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## Creating the Permanent Prisoner

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### *I. American Penalty's Exclusionary Project*

Every year, hundreds of thousands of people churn through the great revolving door of the American penal system. In 2006 alone, more than 840,000 people were convicted of felonies and sentenced to some period of confinement.<sup>1</sup> Of these, approximately 460,000 were sent to state prison, with an average sentence of 4 years and 11 months.<sup>2</sup> By contrast, as of 2008, only slightly more than 41,000 people were serving life without parole (LWOP) sentences,<sup>3</sup> a mere 1.7% of the total incarcerated population.<sup>4</sup>

Based on these numbers, one might well regard LWOP as the anomaly, and certainly not emblematic of the system as a whole. In this chapter, however, I argue that it is LWOP that most effectively captures the central motivating aim of the contemporary American carceral system. LWOP promises permanent exclusion. In one move, it guarantees that the targeted offender will never reemerge, never reintegrate, never again move freely in the shared public space. Of course, not every person convicted of a felony can receive an LWOP sentence. Instead, the vast majority of prison terms are time limited, and even many people who get life sentences retain the promise of parole eligibility. The penal system thus operates, at least formally, on the principle of temporary removal—a principle that fits neatly with a host of other more familiar penological theories (retribution, deterrence, etc.). But a closer look at the system itself, taking into account the way it actually functions and the experience of the people inside it, tells a different story, one more consistent with the ideal of wholesale banishment that LWOP embodies.

At issue is what might be called society's collective disposition toward the people the state has incarcerated. The range of possible such dispositions can be imagined as along a spectrum. At one end is a commitment to meaningful reintegration. At the other is a commitment to permanent exclusion. Every polity that punishes crime with imprisonment must lie somewhere on this spectrum. To determine exactly where a given polity falls, one must look

beyond aspirational statements and rhetorical claims to the actual practices that collectively mediate the interaction between the society at large and those people who are or have been incarcerated.

Consider first the ideal types. In a society fully committed to meaningful postrelease reintegration—call this a *reintegrationist* system—the state would help people in custody to develop prosocial skills consistent with successful reentry and to remedy or mitigate whatever antisocial traits or tendencies are likely obstacles to their living healthy and productive lives on the outside.<sup>5</sup> A reintegrationist system would institute a meaningful parole process through which, perhaps after a custodial term proportionate to the crime, individuals would have the chance to show that they could be released without any appreciable risk to public safety—and would actually be released subsequent to such a showing. On release, people would be helped to assemble the components of a successful postcustody existence: a job, a place to live, the means to reunite with family, etc. On the other end of the spectrum, a society committed to permanent exclusion—call this an *exclusionist* system—would do precisely the opposite.

Given the complexity of modern society, the inevitable scarcity of resources, and the intractability of many social problems known to lead to violence and other antisocial conduct,<sup>6</sup> a fully reintegrationist society may be an impossible ideal. But my claim in this chapter is that the American carceral system, once to some extent at least rhetorically committed to reintegration, has ceased even to gesture in that direction. Instead, in the past three decades, this system has come explicitly to embrace the opposite approach, that of permanent exclusion. Innumerable aspects of the American penal experience speak to this exclusionist commitment. In American prisons, there is little if any programming to help people in custody to address the incapacities that led them to prison in the first place. To the contrary, prison conditions today tend to exacerbate whatever antisocial tendencies people brought with them into custody and to undermine the development of the skills needed to succeed outside prison. Even those people who are parole eligible and capable of living productive and law-abiding lives out in the community are persistently denied not only release but even the opportunity to make the case that they could be safely freed. And those fortunates who *are* released will face a host of state-imposed obstacles making it extremely difficult for them to construct stable and law-abiding lives on the outside.

Viewed through this lens, what may otherwise appear as unrelated if unfortunate features of the current penal climate turn out to be mutually reinforcing components of a particular kind of carceral system. This exclu-

sionist system has no real investment in the successful reentry of the people the state has incarcerated. Instead, a variety of forces (legal, political, economic, and cultural) array themselves against any meaningful loosening of state control, taking different forms depending on the context but all directed toward the ultimate aim of denying readmission to the shared social space to those people once marked out as prisoners.

In this way, the American carceral system has become a key instrument of social organization, a central means (if not *the* central means) by which the state manages both deviant behavior and perceived threats to the social order.<sup>7</sup> The logic of this organizational system is simple: those who are judged undesirable or otherwise unworthy lose their status as moral and political subjects and are kept beyond the bounds of mainstream society. And once excluded in this way, it becomes difficult, if not impossible, for people ever fully to return. In the American context, the experience of having been incarcerated thus can no longer be construed as simply one aspect of a person's life history. With few exceptions (the Martha Stewarts, the Conrad Blacks), a person who has once donned the telltale orange jumpsuit acquires a new, fixed social identity, that of *inmate*, and is thereby transformed into someone who is simultaneously outside society's moral circle and a perennial subject of state control.<sup>8</sup> At a rhetorical level, the fact of the crime itself justifies the subsequent social exclusion. But given the profile of the people most likely to wind up in prison—disproportionately drug addicted, mentally ill, illiterate, unskilled, indigent, and/or people of color—the criminal justice system may simply represent the most obvious sorting mechanism for officially branding as noncitizens those populations with whom, for whatever reason (hatred, fear, or even simple distaste), mainstream society would prefer not to have to deal.

Once the carceral system is understood on these terms, it becomes unsurprising that people of color—African Americans in particular—are dramatically overrepresented in the nation's prisoner population.<sup>9</sup> As Loïc Wacquant has forcefully argued, from slavery to Jim Crow to the northern ghetto, the history of race relations in America has been one of racial segregation officially and violently enforced.<sup>10</sup> On Wacquant's telling, the American prison expansion of the 1980s and 1990s was a direct response to the declining demand for labor in the postindustrial economy and the consequent emergence of a predominantly black urban underclass, the threat of which the ghetto could no longer contain.<sup>11</sup> Yet one need not regard the need for a new form of racial control as the only possible explanation for mass incarceration to recognize that African Americans bear a considerable disproportion

of the exclusionary burdens imposed by the current carceral system—and that, as a consequence, this system has emerged as the preeminent mechanism by which African Americans without social or economic capital are “define[d], confine[d], and control[led].”<sup>12</sup> Nor, once this feature of the system is acknowledged, is it possible to deny that the exclusionary imperative of the American carceral system has a profoundly racial cast.

LWOP is the most obvious and expeditious way to effect permanent exclusion. But as already noted, not everyone convicted of a crime can get LWOP. In an exclusionary system, an LWOP sentence is only one of many penal strategies in place to maintain the boundary between inmates and the broader society. In what follows, I chronicle some of these strategies, which together ensure a life of struggle at the margins of society even for those people who manage on release to avoid subsequent reincarceration.<sup>13</sup> First, I explore the character of prison conditions and argue that the experience of incarceration in American prisons today exacerbates the antisocial behavior of those in custody and undermines their ability to live healthy and productive lives on the outside. In these ways, the institutional shape of American prisons ensures that people with time-limited sentences—the vast majority of the people in prison—will find it hard after being released to avoid reoffending and thus being reincarcerated. Second, I examine some of the strategies that have been adopted to constrain the parole prospects of even those people who manage against the odds to preserve or develop prosocial skills while in custody and who would thus pose little or no public safety threat on release. Third, I consider the collateral consequences of felony convictions and explore the way these consequences heavily burden the prospects of newly released offenders—even those former prisoners who are able to avoid reoffending. In this way, society’s commitment to permanent exclusion proves to reach beyond the prisons, keeping on society’s margins even those formerly incarcerated individuals capable of living lawfully on the outside. Indeed, as the work of Katherine Beckett and Steve Herbert demonstrates, the drive to exclude extends still further, so that even people without criminal convictions but who are perceived as “disorderly” or otherwise socially “undesirable” have been finding themselves forced out of the public space.<sup>14</sup>

This way of framing American penal policy may seem to sideline inappropriately the more legitimate penological purposes—retribution, deterrence, etc. As will be seen, however, there is a strikingly poor fit between these more familiar penological justifications and the actual practices of the penal system. This mismatch strongly indicates the need for an alternative explanation—hence my central claim, that the American carceral system, although

perhaps rhetorically motivated by more familiar penological goals, is in practice designed to mark certain undesirables as social deviants and consign them to lives beyond the boundaries of mainstream society. For many of those so marked—more than 2.3 million at last count<sup>15</sup>—this extrasocietal existence is lived in locked institutions clearly distinct from the social space shared by the privileged persons who retain full political status as citizens. Others, freed (often only temporarily) from custody, exist on society’s margins: skid rows, homeless shelters, “inner cities,” some public housing projects, etc. If these noncustodial marginal spaces are preferable to prison, their inhabitants are still often reduced to what Italian political theorist Giorgio Agamben calls “bare life,”<sup>16</sup> i.e., naked physical being without political, legal, or social status.<sup>17</sup> Agamben’s division between bare life and political existence maps the divide between exclusion and inclusion that, I argue, forms the foundational logic of the American carceral state.<sup>18</sup> Only once this logic is recognized does it become possible really to understand—and thus effectively to challenge—the seemingly disparate exclusionary practices that together define the terms of existence for people marked as criminals.

But first, some historical context.

## *II. The Emergence of the Exclusionary Ideal: A Brief, Partial History*

According to the standard historical account, American penological practice for much of the 20th century was informed by a rehabilitative ideal, on which “the criminal was conceived of as a flawed but fixable individual and the state’s responsibility was to provide the expertise and resources needed to remediate those flaws.”<sup>19</sup> In the 1970s, however, there was a sudden assault on this model from multiple directions, and the void created by its swift abandonment was filled by the highly punitive and unforgiving approach that reigns today.<sup>20</sup>

As it happens, recent work has challenged this “monotonic” account,<sup>21</sup> exposing as mythic the notion of a widespread national commitment to a rehabilitative ideal.<sup>22</sup> Instead, penological practices seem to have varied by region, with the rehabilitative model reigning in “the Northeast, Midwest and coastal West,” while the South and states in the “Sunbelt”—including, among others, Arizona, Nevada, New Mexico, and Utah—cleaved to an approach more consistent with the harsh penal practices that currently define American penalty.<sup>23</sup> Still, if historically the motivating conceptions of penal practice nationwide have hardly been uniform, the evolution of sentencing policy

in the United States since the 1960s nonetheless reveals a notable change in the governing conception of the penal subject,<sup>24</sup> consistent with a shift from some acceptance of reintegration to a wide embrace of wholesale exclusion.

