disparately impact certain racial⁴³ or ideological groups,⁴⁴ they explain that the message expressed depends on whether the state intended the disparate outcome, with the state being motivated to disadvantage the group in question, or whether it was a byproduct of realizing some other state aim.⁴⁵ In this way, they argue that we must look beyond consequences when discerning the message expressed by harmful state action, since “attitudes are expressed in the purposes for which people act and the principles that justify their action.”⁴⁶ We can combine the “expressive” power of intentional state action with the “objective” notion that an early death interferes terribly with one’s essentially human diachronic existence. The expressive result is that the state, when it carries out capital

40. Unrelated to the costs of appellate litigation, the Federal Bureau of Prisons spent nearly \$4.7 million on five executions carried out in July and August 2020, with most of the costs spent on the logistics of arranging execution teams. *See Records Disclose Taxpayers Picked Up a Nearly Million Dollar Price Tag for Each Federal Execution*, DEATH PENALTY INFO. CTR. (Feb. 3, 2021), <https://deathpenaltyinfo.org/news/records-disclose-taxpayers-picked-up-a-nearly-million-dollar-price-tag-for-each-federal-execution>.

41. ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 199 (Justin O’Brien trans., 1961) (“Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders . . . ?”).

42. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–56 (2000).

43. *See id.* at 1533–45.

44. *See id.* at 1545–51.

45. *See id.* at 1533–51; *see also* *Washington v. Davis*, 426 U.S. 229, 248 (1976) (holding that a facially neutral law is not unconstitutional solely because it has a racially disproportionate impact).

46. Anderson & Pildes, *supra* note 42, at 1569.

punishment, emphatically denies an offender's right to exercise their life-building capacities and, thereby, emphatically denies their standing as a human. Put differently, when carrying out the death penalty, the state expresses the idea that the offender has *forfeited* their status—their essentially “human” status—as a life-builder. More modestly, at a minimum, the state expresses the idea that the offender has forfeited the privileges and immunities associated with that status.⁴⁷

The expressive power of the death penalty is bolstered by the notion that the diachronic conception of human value has a basis not only in philosophical thought but also in everyday cultural norms. Without being able to fully defend the claim here, it seems that nearly every culture prizes such inherently “temporal” achievements—families, knowledge, careers, artistic endeavors, etc.—as being central to the ideal of a good and especially “human” existence.⁴⁸

II. Life and Prison

With this framework in mind, we can begin to see how the intentional state injury of prison can be on a par with, or at least not qualitatively different than, the intentional state injury of capital punishment. The death penalty is extreme in the severity of the objective and expressive harm that it imposes on an offender, but the harm is not incommensurate or incomparable with that imposed by prison.⁴⁹ More to the point, if the harm of the death penalty is centered on *denying an offender's status as a life-builder*, then noncapital sentences, especially very long sentences, can objectively and expressively impact someone in an analogous manner.

As I have argued previously, incarceration, at a minimum, represents a severe restriction on the freedom of association, insofar as an inmate will be denied effective access to almost all people in society, including family, friends, neighbors, and co-workers, as well as “new people” that they might

47. Thanks to Steve Schaus and Will Thomas for helpful discussion on this point.

48. There is little worry here, I think, of an overly Western bias, given that the pursuit of temporal goods seems central to every culture. For thoughtful discussion on objectivity and Western bias in the context of discerning the centrally “human” functionings, see MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 34–69 (2000).

49. See Jacob Bronsther, *Vague Comparisons and Proportional Sentencing*, 25 *LEGAL THEORY* 26, 27–36 (2019) (arguing that any two things can be compared in terms of the degree to which they exhibit a particular value, such that there is no such thing as “incomparability”); see also Cian Dorr et al., *The Case for Comparability*, 56 *NOÛS* (forthcoming 2022), <https://philpapers.org/archive/DORTCF-2.pdf> (same).

meet in environments conducive to enjoyable and productive relationships.⁵⁰ As the years pass by, this associational limitation gravely impacts the quality of a person's life as a whole 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 itself is a long-term form of association. Others, like the development of professional expertise, are *instrumentally* associational, meaning that one realizes such a good by associating with other people. By making it exceedingly difficult for an inmate to realize either type of associational good, long-term incarceration makes it extremely difficult for an inmate to construct a good life as a whole.