In the sentencing context, this shift was most obviously expressed by the move from indeterminate to determinate penalties. For most of the 20th century, criminal sentencing in the United States was “indeterminate”: for any given crime, legislatures would stipulate statutory ranges (e.g., 5 to 15 years, 10 years to life), and judges would exercise their discretion to sentence within that range in particular cases.<sup>25</sup> This was true even in Arizona,<sup>26</sup> where the commitment to rehabilitation was at best “fragil[e] and fleeting.”<sup>27</sup> And in some contexts—most notably, California, which “[b]y the early 1970s . . . sentenced nearly all serious offenders to an indeterminate term of between one year and life in prison”—even the judge would sentence within a broad range, leaving it to parole boards to determine the precise length of time an individual would actually serve.<sup>28</sup>

As Joan Petersilia explains, during this period, “[i]ndeterminate sentencing coupled with parole release was a matter of absolute routine and good correctional practice.”<sup>29</sup> Even in places with shallow commitments to rehabilitation, these two systems acted in concert, reflecting the belief that custody decisions should be individualized and that people who committed crimes could be “reformed.”<sup>30</sup> Together, they gave individuals found suitable for release the chance to build stable lives on the outside.<sup>31</sup> Consistent with this approach, people could earn time off their sentences for good behavior, an incentive promoting the development of skills and habits compatible with successful reentry. Crediting time for good behavior also had a positive effect on the prison environment, making it safer, more orderly, and thereby less destructive of (and less scary for) the people who lived inside.

Under this system, it was expected that even people with life sentences would at some point be released. As recently as 1980, the Supreme Court could justify upholding a Texas decision imposing a life sentence for passing a bad check in part because that state’s “relatively liberal policy of granting ‘good time’ credits” meant that lifers “become eligible for parole in as little as 12 years.”<sup>32</sup> But even as Justice Rehnquist wrote those words, strong opposition toward indeterminate sentencing had already emerged from several points on the political spectrum.<sup>33</sup> And one point on which diverse critics agreed was that the penal goal of rehabilitation was wrongheaded and should be abandoned.

The broader aim of the rehabilitative model was “to effect changes in the characters, attitudes, and behavior of convicted offenders” so that they could

safely and productively be returned to society on completion of their sentences.<sup>34</sup> True, as Craig Haney notes, even in the heyday of programmatic efforts to rehabilitate people behind bars, “very few prisons anywhere in the United States ever really functioned as full-fledged treatment or program-oriented facilities.”<sup>35</sup> But there was nonetheless a belief among many corrections professionals that society’s interests could best be served by providing prisoners with tools to help them become productive citizens. The broad-based commitment to rehabilitation, coupled with recognition of the limits of individualized therapies in isolation from community, even led prison administrators to call for broader adoption of alternative “community-based programs” and for the use of institutionalization as “a last resort to be used only when the system had [demonstrated] that it was necessary.”<sup>36</sup>

If in practice, prison treatment programs were unable to live up to their advocates’ highest aspirations, the widespread institutional commitment to the rehabilitative ideal at least signaled a recognition—key for our purposes—that penal subjects were fellow human beings with, as Mona Lynch puts it, “all of the psychological and sociological complexity inherent in being human.”<sup>37</sup> As such, they were thought to be capable of change and growth, and worthy targets for state investment and intervention.<sup>38</sup> Consistent with this view was the sense that antisocial behavior was a collective problem requiring a collective solution. Indeed, during this period, it was not uncommon to find official acknowledgment of the possibility that individual criminal behavior was “produced much more by social than individual pathology”<sup>39</sup> and thus that to prevent crime, society itself would need to change.

This way of construing crime and criminal offenders was thus recognizably reintegrationist. Of course, the extent of the reintegrationist commitment should not be overstated; a society truly disposed toward meaningful reintegration would have been unwilling in the first place to deploy a penal strategy against society’s most disadvantaged citizens and would instead have opted for meaningful social programs to assist those who are mentally ill, drug addicted, illiterate, etc., to deal with those problems without involving the criminal justice system.<sup>40</sup> This difference must be acknowledged if we are to have an accurate sense of where American society pre-1980 fell on the spectrum between reintegration and exclusion. Still, during this period, it was generally expected even in the most punitive states that people imprisoned for their crimes would at some point rejoin society.<sup>41</sup>

As noted, however, by the mid-1970s, the rehabilitative model informed by this seemingly reintegrationist conception was coming under major crit-



icism from multiple quarters. The combined effect of these assaults was a rapid and dramatic shift in penological priorities toward a more punitive approach, even in those jurisdictions previously committed to rehabilitation.<sup>42</sup> One casualty of this shift was the then-widespread regime of indeterminate sentencing. What emerged instead was a system of “determinate” or mandatory sentences, in which penalties stipulated a specific term and any official discretion to authorize early release was strongly curtailed. Consistent with this new approach, many states entirely abolished discretionary parole, and others considerably narrowed its scope.<sup>43</sup> By 2002, “just 16 states still gave their parole boards full authority to release inmates through a discretionary process.”<sup>44</sup>

The turn to mandatory sentencing proved a signal event in the emergence of the exclusionary ideal in American penology. The previous open-ended model was certainly not perfect. For one thing, the wide discretion afforded prison officials produced a pattern of inconsistent and arguably discriminatory outcomes that ultimately pushed even the political left to advocate fixed terms. But whatever the shortcomings of a system of indeterminate sentencing combined with meaningful parole review, it at least embodied an inclusionary disposition toward the people the state incarcerated. By contrast, in a determinate sentencing system, individual character and capacities are irrelevant,<sup>45</sup> as is the question of whether a given person might be able to live safely and productively in society. A mandatory sentence is a commitment to the social exclusion of the sentenced person for the stipulated period, irrespective of anything he or she might do or not do, be or not be. Any understanding of prisoners as people drops out of the picture.

The stripped-down conception of the penal subject reflected in mandatory sentencing schemes stands in stark contrast to the animating vision of the indeterminate approach. This shift was no accident. It reflected a broader transformation in attitudes toward convicted offenders, consistent with the self-consciously punitive penal policies—concerned less with social welfare than with the infliction of “penal harm”<sup>46</sup>—broadly adopted following the repudiation of the rehabilitative project. This new model found intellectual foundation in the work of James Q. Wilson, who argued that the function of the penal system was not to reform offenders but “to isolate and . . . punish” them.<sup>47</sup> Whereas the rehabilitative approach emphasized the social inputs of individual criminal behavior, Wilson argued that the problem was the individuals themselves. As he put it, “Wicked people exist. Nothing avails except to set them apart from innocent people.”<sup>48</sup> Although Wilson’s phrasing implies that “wicked people” are still “people”—i.e., psychologically complex

beings with “rich, multi-layered identities and motivations”<sup>49</sup>—his broader account suggests otherwise. As he framed the issue, criminal offenders are evil, plain and simple. If they do bad things, it is because of who they are and what they therefore choose to do, and no interventions, however well meaning, can change them. Seen in this way, criminal conduct is no longer a collective problem but an individual one. And if individual actors choose to do wrong, not only is there no help for them, but the rest of us need have no sympathy for them. In this way, the punitive penalty heralded by Wilson’s model recast not only the nature of penal subjects but also society’s moral obligations to those subjects. On the earlier model, criminal offenders were still regarded as people, able to change and grow and as such deserving of collective understanding and investment. In the new punitive climate, by contrast, 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.

Wilson’s deracinated and unidimensional account fit perfectly with the Reagan era’s radical individualism. It also helped justify a sharp ideological shift away from any thought of reintegrating convicted offenders and toward permanent exclusion. Consistent with this shift, legislatures across the country, explicitly rejecting the goal of rehabilitation,<sup>50</sup> set about revising their sentencing laws. By the mid-1990s, many states had adopted policies such as “truth in sentencing,” “three strikes,” and other schemes designed to impose fixed terms and to increase the length of time served. Predictably, following these changes, prison populations soared, and the people sent to prison found themselves facing longer and longer periods of banishment.

Still, the system that emerged during the 1980s and 1990s did retain some avenues for release and reentry. So long as sentences remained temporally limited, even people with long fixed terms could at some point expect to hit their deadlines and be legally entitled to release. Many life sentences, moreover, retained the possibility of parole. And although going forward, sentenced offenders would be mostly subject to the new mandatory regime, there remained in custody many people sentenced under the previous approach who retained parole eligibility.

The American criminal justice system in the late 20th century was thus to some extent a patchwork, with some avenues remaining for the possible reintegration of former prisoners. In a system without a strong exclusionary disposition, the fact that some prisoners could continue to earn their way back to society (whether through time served or demonstration of personal reform) would provoke no backlash. When permanent exclusion *is* the moti-

vating aim, however, such a backlash may be expected to emerge, along with various legal and institutional strategies designed to plug the gaps. As I argue in the sections that follow, this is precisely what has occurred, in ways consistent with the aim of exclusion and the normative vision of penal subjects as something less than human.

### *III. The Reproductive Effects of the American Prison*

First, consider prison conditions.<sup>51</sup> A system committed to meaningful reintegration postrelease would treat the period of custody as a chance to help people overcome the personal difficulties and incapacities that informed whatever antisocial behavior first brought them within the ambit of the criminal justice system. Yet in American prisons today, one finds just the opposite. In fact, it is hard to imagine institutional conditions less well designed to facilitate successful reentry. There is little effective drug treatment, although as many as half or more of incarcerated offenders have reported problems with drug and/or alcohol addiction.<sup>52</sup> Nor is there anything like sufficient mental health care to provide adequate treatment for the estimated 56% of state prisoners who suffer from serious mental illness.<sup>53</sup> The emphasis on custody over rehabilitation means that whatever skills people may have had on admission are likely to deteriorate during their prison term<sup>54</sup> and also that few people are likely to develop new skills while in prison that will be useful to themselves or others on release. Strict limits on visiting, combined with the high cost of phone calls from prison<sup>55</sup> and the widespread practice of siting prisons far from the urban centers where prisoners' families are most likely to live,<sup>56</sup> mean that few people in prison are able to retain close family ties<sup>57</sup>—even though “one of the strongest predictors of post-release success is the quality of a prisoner’s ongoing contact with loved ones.”<sup>58</sup> Grossly inadequate medical care<sup>59</sup> leaves many people in custody with serious and/or chronic medical conditions, which can impair successful reintegration. Severe overcrowding in often unhygienic conditions, together with what is frequently an absence of institutional strategies for preventing the spread of disease, means that prisoners face infection rates for HIV, hepatitis C, tuberculosis, and even staph that are far in excess of infection rates on the outside,<sup>60</sup> thereby further burdening not only their health but also their capacity to escape the social marginalization that often attends the poor and chronically ill.

These material effects are not the only barriers to successful reentry that prisons systematically create. Equally debilitating is the severe emotional and

psychological toll of the day-to-day custodial experience. As Terry Kupers observes, this experience can “destroy[] prisoners’ ability to cope in the free world,” leaving them “broken, with no skills, and a very high risk of recidivism.”<sup>61</sup> Worse still, the experience of living under the conditions that currently define life in many of the nation’s prisons and jails can leave at least some people resembling the image of the angry, unstable, antisocial, and potentially dangerous deviant that already justifies mass incarceration. And having been subjected to this transformative process, affected individuals will become even less able to successfully rejoin society on release.

Take, for example, the matter of personal space. As Justice Marshall noted in his dissent in *Rhodes v. Chapman*, “long term inmate[s]” require a minimum amount of personal space if they are “to avoid serious mental, emotional, and physical deterioration.”<sup>62</sup> But American prisons today are often chronically overcrowded, which means that people routinely live jammed into dormitories<sup>63</sup> or doubled up in tiny cells designed for a single person, a situation that alone may seriously compromise an individual’s “mental [and] emotional” capacities<sup>64</sup> and that can readily give rise to anger, tension, and hostility—and thus to disorder and violence—even among people not typically prone to aggression.<sup>65</sup>

At the same time, the increased use of punitive isolation, whether in supermax prisons<sup>66</sup> or under less extreme conditions, means that the damaging effects of isolation are being experienced by more and more detainees, many of whom will at some point be released.<sup>67</sup> Studies show that people who have lived in extended solitary confinement are likely to be not only more erratic and violent in their behavior but also more angry. Haney’s research involving prisoners in the “secure housing unit” (SHU) of California’s Pelican Bay facility found that almost 90% of SHU residents “had difficulties” with “irrational anger, compared with just 3% of the . . . population [outside prison].”<sup>68</sup> These combined effects on residents can lead to longer stays in isolation. But the self-perpetuating character of supermax prisons and other forms of solitary confinement has also meant that in a growing number of cases, prisoners are completing their sentences while in highly restrictive solitary confinement and being released directly to the community. Unsurprisingly, when people are freed straight from any type of solitary confinement, “there is often trouble,” since “[t]he anger that has been mounting during their stints in isolation causes many prisoners great difficulty controlling their tempers just after being released.”<sup>69</sup> Thus, both crowding and isolation contribute to the reproductive logic of the prison, producing inmates whose anger, volatility, and general inability to function successfully in a social milieu are very

likely to prompt disruptive and antisocial behavior both out in the free world and in the prisons themselves, which in turn serves to justify the incarceration (or reincarceration) of those who act out in this way.

There is still another component of life in the modern American prison that powerfully contributes to the exclusionary project: the ever-present possibility of violence. Although this phenomenon has many explanations, prison violence is frequently traceable to a complex set of institutional dynamics, found especially in higher-security men's facilities, reflecting what might be thought of as a culture of hypermasculinity.<sup>70</sup> In this culture, there is a premium placed on being “manly,” a behavioral code that “says carry yourself like a man, be hard and tough, and don't show weakness.”<sup>71</sup> Those who act against this code, who show emotion, express need, or otherwise reveal themselves as “soft,” risk being labeled a “punk”<sup>72</sup> and, as such, a target for all manner of abuse, ranging from intense verbal harassment and theft of personal property to serious physical assault and rape.<sup>73</sup> Men in prison thus work hard at seeming tough and avoiding any word or act that might suggest weakness or vulnerability.<sup>74</sup>

Being forced to maintain a constant front of hypermasculinity over a long period can take a profound psychological toll. Men who have lived under these circumstances report corrosive effects on the possibility for meaningful interpersonal interaction, since “[w]ithout trust or letting someone know at least some of your weaknesses, no strong bonds can develop.”<sup>75</sup> The effect of these emotional barriers is more than just loneliness. Over time, the need to project a tough image and thus to build emotional walls compromises one's ability, whether inside or outside the prison, to forge any meaningful bonds with anyone. Yet this ability is crucial to a stable, healthy life. As Derrick Corley reasonably asks, “If it is true that healthy people have healthy relationships, and, if [as a consequence of these cultural dynamics] these relationships are systematically denied prisoners, then how can [they] be expected to eventually live in society as normal, law-abiding, productive people?”<sup>76</sup>

But the cultural code of hypermasculinity does not only impose obstacles to emotional connections with others. In addition, the unrelenting need to project an image of “hardness and toughness”<sup>77</sup> demands a constant readiness to use violence to prove one's own “manliness.” And this posture too can become instinctual if sustained long enough. Such instincts may serve one well in a carceral context, but their likely accompaniments—belligerence; insensitivity; a hair-trigger temper; an inability to admit error, back down, compromise, or work through differences in a mutually respectful way—are precisely the antisocial tendencies that society fears to see in former pris-

oners. They are also tendencies that are very likely to keep their possessors caught in the cycle of incarceration even after they have served their initial prison terms.

There is an even worse malignancy in all this pressure to seem tough: the direct link between the culture of hypermasculinity and the fear of rape. Although not true of all prisons,<sup>78</sup> in many facilities—especially the overcrowded ones—the threat of rape motivates a gendered economy of respect in which the more masculine one appears, the more respect one gets and thus the greater one’s protection from victimization. In this system, sexual predators show themselves by their predation to be real men, and those prisoners facing a threat of rape who seek protection from correctional officers will often be told by the officers to “fight or fuck.”<sup>79</sup> In such a climate, those individuals with the physical strength to defend themselves from attack—even those not otherwise prone to violence—must be constantly prepared to fight.<sup>80</sup> As for those who are unable to protect themselves, they can escape their dilemma only by hooking up with a more powerful prisoner (sometimes known as a “wolf”),<sup>81</sup> who will protect them from violent rape by other prisoners in exchange for unlimited sexual access and other wifely duties such as cooking and cleaning.<sup>82</sup> This last resort, sometimes referred to as “protective pairing,” has also perhaps more aptly been described as “sexual slavery.”<sup>83</sup>

It is important to note that not all prison environments reproduce these dynamics. Nor, even in those that do, are all prisoners caught up in them.<sup>84</sup> But for those people who are not so lucky, the experience of living in such a culture will be deeply degrading and dehumanizing and can do serious emotional and psychological damage. Prisoners facing such conditions are not free just to walk away. They instead must remain locked inside the site of their abuse, often in close proximity to their abuser, in what can only be a permanently traumatized and terrorized state bereft of any peace of mind.<sup>85</sup> It should come as no surprise if, having endured such conditions for months or even years on end, a man might be so full of rage and self-loathing as to have trouble (re)building stable, healthy relationships or even navigating ordinary social interactions on the outside. Given the important role played by close personal relationships in successful reintegration, an inability to form close personal bonds is likely to mean the continued social marginalization of those who have been traumatized in this way. And the propensity to anger and violence that anyone subjected to such treatment is likely to develop will only contribute to the possibility of further antisocial conduct and eventual reincarceration.

As this brief sketch suggests, incarceration in the American prison is not an experience designed to promote the successful social reintegration of the people who have served their time. To the contrary, such a system is far more likely to have the opposite effect, so that people who have once been caught in its net will be unable to break free and rejoin society on terms of equal citizenship and belonging. For a polity committed to meaningful reintegration, this state of affairs would be intolerable. It does, though, seem wholly consistent with the goal of permanent exclusion. It is also not difficult to recognize in these conditions a particular normative view of the people subjected to them. Plainly put, these are not conditions that would be imposed on people widely regarded as fellow citizens and fellow human beings. They are instead the conditions of Agamben's "state of exception," in which bare biological life is all that is left, in which one may be killed without being either sacrificed (because, not being a person of value, one's death demands no ritual) or murdered (because one's death has no legal significance).<sup>86</sup> Agamben locates this status in the figure of the "wolfman" or "werewolf," a "monstrous hybrid of human and animal," which, although bearing the outward appearance of man, is widely recognized not to be human.<sup>87</sup> As such, these creatures may be killed without ceremony or at the very least banned from the community without a second thought. Indeed, the exclusion of such monsters becomes precisely what must be done to protect those who *are* regarded as fully human (and thus as full citizens)—an imperative consistent with Jonathan Simon's characterization in this volume of "total incapacitation" as a means to guard society from the "contamination" thought to emanate from prison inmates.<sup>88</sup> Notice, moreover, what Agamben's image of the wolfman/werewolf suggests about the appropriate conditions of confinement for the contaminated: if the werewolf is successfully trapped, he may perhaps be kept alive, but no efforts need be expended to ensure his well-being while caged or to help him flourish despite his constraints. He is nonhuman, an animal, and thus merits no such consideration.