To be sure, it is a matter of degree and risk. Here, incarceration is different than the death penalty. Unlike the person killed by the state, it is not *impossible* for the long-term incarcerated to flourish, whether in prison or after they are released (if they are in fact released). Some people are extraordinary. Nonetheless, by intentionally placing an offender in an environment that is so intensely inhospitable to realizing diachronic value, and by forcing them to stay there for a very long period, the state effectively denies the presence or worth of their capacity to stitch moments together through time as a means of constructing a good life as a whole. In this way, long-term incarceration denies an offender's status as a life-builder and belongs in the same category of injury as the death penalty.

But how “long” must the sentence be? Some have analogized life without parole to the death penalty,⁵¹ especially when imposed on juveniles,⁵² but surely sentences shorter than that would qualify. There is not a precise answer, however. Between those sentences that affirmatively deny an

50. See Bronshter, *Moral Limits of Punishment*, *supra* note 9, at 2400–04. Of course, unless inmates are placed in solitary confinement, they will certainly interact with people in prison—people who become familiar over time and “new people” as well—but generally in an environment that is far less conducive to meaningful interactions by comparison to life outside of prison. 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).

51. See generally LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) [hereinafter LIFE WITHOUT PAROLE].

52. See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that juvenile offenders cannot be sentenced to life without parole for non-homicide offenses); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that mandatory sentences of life without parole are unconstitutional for juvenile offenders).

offender's status as a life-builder and those that do not, there is a vague middle ground. Given the moral stakes, it would seem that we ought to keep far away from sentences that might reject an offender's humanity, following Jeremy Waldron's notion that we should give wide berth to vague but prohibited realms such as "domestic violence" or "torture," and should not go as close to the line as possible.⁵³ He writes: "*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."⁵⁴ Regardless, there are sentences that I believe are *clearly* outside the zone of vagueness—say, twenty years in prison without any serious possibility of parole—which would radically alter our sentencing code were they deemed equivalent to the death penalty as a matter of law and culture.⁵⁵

The issue, to be clear, is not whether a sentence severely risks ruining one's *current* life project, with its very particular players and plans. A relatively short sentence could probably achieve that result. The issue is the degree to which a sentence makes it more challenging for someone to realize *any* conception of a decent human life as a whole. Our mortality looms

53. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1701 (2005) (comparing situations where people have a legitimate interest in knowing precisely what their legal liabilities are, e.g., a driver who wants to know the exact speed limit, with situations where an interest in precision would be inappropriate, e.g., a husband who wants to know exactly how much he can push his wife around before it counts as domestic violence).

54. *Id.*

55. The prohibition on long sentences presented here is thus stronger than the "right to hope" guaranteed by a recent line of cases in the European Court of Human Rights ("ECtHR"). Those cases provide 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, e.g., Vinter & Others 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, with preventing terms of incarceration that, given an offender's rehabilitation, were no longer justifiable by reference to a member state's penal rationale (deterrence, retribution, etc.). *Vinter*, 2013-III Eur. Ct. H.R. 317, ¶ 111. However, the court also gestured toward a more robust external stop on the pursuit of penal rationales that would guarantee offenders the opportunity for release as a matter of their "human dignity." *See id.* ¶ 113; *see also id.* (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>. The ECtHR provided that a life term would be legal, so long as there was *some* chance, even an extremely remote chance, of releasing an offender upon his rehabilitation, as set out in advance by relatively clear procedures. *Id.*

hugely in the background of this analysis, just as it did with the death penalty. We have only so much time to associate with others to produce the temporal goods that might constitute our good lives as a whole. And given our limited existences, being radically deprived of the freedom of association for twenty years would severely risk ruining one's life project in this broader sense, even if the prison facility were uncommonly safe and comfortable. Of course, the quality of life in prison is a crucial variable, and it varies dramatically from facility to facility. To the extent that people are neither safe nor comfortable,⁵⁶ fewer years would surely be required for a sentence to deny someone's status as a life-builder, given the risks of long-lasting physical and psychological harm.⁵⁷

Beyond the deprivations of prison itself, we ought to incorporate *post-carceral* deprivations into our analysis. Examples include the presence of an intrusive and threatening probation officer; inability to access public housing; loss of the job one held before prison; difficulty finding work due to gaps on one's resume, as well as employers' right to check one's ex-convict status; placement on a sex-offender registry; losing the right to vote and sit on juries; etc.⁵⁸ A "short" sentence, when combined with the "civil death"⁵⁹ caused by these collateral consequences, may render the pursuit of a decent life so onerous as to belong in the category of life-crushing punishments beyond the pale.⁶⁰ In that case, there would be no qualitative

56. See, e.g., U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN (2020), https://www.justice.gov/crt/case-document/file/1297031/download?utm_medium=email&utm_source=govdelivery (reporting utterly horrendous conditions in Alabama state prisons for men).