#### *IV. Life Means Life: The Gradual Disappearance of Parole*

The conditions just explored, although perhaps officially bemoaned, are in fact fully consistent with the exclusionary project. Still, despite the debilitating effects of prison, some people do—against the odds—manage to find a way while in custody to develop or strengthen prosocial skills. This is especially true of lifers, who tend to be better able to screen out the toxic and often violent gamesmanship of the younger inmates and to be left alone to do their time in peace. This means that, over time, even long-term inmates

who once posed a threat to public safety may become fully capable of leading healthy and productive lives on the outside.

In a society committed to meaningful reintegration, a showing that individuals in custody could be safely returned to society would prompt their ready release. By contrast, in a society committed to permanent exclusion, such a showing would only be unwelcome. This is particularly so when the exclusionary project is cloaked by a rhetorical commitment to reintegration when possible, since in such a system, it would be hard to justify keeping behind bars someone capable of living safely in society. Indeed, from an exclusionary perspective, every person who succeeds in demonstrating the capacity to safely reintegrate exposes the gaps in a system that cannot punish every convicted offender with LWOP. For an exclusionist system, the challenge is closing the gaps.

Over the past two decades, jurisdictions across the U.S. have met this challenge with various strategies to limit parole grants even for those people who can demonstrate their rehabilitation.<sup>89</sup> The most obvious development in this regard was the introduction and swift adoption of LWOP sentences. LWOP is the perfect exclusionary strategy. In one stroke, the target is permanently exiled, foreclosed from ever making a case for release. It is thus to be expected that a system committed to permanent exclusion would embrace the use of LWOP. And sure enough, one finds a substantial recent increase in the use of this sentence. According to the Sentencing Project, in 1992, there were 12,453 people serving LWOP sentences in the United States. By 2003, there were over 33,000, and by 2008, over 41,000.<sup>90</sup> Every state save one has made LWOP an available penalty,<sup>91</sup> and as of 2009, at least six states and the federal system have eliminated parole eligibility entirely for people receiving life sentences, making LWOP the norm in those jurisdictions.<sup>92</sup> Between 2003 and 2008, the number of LWOP sentences grew at a rate “nearly four times [that] of the parole-eligible life sentenced population,”<sup>93</sup> a change consistent with an emerging commitment to permanent exclusion.<sup>94</sup>

Still, many people have continued to receive life *with* the possibility of parole: 5,471 between 2003 and 2008 out of a total of 12,933 life sentences imposed.<sup>95</sup> This fact may seem to cut against the notion of a widespread commitment to exclusion. But too much should not be made of the persistence of life with parole eligibility. For one thing, given that LWOP is a relatively recent innovation, it is striking that well over half the life sentences imposed during this period were LWOP sentences. More significant still, the fact that the possibility of parole is retained as a formal matter turns out in today’s penal climate to make little practical difference. What in the middle decades



of the 20th century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole is rarely granted.

California is a case in point. In California, life sentences typically take the form of some minimum number of years (typically 7, 15, or 25) to life. Prisoners do not become parole eligible until they have served the minimum. Once they serve that time, the governing regulations require the Board of Parole Hearings (the Board) to consider parole eligibility. Directed by law to take account of a wide range of circumstances, including the crime itself, the individual's criminal and "social" history, and his or her behavior while incarcerated,<sup>96</sup> the Board is to consider whether the prisoner "pose[s] an unreasonable risk of danger to society."<sup>97</sup> If not, a parole date is to be set.<sup>98</sup> Given the population at issue, it would not be surprising if many people who came before the Board were found ineligible for parole at their earliest possible release date. But, assuming meaningful review, one might expect the Board to see some appreciable number of people, especially by the third or fourth time around, who could be released with minimal public safety risk. And yet, for the past decade, the Board has denied 98% of the petitions it hears.<sup>99</sup> From this, one might conclude that lifers in California are especially dangerous. But in fact, the evidence suggests that the Board's practice of routinely denying petitions is a product not of the meaningful review of the merits of each case but of a determination not to grant parole except in the rarest instances.

This sort of resistance to granting parole is not unique to California. Across the country, parole boards and governors have grown increasingly reticent to release even people with strong cases that their release would pose a minimal threat to public safety. As a result, "it has become increasingly difficult for persons serving a life sentence to be released on parole."<sup>100</sup> Why should this be? One possible explanation is the nature of prison conditions sketched earlier. Having been systematically subjected to degrading, destructive conditions, fewer and fewer prisoners may be able to demonstrate that they are fit for release. And to some extent, this may well be the case. But research into the relevant population—lifers who retain the possibility of parole—strongly indicates that in many cases, the obstacle is not the individual's inability to safely reintegrate but political resistance to granting release. As Ashley Nellis notes, lifers often mature in custody, are generally more well adjusted than younger prisoners, and "are frequently lauded by corrections administrators as easier to manage."<sup>101</sup> As long-term inmates, moreover, lifers

typically age out of crime, and those who have managed to get out on parole have been persistently found to pose a relatively lower risk of recidivism.<sup>102</sup> Finally, the growing willingness of the federal courts to intervene and reverse parole denials by state parole boards<sup>103</sup> strongly suggests that one must look beyond prison conditions—destructive though they may be—to understand the dramatic decline in parole grants in recent years.

In practical terms, this decline is best understood as a political phenomenon. Parole decisions require all-things-considered judgments as to the ability of an individual to live safely in society. This enterprise necessarily carries some risk that errors will be made. This was as true in the mid-20th century as it is today. But politicians have increasingly come to pay a serious political price for any such mistakes. Most famously, in 1988, the presidential campaign of Democratic nominee Michael Dukakis was derailed by revelations that while Dukakis was governor of Massachusetts, a state prisoner escaped from a weekend furlough and went on to commit violent rape and aggravated assault. It is unlikely that Dukakis had ever heard of Willie Horton before the campaign of Republican nominee George H. W. Bush brought Horton to the attention of the American public, but no matter. The furlough had happened on Dukakis's watch, so he was held politically accountable for all that followed.

Politicians' fear of being "Willie Horton-ed" has arguably had a direct and serious impact on parole in the United States. Although the parole structure differs among jurisdictions, in many states the governor has considerable control over the process, whether indirectly through the appointment of parole board members or directly through veto power over their decisions. Many state executives have preferred to dramatically curtail the granting of parole rather than risk the single mistake that might threaten their career. But—and here is the key point—it is unlikely that this trend would have emerged were it not consistent with the prevailing propensity to exclude. Were people in prison widely viewed as human beings just like anybody else, it might be regarded as beyond cruel, not to mention an indefensible waste of taxpayer dollars, to maintain in custody those who could show themselves to be reformed. It is understandable that parole boards would want to be sure that petitioners would pose little public safety threat. Still, when a person has spent decades behind bars and when the evidence of suitability for release is strong, a society committed to meaningful reintegration would take for granted that he or she should be released.

Judging from the policies and practices that currently govern the parole context, however, American society at present takes a very different view of

the matter. What one finds instead are demands for fewer parole grants and even for parole-eligible individuals to have fewer opportunities to present their cases for parole. In California, for example, a recently adopted ballot initiative known as “Marsy’s Law” greatly extended the time between parole hearings. Prior to the law’s passage, there was a presumption of annual hearings,<sup>104</sup> although the Board retained the discretion to delay a hearing for an additional year on a finding that “it is not reasonable to expect that parole would be granted at a hearing during the following year” and for four additional years if this finding is made and “the prisoner has been convicted of murder.”<sup>105</sup> Marsy’s Law extends the default between parole hearings to 15 years and flips the presumption. The Board retains the authority to reduce the waiting time but can do so only if it “finds by clear and convincing evidence” that “consideration of the public and victim’s safety does not require a more lengthy period of incarceration.”<sup>106</sup> And that discretion is limited: the shortest possible period between hearings is now 3 years (the other stipulated alternatives are 5, 7, and 10).<sup>107</sup> In theory, after Marsy’s Law, the most someone who is able to show clear and convincing evidence of parole eligibility would need to wait between hearings would be 3 years. But the restrictions the new law creates dovetail too well with the Board’s existing inclination to refuse parole in almost all cases for a 3-year delay to become standard. Those familiar with the process report that post-Marsy’s Law, most people denied parole are receiving subsequent hearing dates at least 5 years from the time of a denial.<sup>108</sup>

Implicit in this shift is not only a commitment to longer sentences but also an insistence that, despite statutory schemes creating an entitlement to parole consideration, people in prison must and will be kept behind bars as long as the state can possibly keep them there. One might frame this disposition as indifference to the fate of society’s prisoners, and that attitude is certainly part of the story. But in some cases, such a neutral term seems inadequate to capture what appears rather to be affirmative hostility to the prospect of any reintegration. This hostility was vividly on display recently in North Carolina, when—to the apparent surprise of both the courts and the legislature—it emerged that over a hundred lifers convicted in the 1970s would soon be legally entitled to release. At issue were life sentences imposed between 1974 and 1978. During those years, the governing statute fixed a life term at 80 years.<sup>109</sup> But in 1981, the state legislature passed a law allowing prisoners the opportunity to earn up to 50% off their sentences through good behavior.<sup>110</sup> And in 1983, the state’s Department of Corrections expanded the “day-for-a-day” provision of the 1981 law to apply retroactively to those who were convicted prior to 1981.<sup>111</sup> Taken together, these provisions established

that, assuming uniformly good behavior, people sentenced to life under the 1974 law could be entitled to release once they had served 40 years.

In 2005, North Carolina prisoner Bobby Bowden made just this argument in a habeas petition, and he prevailed in the state court of appeals.<sup>112</sup> Because in 1978 the North Carolina legislature amended its statute, redefining life as the indeterminate sentence of life with the possibility of parole,<sup>113</sup> the ruling in *State v. Bowden* potentially applied only to an estimated 120 or so people sentenced to life between 1974 and 1978.<sup>114</sup> Predictably, however, opponents of the outcome in *Bowden*—including the state’s governor, leading newspapers, the North Carolina Fraternal Order of Police, and victims’ rights advocates—quickly lined up to condemn the decision.