57. 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).

58. 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 et al., *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).

59. See Chin, *supra* note 58.

60. See Judith Resnick, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365, 369 (2020) ("[T]his constitutional democracy has no licit penological purpose in seeking to ruin people economically or by imposing destructive forms of confinement. . . . [G]overnments are not supposed to use their punishment powers to debilitate people . . .").

difference between “short” and “long” prison sentences or, indeed, between “short” sentences and the death penalty. To be sure, the “life harm” of long prison sentences results from the associational deprivation that is inherent or analytic to the prison. By comparison, we *could* have prisons and short sentences without burdensome collateral consequences; indeed, not every society treats ex-prisoners so punitively.⁶¹

While I believe these life-crushing sentences are flatly impermissible, there is a more modest conclusion available, which still offers the possibility of radical policy change, as suggested above. Imagine that one steadfastly rejects the non-contingent argument against the death penalty. That is, they believe that sometimes people really do forfeit their humanity and their right to build a good life, such that the state can permissibly kill them as a form of punishment. Now, if one believes in the death penalty along these lines, presumably they believe it is legitimate only in response to the most extreme offenses. One could combine this position with my conclusion that certain prison sentences (especially but maybe not exclusively very long sentences) belong in the same category of punishment as the death penalty. The upshot is that those sentences would be permissible, but only in the very special cases in which the death penalty would be an acceptable alternative.

Conclusion

This Essay is centered on the following set of ideas: humans are life-builders, such that they realize value diachronically and cumulatively, primarily by building and maintaining temporal goods; humans do not forfeit their status as life-builders when they commit offenses; and, thus, the state must respect and not destroy the life-building capacities of offenders. These ideas condemn punishments that severely risk ruining an offender’s life as a whole, a category that includes not only the death penalty but also many prison sentences. To use Justice Brennan’s language once more, such punishments “treat members of the human race as *nonhumans*, as objects to be toyed with and discarded.”⁶²

Alternatively, if a community is willing or even eager to inflict such punishments, whether of the capital or noncapital variety, then that community should understand that it upholds the principle that offenders at

61. See PROBATION ROUND THE WORLD: A COMPARATIVE STUDY (Koichi Hamai et al. eds., 1995).

62. *Furman v. Georgia*, 408 U.S. 238, 272–73 (1972) (Brennan, J., concurring) (emphasis added).

least sometimes *do* forfeit their humanity.⁶³ By this logic, all American jurisdictions—even those that have abolished the death penalty—endorse this forfeiture principle, such that at least certain offenders can permissibly be “toyed with and discarded,”⁶⁴ as evidenced by the hundreds of thousands of individuals currently serving decades-long sentences. Indeed, in jurisdictions opposed to the death penalty but accepting of such prison sentences, their opposition to capital punishment may be explained more by squeamishness than by any conviction about the moral status of people who commit offenses.

This Essay merely introduces the question of how the death penalty relates to prison sentences. There are many unresolved moral and legal questions that I hope to pursue elsewhere, such as whether the long-term confinement of a demonstrably dangerous individual could ever be consistent with the values espoused here, the proper role for rehabilitation and parole within a legitimate penal system, and how the Supreme Court might incorporate these concerns into its Eighth Amendment jurisprudence.

63. See Kleinfeld, *supra* note 55, at 941 (“Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes. Offenders’ criminality is thus both immutable and devaluing: it is a feature of the actor, rather than merely the act, and, as such, it diminishes offenders’ claim to membership in the community and loosens offenders’ grip on certain basic rights.”); Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE*, *supra* note 51, at 96, 104 (“In the new punitive climate, . . . to commit a criminal act is to reveal oneself as essentially and uniformly bad and thus not entitled to the consideration or respect otherwise due fellow human beings.”); Avlana K. Eisenberg, *Getting to “Prisoner as Neighbor,”* 75 OKLA. L. REV. 69 (2022).

64. *Furman*, 408 U.S. at 272–73 (Brennan, J., concurring).