What is interesting here is that this opposition *was* so predictable, despite the fact that those people whose sentences stood to be affected had uniformly committed their crimes more than three decades previously. Admittedly, there may have been grounds for concern regarding the release of so many lifers without any individualized determinations as to a possible public safety threat. But as noted, available research suggests that, given the age and lengthy confinement of those individuals whose sentences were affected, the risk of recidivism they posed was relatively low.<sup>115</sup> Indeed, Bowden himself had only hit the statutory deadline because of his accumulated good-time credit,<sup>116</sup> which in total suggested someone who had lived in an orderly and peaceable manner for over 30 years. And the same would have to be true of anyone entitled to early release in the foreseeable future on the statutory scheme on which Bowden relied.

Yet rather than press for individualized hearings to determine suitability for release, Governor Bev Perdue fought any release at all.<sup>117</sup> In terms consistent with the exclusionary project, she asserted that “life should mean life, and, even if a life sentence is defined as 80 years, getting out after [40 years] is simply unacceptable.”<sup>118</sup> Thomas Bennett, executive director of the North Carolina Victims Assistance Network, had a similar take. As Bennett put it after *Bowden*, “we’ve got a hole in the law, and these felons are going to use it to crawl out of prison.”<sup>119</sup>

It is through its policies and practices that a state reveals its position on the spectrum between meaningful reintegration and permanent exclusion. For this reason, one should perhaps not make too much of the statements of Perdue and Bennett. But these statements are nonetheless telling, especially read alongside the state’s refusal even to consider releasing people who were found to have a strong legal claim to freedom and who, after decades in prison, may well have posed no public safety threat. Both sets of comments

lay bare the exclusionary imperative motivating the opposition to *Bowden*, and Bennett's statement in particular makes plain the conception of prisoners that undergirds the relentless impulse to exclude. Not only, as James Q. Wilson had it, are incarcerated offenders essentially "wicked," but they are insects or worms crawling in the dirt. This imagery exposes two basic beliefs that seem to animate the exclusionary project: people in prison are subhuman, and they are polluted and unclean. They must therefore be kept away from society, lest they defile the rest of us. Viewed in this light, recent events in North Carolina seem further to vindicate Simon's construal of the penal push for "total incapacitation" as motivated less by a desire to prevent crime than by a fear of "contamination" from contact with people who have spent time in prison.<sup>120</sup>

### *V. The Exclusionary Effects of Collateral Consequences*

Despite LWOP's eclipse of parole-eligible life sentences and the relative rarity in today's carceral climate of parole grants even for those individuals who retain the possibility of parole, the time-limited nature of most custodial sentences means that most people sent to prison will at some point be released.<sup>121</sup> But the challenges facing people with felony convictions do not end with the custodial term. Even apart from the long-term harmful effects of prison conditions,<sup>122</sup> former prisoners will face many serious obstacles to successful reentry. Many will find themselves without the support of friends or loved ones who over the years may have died or become estranged or just moved on.<sup>123</sup> Employers may be reluctant to hire them.<sup>124</sup> People newly released from prison are also likely to have little or no money on which to rely while trying to set themselves up with the components of a postcarceral life.<sup>125</sup> After living for long periods—sometimes years—making few decisions and taking no responsibility for the provision of even basic personal needs, they may feel themselves at sea and unable to manage the endless details of daily life on the outside. And to make matters worse, they may yet be wrestling with the temptations of substance abuse after years without effective drug treatment. In short, for many if not most people, successful reentry is sure to be extremely hard.

A society committed to meaningful reintegration would regard these difficulties as collective problems demanding public attention and state action. In the American context, however, far from working to alleviate the burdens of reentry, the state instead exacerbates them.<sup>126</sup> As a consequence, people newly released from prison face not only the psychological, material, and

structural obstacles already noted but also a host of state-imposed disabilities that make it even harder for them to successfully reintegrate.<sup>127</sup> Among other impediments, these disabilities can include “[b]ans on entry into public housing, restrictions on public-sector employment, limits on access to federal loans for higher education, and restrictions on the receipt of public assistance.”<sup>128</sup> Those with felony convictions may also be “ineligible for many federally-funded health and welfare benefits,” including food stamps.<sup>129</sup> They “may no longer qualify for certain employment and professional licenses.”<sup>130</sup> Their driver’s licenses may be automatically suspended,<sup>131</sup> making it hard in some jurisdictions for them to make meetings with their parole officers, get to work, etc., thus risking revocation of their parole. In many cases, people with felony convictions cannot vote, serve on juries, or enlist in the military.<sup>132</sup> Formerly incarcerated people also face legal obstacles to getting access to their own children. Before regaining custody, newly released parents may be required, among other things, to attend parenting classes, complete drug-treatment programs, and provide stable residences. Given the obstacles they face, it can be difficult for people just out of prison to find work and housing, which means that in practice, even those committed to reconstituting their families may be unable to do so.<sup>133</sup>

It is hard to overstate the breadth of the legal disabilities placed on people with felony convictions in the United States. The American Bar Association Criminal Justice Section recently embarked on a project to catalogue all state and federal statutes and regulations that impose legal consequences on the fact of a felony conviction. As of May 2011, the project had catalogued over 38,000 such provisions,<sup>134</sup> and project advisers estimate that the final number could reach or exceed 50,000.<sup>135</sup> Many of these restrictions will likely prove unobjectionable, particularly those that carefully tailor the restriction to the nature of the crime. To take an example at random: § 4842(d) of the California Business and Professional Code allows the licensing board to deny an application for a prospective “registered veterinary technician” if the applicant has “[b]een convicted of a crime substantially related to the qualifications, functions and duties” of someone in that position.<sup>136</sup> But in many other instances, the restrictions are far broader and seemingly gratuitous. For example, under federal law, anyone convicted of drug possession or drug trafficking may permanently lose access to all “federal benefits.”<sup>137</sup> As Gabriel Chin notes, this blanket exclusion potentially applies to over 750 federal benefits, “including 162 by the Department of Education alone.”<sup>138</sup>

People coming home from prison already face long odds. The combined effect of these various obstacles makes it that much harder for former pris-

oners to piece together the components of a stable life (home, family, work, schooling, etc.) and only increases the chances that they will slip back into the patterns and behaviors that led them to prison in the first place. But the practice of placing formidable impediments in the way of successful reentry does more than simply increase the likelihood of reincarceration. It also consigns to social marginalization even those people who manage to stay free. As Bruce Western and Becky Pettit observe, former prisoners have collectively become “a group of social outcasts,” whose “[s]ocial and economic disadvantage, crystallizing in penal confinement, is sustained over the life course.”<sup>139</sup> This group has “little access to the social mobility available to the mainstream.”<sup>140</sup> The effect, moreover, is “intergenerational,” so that children of incarcerated parents are more likely when young to experience poverty, dislocation, and other markers of disadvantage, setting them up for lives as “social outcasts” themselves.<sup>141</sup>

The socioeconomic disadvantage that dogs even those people who manage to stay out of prison may at first seem unrelated to the impulse to exclude that currently drives much penal policy in the direction of increased incarceration. But as the term “social outcast” suggests, there are many ways to exclude, of which prison is only the most obvious. The wide employment and residency restrictions many jurisdictions have lately imposed on registered sex offenders—indeed, the very notion of a sex-offender registry itself—indicates the array of noncustodial options available to a state wishing to contain those who are judged socially undesirable.

Indeed, as important recent work by Katherine Beckett and Steve Herbert reveals,<sup>142</sup> creative collaborations between municipal authorities and local police have begun to make it possible for the state to mark out certain people for extended exclusion from the shared public space without the need for prisons—or even for criminal conduct. In Seattle and other urban centers, multiple such tools are now operating to “explicitly create and enforce zones of exclusion.”<sup>143</sup> For example, “off-limits” orders, which can be imposed on people merely suspected of drug or prostitution offenses, require subjects to stay out of designated neighborhoods or “zones” on pain of imprisonment.<sup>144</sup> In some cases, these zones “comprise significant parts of the city and may include the entire downtown core in which social and legal services are concentrated.”<sup>145</sup>

Similar effects have also been achieved through innovative expansion of trespass laws. To commit trespass, a person must have previously received a warning or “admonishment” of limits on access. Having been so admonished, a person who returns may be subject to arrest and imprisonment. Trespass is

typically used to prevent access to private property. But in Seattle, the law of trespass has been increasingly applied to a remarkably wide range of public spaces, including “public parks, libraries, recreation centers, the public transportation system, college campuses, hospitals, religious institutions, social services agencies, and commercial establishments,” as well as public housing and even sidewalks and public streets.<sup>146</sup> The justifications for exclusion range widely. “Parks exclusion” laws allow police and park officials to impose bans on access to “one, some, or all public city parks for up to one year” for a host of minor infractions including “being present after hours, having an unleashed pet, camping, urinating, littering, or possessing an open container of alcohol.”<sup>147</sup> In a number of municipalities, any nonresident found on public housing property may be “trespass-admonished” and subject to arrest if he or she returns. Business associations are increasingly encouraged to delegate to police officers the power to remove people from places otherwise open to the public, merely on suspicion that targeted individuals “lack ‘legitimate purpose’ for being there.”<sup>148</sup> In Seattle, such an arrangement exists even as to “321 downtown parking lots”—and if a person is banned from one such lot, he or she is banned from them all and “thereby subject to arrest (for trespass) for walking through any one of them.”<sup>149</sup>

Seattle is not alone in this creative use of exclusionary authority. According to Beckett and Herbert, some combination of the programs they describe are in force in cities as varied as New York, Los Angeles, Portland, Las Vegas, Cincinnati, Honolulu, Boston, Richmond (Virginia), and Fort Lauderdale. This panoply of exclusionary tools has a “net-widening” effect; despite the civil nature of the violations that can lead to “no-go” orders, repeated violation can land a person in jail even absent otherwise criminal conduct. In this latest twist, to be marked out for exclusion it is enough simply to be persistently “undesirable” or “disorderly.”<sup>150</sup> Viewed alongside this range of innovative and noncustodial exclusionary mechanisms, the prison begins to appear less the necessary centerpiece of the state’s response to crime than simply the most extreme and effective means to enforce a spatial segregation between, on the one hand, those people the polity is prepared to recognize as full political citizens and, on the other hand, the marginal, disorderly, aesthetically unpalatable others with whom “respectable” members of society would prefer not to have to deal.<sup>151</sup>



## *VI. Current Carceral Practice and the Purposes of Punishment*

The picture painted above does not, of course, reflect the way the penal system is conventionally understood. According to the standard account, penal sanctions are not about exclusion for its own sake but are instead the essential means by which the state prevents crime and imposes just deserts on criminal wrongdoers. Indeed, to suggest otherwise may strike some readers as wrongheaded and even offensive. Prison, after all, is what we do to the people who have done awful things to innocent victims. It is where we send the rapists, the murderers, and other violent people to punish them for their wrongdoing, to keep them from reoffending, and to send a warning to others. Seen in this light, exclusion is simply a byproduct of punishment. It is what happens to criminal offenders so that society's legitimate penological interests may be vindicated.

In the abstract, this standard account may seem compelling. But closer inspection reveals a remarkably poor fit between the actual practices of the American carceral state and the most frequently invoked penological purposes. These stated purposes center on individual actors and their crimes. At base, retribution asks what the actor did and what penalty he or she deserves as a result. Deterrence asks what it would take to dissuade other similarly situated actors from committing the same crime. Even incapacitation focuses on the offenders themselves and considers whether, to what extent, and for how long those individuals must be kept separate from society in order to ensure public safety. Yet many of the most significant burdens imposed on people with felony convictions, including many noted here, have at best an attenuated connection either to the original offense or to the character of the offender. Prison conditions are borne equally by all residents of a given facility, whatever their offense of conviction. Specific harms experienced by individual prisoners—say, denials of urgently needed medical care or sexual assault at the hands of fellow inmates or guards—are in practice inflicted randomly, with no connection to the sufferer's original crime.<sup>152</sup> Likewise, the collateral consequences of felony convictions are frequently imposed across the board regardless of the precise nature of the felony—and in cases in which this is not so, it is not necessarily the worst offenders who are most heavily burdened.<sup>153</sup> And, as we have seen, what currently passes for parole review in many jurisdictions systematically denies release even to people who would pose a minimal public safety threat, without any effort to justify the denial in terms of the purposes of punishment. Perhaps in some cases the parole denial could be so justified, but the almost total absence of thought-

ful consideration in this vein strongly undermines any claims of meaningful individualized determinations in each case, which is what standard penological justifications would require.

The move to determinate sentencing—whether LWOP or less extreme mandatory minimums—equally suggests an unconcern with the particulars of individual cases, the relative culpability of individual offenders, or the actual threat individuals pose. The length of many fixed sentences, although perhaps in some individual cases consistent with assessments of the actor's desert or the demands of public safety, often seems wildly excessive and thus hard to justify on these terms. More generally, given the wide range of acts currently punished with extended prison time, not to mention the general absence of concerted efforts to ensure that the range of penalties imposed reflects considered moral judgments as to the greater or lesser severity of the various crimes, it is hard to argue that the penal system today is motivated by a commitment to imposing morally proportionate punishment. Nor is there any apparent effort to determine whether and to what extent  $x$  years in prison—or, for that matter, any prison sentence at all—would yield meaningful deterrence or otherwise serve public safety.

LWOP is just one obvious example. Even assuming that some offenses are atrocious enough to justify the extreme step of incarcerating the offenders for the rest of their natural lives—a premise at least called into question by the historically contingent character of the penalty and its wholesale rejection by many European and Latin American countries<sup>154</sup>—the wide range of crimes currently punishable with LWOP in the United States,<sup>155</sup> not to mention the racial disproportion in the application of the sentence,<sup>156</sup> makes it hard to credit the notion that LWOP sentences are imposed only when proportionate to the offense and deserved by the offender. LWOP sentences are also hard to justify on grounds of incapacitation; in any given case, it is impossible at the time of sentencing to gauge the threat the offender will pose decades down the road, thus making the denial of parole eligibility up front at best penologically gratuitous. As to deterrence, any claim that imposing a permanent life sentence on a given set of offenders will discourage other people from committing similar crimes is wholly speculative, as is the notion, implicit in the LWOP sentence, that no lesser penalty—say, life with the (meaningful) possibility of parole—would serve as well.

The claim here is not that no legitimate public interests are realized by criminal punishment. Some criminal offenders certainly deserve serious punishment. No doubt, too, many citizens are dissuaded from criminal activity by the threat of penal sanctions. But given the highly imperfect fit between con-

ventional penological justifications and the actual practices of the American carceral state, it seems clear that something more is going on and that contemporary penal practices are serving some other purpose.<sup>157</sup> Nor is my claim that the state may never legitimately inflict punishment, even severe punishment, on convicted criminal offenders. To be legitimate, however, penal sanctions should at a minimum be justifiable on some valid penological theory, held and applied in good faith.<sup>158</sup> Moreover—and here is perhaps the key point—the imposed sanction must be consistent with an acknowledgment that the object of punishment is a fellow citizen and human being who, notwithstanding the crime, is entitled to equal consideration and respect as such.<sup>159</sup>

To approach criminal punishment from this perspective would demand a radical rethinking of many practices that are taken for granted in the current penal climate, including many of those examined here. Consider what would have to change if prisoners were widely understood to be fellow human beings and fellow citizens: Prison conditions would necessarily be humane and the opportunities for human development meaningful, notwithstanding the (temporary) deprivation of freedom. Parole applications would be seriously scrutinized, and, perhaps after some period of confinement proportionate to the crime, those individuals found to pose no future public safety risk would be released. And once released, people with felony convictions would not be burdened with gratuitous civil disabilities and might even be assisted by the state with the enterprise of reentry.

If these possibilities seem familiar, it is because we have seen them once already, when contemplating the likely policies of a system committed to meaningful reintegration.<sup>160</sup> It turns out, in other words, that to challenge current penal practices as illegitimate, it is necessary to reject the assumption currently driving the American carceral system, that individuals subject to criminal punishment have thereby forfeited their status as political citizens and moral equals.<sup>161</sup> It is this assumption that underpins the exclusionary project and that must be disavowed if this project is to be abandoned and its destructive effects reversed.

## *VII. Death and Life*

Societies that punish with imprisonment may yet commit themselves to the meaningful reintegration of the people who have served their time. The American carceral system in the early 21st century takes the opposite approach, committing itself as much as possible to the social exclusion of convicted offenders. Viewed in this light, LWOP is the emblematic criminal

penalty. LWOP affords permanent exile. By foreclosing the targets from ever even making a case for release, LWOP leaves no gaps. In this sense, it is the limit case of the exclusionary impulse.

To this, one might argue that the death penalty is an even more extreme mechanism for exclusion, and in one obvious sense this is so: not only will people sentenced to death have no opportunities to press their case for release, but they will also be executed. Still, there are grounds for regarding these two penalties as fundamentally distinct in ways that make LWOP and not capital punishment the logical extreme of the exclusionary ideal. One telling difference lies in the temporal implications of each. When the death penalty is imposed, the state commits to destroying the offender, to ending his life. Not only has the offender been judged irredeemable, beyond reform, but the destructive character of the sentence forecloses the possibility that he might one day prove the state wrong. His life is over, and he will have no more chances. LWOP, too, reflects a judgment that the target is irredeemable; for what she has done, she will spend the rest of her life in prison. But the sentence, by its very nature, creates the space within which the targeted offender can continue to exist. And with that ongoing existence—that life—comes the possibility of growth and change. This means that, notwithstanding the finality of an LWOP sentence, subsequent events may rebut the judgment of irredeemability that originally justified the penalty. Yet at the same time, the sentence also deprives the subject, *ex ante*, of any future opportunity to show that she has changed sufficient to justify release.

It is this finality *in spite of the possibility of change* that in key part distinguishes LWOP from death. Of course, in reality, the pronouncement of a death sentence is typically followed by decades in custody, during which people on death row could well change and mature. Viewed in this light, the differences in this respect begin to narrow. But what in the death penalty context is only an accidental effect of a lengthy appeals process is an essential feature of LWOP, and this essential feature makes LWOP the defining sentence of an exclusionary system. Even a reintegrationist system would maintain in custody those who could not be safely released. What distinguishes a system committed to permanent exclusion is the determination to refuse reentry *even to those who could be productively reintegrated*. And what better way to guarantee this refusal than to foreclose in advance any possibility of review?

There are other respects in which recipients of LWOP are more profoundly excluded from the body politic than those who are sentenced to death. People who get death immediately embark on a lengthy appeals pro-

cess, often with high-powered pro bono legal representation for which they never could have afforded to pay, and which they receive only because of their death sentences. During this period, they will receive regular and perhaps even searching review of their legal claims. To be sure, this attention is limited, as is the scope for legal redress. And any attention accorded capital defendants by the state during the appeals process is only in the service of clearing the way for their ultimate execution. Still, when a death sentence is imposed, the threat of state-sponsored execution means the law remains engaged. If a death sentence reflects a collective rejection of the subject's right to coexist with others in society, it also affirms his ongoing status as citizen and legal subject.

By contrast, with a sentence of LWOP, the law withdraws, taking with it the acknowledgment of shared membership that ongoing legal engagement provides. The individual sentenced to LWOP thus finds herself permanently outside the legal and political world, facing what is in practice unmitigated official discretion. In this way, the people who get LWOP come to occupy a version of Agamben's "state of exception,"<sup>162</sup> a zone of "bare life" into which the law does not reach, and in which the sovereign—here, in the guise of prison officials—has assumed permanent custody and control over subjects "ripped out of their social contexts and gutted of their politics and identities."<sup>163</sup> To be sure, people doing LWOP retain some (minimal) constitutional protections, available to those few claimants able to overcome high procedural hurdles, defeat official claims to immunity, and satisfy demanding and extremely deferential standards for recovery. Yet even when successful, such claims will bear only on the custodial conditions in which these permanent prisoners will spend the rest of their natural lives. What is not open to considered review is the sentence itself. As a formal matter, current Eighth Amendment doctrine provides for judicial review of noncapital sentences for "gross disproportionality."<sup>164</sup> In practice, however, this review is cursory at best, and the finality embodied in the sentence itself generally reflects the fate of the subject, notwithstanding the formal availability of direct appeal and habeas review. Thus, unlike a death sentence, which affords the subject continued meaningful engagement with the legal system, an LWOP sentence in all but the rarest of cases brings an immediate and final excision of the subject from the body politic.<sup>165</sup>

Capital defendants, moreover, retain a moral status, an affirmation of their essential humanity, in a way that subjects of LWOP do not. Certainly, one should not overstate the degree of this affirmation in the death penalty context. Indeed, given the natural human aversion to killing another person,<sup>166</sup>

the dehumanization of those people sentenced to death may be a necessary prelude to their execution by those men and women charged with performing this task. But there are nevertheless ways that targets of capital punishment remain very much present to the collective consciousness as fellow human beings. This awareness is evident from the outset, in the seriousness of purpose with which the state approaches even the possibility of imposing a death sentence. As I. Bennett Capers describes in this volume,<sup>167</sup> in the U.S. Attorney's office where he worked, he and his fellow Assistant U.S. Attorneys (AUSAs) followed detailed protocols ensuring many layers of consideration and review merely to decide whether to bring a death case in the first place.<sup>168</sup>

This sort of careful and solemn attention is evident at every stage of a capital case: the decision to file, the many levels of judicial review, the ceremony brought to bear on the execution itself, not to mention the frequently intense public expressions of doubt and misgiving as to the propriety and legitimacy of state-sponsored killing in general. Each step reflects at least some collective awareness of the gravity of the undertaking—the proposed execution of a human being. In this recognition is a bridge between the subject of punishment and the rest of us; like us, he can die and can suffer both in death and in the knowledge beforehand that death is upon him. Indeed, the very notion that an offender deserves to die for what he has done—perhaps the most frequent and powerful justification for capital punishment—affirms his place in the human community; as a full moral agent, he is responsible for his actions and must bear the consequences. In these ways, even in death, the executed are accorded and thereby retain a place in the shared moral world.

These features contrast starkly with official practices and public attitudes in the context of LWOP. Capers recounts that he and his fellow AUSAs “barely gave . . . a thought” to those defendants facing LWOP, who were tried “as if they were . . . on an assembly line.”<sup>169</sup> Although Capers took his death cases so seriously that “the names of [his] death-eligible defendants” remain with him to this day, he has “trouble remembering even one of [his] LWOP defendants.”<sup>170</sup> Unlike death sentences, LWOP sentences are not rationed; as Jessica Henry's catalogue of the arbitrary and excessive imposition of LWOP and other DIP (death-in-prison) sentences makes clear,<sup>171</sup> they are meted out readily and seemingly with little reflection as to either the extreme severity of the penalty or its proportionality to the crime. Once sentenced, those individuals serving LWOP are generally ignored by the public at large, as is the normative question of the propriety of the LWOP sentence itself. In contrast to the implicit acknowledgment of a capital defendant's moral subjectivity and the public debate over the appropriateness of capital punishment, society scarcely considers either the

question of what a person getting LWOP did to deserve such a severe punishment or the fact of his or her continued existence and thus ongoing suffering in prison. In the case of LWOP, these issues, and the individuals they most immediately and urgently concern, are instead swept away like the insects and worms invoked by North Carolinian Thomas Bennett after *Bowden*.<sup>172</sup>

The animating question of this volume is whether LWOP is the new death penalty. As a practical matter, the numbers do suggest something like LWOP's displacement of capital punishment. Today, over 41,000 people are serving LWOP sentences, compared with approximately 3,100 people on death rows nationwide.<sup>173</sup> There are of course innumerable legal and political explanations for this shift. But the impulse to social exclusion evident in the policies and practices explored in this chapter raises the possibility that, more than simply a policy shift toward a different penal regime, these numbers may also indicate a shift in the collective disposition toward the targets of penal harm.

In recent discourse on penal practices, one senses an additional emotional driver alongside the more familiar hatred and rage often expressed against criminal offenders: a profound unconcern with what ultimately happens to the individuals caught by the criminal justice system—or the juvenile justice system, or immigration detention, or at Guantánamo, or any of the other “states of exception”<sup>174</sup> that currently dot the American landscape. If there is something to this sense, it suggests that the challenge for advocates of criminal justice reform is not only that of confronting public anger, hatred, and fear toward criminals, although these emotions are still very present and must be acknowledged and addressed. It is also that of somehow overcoming the denial of a shared social membership, and of a common humanity, that lies at the heart of the impulse to exclude. Here the rhetoric of the “reentry” movement seems to hold much promise. By reminding observers that the people we send away “all come back,”<sup>175</sup> reentry efforts aim to construct an understanding of former prisoners as fellow members of society, fellow human beings who, once “back,” have the same aspirations—for a stable home, a family, employment, personal betterment, etc.—as everybody else. If the material commitments to this enterprise have thus far been less than one might wish, the normative thrust of the movement begins to appear precisely what is necessary to challenge the project of permanent exclusion that, I have argued, drives current penal practice from LWOP on down.

## NOTES

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1. Sean Rosenmerkel, Matthew Durose, and Donald J. Farole, Jr., *Felony Sentences in State Courts, 2006—Statistical Tables* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, December 30, 2009), 9, table 1.6. This figure does not include misdemeanants.

2. *Ibid.*, 5–6, tables 1.2.1 and 1.3.

3. See Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America* (Washington, DC: Sentencing Project, July 2009), 3.

4. See *ibid.*; Heather C. West, *Data Brief: Prisoners at Yearend 2009—Advance Counts* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, June 2010), 1; Todd D. Minton, *Jail Inmates at Midyear 2009—Statistical Tables* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, June 2010), 1.

5. Of course, such a society would be unlikely in the first place to create a penal system that captured high numbers of people with such personal disadvantages, opting instead for meaningful social programs to assist those who are mentally ill, drug addicted, illiterate, etc. to deal with these problems without involving the criminal justice system. Here, however, my aim is to contrast the possible dispositions, vis-à-vis the people who have been incarcerated, of systems that rely on incarceration. To motivate this contrast, it is necessary to posit a system that incarcerates regardless of social disadvantages yet takes steps to address those disadvantages to facilitate successful reentry.

6. See generally Nkechi Taifa and Catherine Beane, “Integrative Solutions to Interrelated Issues: A Multidisciplinary Look behind the Cycle of Incarceration,” *Harvard Law & Policy Review* 3 (Summer 2009): 283–306.

7. For more on this point, see Sharon Dolovich, “Foreword: Incarceration American-Style,” *Harvard Law & Policy Review* 3 (Summer 2009): 237–39.

8. For more on the moral economy of this exclusionary dynamic, see Sharon Dolovich, “Exclusion and Control in the Carceral State,” *Berkeley Journal of Criminal Law* 16 (2011): 259.

9. African Americans make up no more than 13% of the American population, but they constitute close to 40% of the people behind bars in the United States. See William J. Sabol and Heather Coutre, *Prison Inmates at Midyear 2007* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, June 2008), 7, table 9 (estimating that of 2,090,800 people behind bars in the United States in 2007, 814,700 were black males and 67,600 were black females); see also *Facts about Prisons and Prisoners* (Washington, DC: Sentencing Project, December 2010) (estimating that 38% of persons in jails or prisons in 2009 were black).

10. See, e.g., Loïc Wacquant, “From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the US,” *New Left Review* 13 (January–February 2002): 41–60; Loïc Wacquant, “Class, Race and Hyperincarceration in Revanchist America,” *Daedalus* (Summer 2010): 74–90; Loïc Wacquant, “Deadly Symbiosis: When Ghetto and Prison Meet and Mesh,” *Punishment & Society* 3 (January 2001): 95–133.



11. In the postindustrial economic climate, the ghetto “lost its economic function of labor extraction and proved unable to ensure ethnoracial closure.” The prison was therefore “called on to help contain a dishonored population widely viewed as deviant, destitute and dangerous.” Wacquant, “Class, Race, and Hyperincarceration,” 81.

12. Wacquant, “From Slavery to Mass Incarceration,” 41.

13. See, e.g., Jennifer Gonnerman, *Life on the Outside: The Prison Odyssey of Elaine Bartlett* (New York: Farrar, Straus and Giroux, 2004) (recounting the struggle of Elaine Bartlett to reunite her family and build the components of a stable life after her release from prison).

14. See Katherine Beckett and Steve Herbert, *Banished: The New Social Control in Urban America* (New York: Oxford University Press, 2010), 8.

15. See Jenifer Warren et al., *One in 100: Behind Bars in America 2008* (Washington, DC: Pew Center on the States, 2008), 5 (“With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258.”).

16. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 8–10 and generally.

17. Agamben seems in his work to want to exclude prisons from what he calls “states of exception,” law-free zones where the sole protections occupants enjoy lie in the discretion of their keepers, who have license to do what they will without (legal) restraint. See *ibid.*, 15–29, 57; Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005), 1–4, 11–22, and generally. Certainly, there is a great distance between modern-day American prisons and the Nazi-run concentration camps that represent Agamben’s archetypal state of exception. But a full understanding of the way the law operates in contemporary prisons and the scope of the discretion extended as a practical matter to corrections officials; of the stark division between prisoners and citizens that has become a taken-for-granted feature of modern American penality; and of the degree to which, again as a practical matter, convicted felony offenders are abandoned by political society to their fate, strongly suggests that prisons *are*, at least to some degree, states of exception in Agamben’s sense. If in some ways the law actually does shape life on the inside, in other ways it has for all practical purposes withdrawn entirely. Although making this case is well beyond the scope of the present project, my sense is that the current state of the law vis-à-vis life in the prisons supports the conclusion that the “state of exception” Agamben theorizes is better understood as a matter of degree, so that the characteristics of existence in such a state (i.e., “bare life”) can coexist with (limited) political subjectivity. But see Agnes Czajka, “Inclusive Exclusion: Citizenship and the American Prison and Prisoner,” *Studies in Political Economy* 76 (2005): 130–32 (arguing that supermax prisons constitute states of exception in which subjects have been “absolute[ly] delet[ed] from the sphere of citizenship,” although suggesting that people held in “standard prisons . . . remain at least partly within the purview of legal and social structures”).

18. Agamben, *Homo Sacer*, 8 (“The fundamental categorial pair of Western politics is not that of friend/enemy but that of bare life/political existence, *zoē/ bios*, exclusion/inclusion.”).

19. Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (Stanford: Stanford Law Books, 2010), 9.

20. See *ibid.*, 10.
21. *Ibid.*, 13.
22. For example, Robert Perkinson makes a strong case in his history of the Texas prison system that the punitive cast of contemporary American penal practice has historical roots in the southern plantation prisons, with their commitment to “subjugationist discipline.” Robert Perkinson, *Texas Tough: The Rise of America’s Prison Empire* (New York: Picador, 2010), 8. And Mona Lynch convincingly shows in *Sunbelt Justice*, her rich account of Arizona penal policy over the past century, that the rehabilitationist model, although not without influence in the early years of Arizona’s correctional bureaucracy, never really took hold there. See Lynch, *Sunbelt Justice*, 77–78. Instead, deep cultural currents in that state—most notably a stern ethos of “individualism and self-reliance” and a pronounced fiscal frugality (*ibid.*, 46–47)—informed a century of punitive penalty more consistent with today’s “harsh, postrehabilitative, mass incarcerative warehouse-style prison system” than with the more progressive model typically associated with the American penal system in the mid-20th century (*ibid.*, 4).
23. Lynch, *Sunbelt Justice*, 50.
24. See Mona Lynch, “The Contemporary Penal Subject(s),” in *After the War on Crime: Race, Democracy, and a New Reconstruction*, ed. Mary Louise Frampton, Ian Haney López, and Jonathan Simon, 89–105 (New York: NYU Press, 2008).
25. Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago: University of Chicago Press, 1998), 18–19.
26. See Lynch, *Sunbelt Justice*, 95 (explaining that legislative revision of the Arizona penal code in 1977 “dramatically decrease[d] judicial discretion in sentencing,” suggesting that prior to 1977 state judges had considerable discretion in this arena).
27. *Ibid.*, 111.
28. Stith and Cabranes, *Fear of Judging*, 21. Joan Petersilia reports that by 1927, all but three states (Florida, Mississippi, and Virginia) had parole systems in place, and by 1942, these three states and the federal system had joined the majority. See Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press, 2003), 58.
29. Petersilia, *When Prisoners Come Home*, 62.
30. *Ibid.*, 60–63. See also Lynch, *Sunbelt Justice*, 125–26 (explaining that even in Arizona, where no meaningful commitment to rehabilitation ever took hold, “it was generally accepted that [the criminal actor] was both capable of being returned to the broader community and in most cases deserved to have the opportunity upon reformation”).
31. Petersilia, *When Prisoners Come Home*, 60–63.
32. *Rummel v. Estelle*, 445 U.S. 263, 265–67, 280 (1980).
33. Petersilia, *When Prisoners Come Home*, 65 (explaining that “[t]he political Left was concerned about excessive discretion that permitted vastly different sentences in presumably similar cases, and the political Right was concerned about the leniency of parole boards”).
34. Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven: Yale University Press, 1981), 2 (quoted in Craig Haney, “Counting Casualties in the War on Prisoners,” *University of San Francisco Law Review* 43 (2008): 93).
35. Haney, “Counting Casualties,” 93.

36. *Ibid.*, 97; see also California Board of Corrections, *Report: Coordinated California Corrections* (1971), v.
37. Lynch, “Contemporary Penal Subject(s),” 90.
38. *Ibid.*, 90–91 (“[S]ince the penal subject’s offending behavior or deviant acts fell within a continuum of human behavior, this conception of the penal subject held the potential for productive change and was generally viewed as worthy of state efforts to impel that change.”).
39. Haney, “Counting Casualties,” 95–96. As Haney describes, in 1968, the “primary message” of the politically diverse President’s Commission on Law Enforcement and Administration of Justice was that “crime needed to be addressed by rebuilding the cities, eliminating slum conditions, and transforming lingering racial segregation to improve the lives of poor and minority citizens” (*ibid.*, 96).
40. See generally Taifa and Beane, “Integrative Solutions to Interrelated Issues,” 283–306.
41. Petersilia, *When Prisoners Come Home*, 60–63.
42. The flashpoint for this dramatic change is widely thought to have been a 1974 essay, published in the journal *Public Interest*, by sociologist Robert Martinson. See Jerome Miller, “Criminology: Is Rehabilitation a Waste of Time?,” *Washington Post*, April 23, 1989 (discussing Robert Martinson, “What Works? Questions and Answers about Prison Reform,” *Public Interest* 35 (Spring 1974): 22–54).
43. See Petersilia, *When Prisoners Come Home*, 65.
44. See *ibid.*, 65–67 and table 3.1.
45. Steven Donziger, ed., *The Real War on Crime: Report of the National Criminal Justice Commission* (New York: HarperPerennial, 1996), 24.
46. Todd R. Clear, *Harm in American Penology: Offenders, Victims, and Their Communities* (Albany: SUNY Press, 1994), 4.
47. James Q. Wilson, *Thinking about Crime* (New York: Basic Books, 1985), 193 (quoted in Petersilia, *When Prisoners Come Home*, 64).
48. Wilson, *Thinking about Crime*, 193 (quoted in Petersilia, *When Prisoners Come Home*, 64).
49. Lynch, “The Contemporary Penal Subject(s),” 95.
50. The preamble to the California Determinate Sentencing Law, adopted in 1977, made this shift explicit, announcing that the purpose of prison was “punishment” and not “rehabilitation.” See Petersilia, *When Prisoners Come Home*, 65.
51. This section is largely drawn from Dolovich, “Incarceration American-Style,” 245–53.
52. See Christopher J. Mumola and Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners 2004* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, October 2006; revised January 19, 2007), 6; Jennifer C. Karberg and Doris J. James, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, July 2005), 1–5.
53. Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, September 2006), 1.
54. See Bruce Western, Becky Pettit, and Josh Guetzkow, “Black Economic Progress in the Era of Mass Imprisonment,” in *Invisible Punishment: The Collateral Consequences*

of *Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind (New York: New Press, 2002), 176 (noting that “incarceration erodes job skills”).

55. See Donald Braman, “Families and Incarceration,” in Mauer and Chesney-Lind, *Invisible Punishment*, 120.

56. See Tracy Huling, “Building a Prison Economy in Rural Areas,” in Mauer and Chesney-Lind, *Invisible Punishment*, 197–99.

57. See Braman, “Families and Incarceration,” 117–18.

58. Terry A. Kupers, “Prison and the Decimation of Pro-Social Life Skills,” in *The Trauma of Psychological Torture*, ed. Almerindo E. Ojeda (Westport, CT: Praeger, 2008), 10.

59. See, e.g., Benjamin Fleury-Steiner with Carla Crowder, *Dying Inside: The HIV/AIDS Ward at Limestone Prison* (Ann Arbor: University of Michigan Press, 2008); Plata v. Schwarzenegger, No. Co1-1351 TEH, 2005 U.S. Dist. LEXIS 43796, at \*2–3 (N.D. Cal., Oct. 3, 2005).

60. See, e.g., Silja J. A. Talvi, “Deadly Staph Infection ‘Superbug’ Has a Dangerous Foothold in U.S. Jails,” *Alternet*, December 4, 2007, <http://www.alternet.org/story/69576/%20?page=entire>; Brent Staples, “Treat the Epidemic behind Bars before It Hits the Streets,” *New York Times*, June 22, 2004; Jessica R. MacNeil, Mark N. Lobato, and Marisa Moore, “An Unanswered Health Disparity: Tuberculosis among Correctional Inmates, 1993 through 2003,” *American Journal of Public Health* 95 (October 2005): 1800–05; James A. Inciardi et al., “Developing a Multimedia HIV and Hepatitis Intervention for Drug-Involved Offenders Reentering the Community,” *Prison Journal* 87 (March 2007): 111–42.

61. Kupers, “Prison and the Decimation of Pro-Social Life Skills,” 129.

62. *Rhodes v. Chapman*, 452 U.S. 337, 371 (1981) (Marshall, J., dissenting).

63. As of 2006, over 15,000 California inmates were sleeping in prison common areas “such as prison gymnasiums, dayrooms and program rooms.” Governor Arnold Schwarzenegger, *Prison Overcrowding State of Emergency Proclamation*, October 4, 2006, <http://gov.ca.gov/news.php?id=4278>.

64. *Rhodes*, 452 U.S. at 371 (Marshall, J., dissenting).

65. See Kupers, “Prison and the Decimation of Pro-Social Life Skills,” 130.

66. On supermax prisons, see generally Lorna Rhodes, *Total Confinement: Madness and Reason in the Maximum Security Prison* (Berkeley: University of California Press, 2004); Leena Kurki and Norval Morris, “Supermax Prisons,” *Crime and Justice: A Review of Research* 28 (2001): 385–424.

67. “[F]or just about all prisoners [even those without documented mental health histories], being held in isolated confinement for longer than 3 months causes lasting emotional damage if not full-blown psychosis and functional disability.” Terry Kupers, “What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement,” *Criminal Justice and Behavior* 35 (August 2008): 1005–06.

68. Atul Gawande, “Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement: Is This Torture?,” *New Yorker*, March 30, 2009, [http://www.newyorker.com/reporting/2009/03/30/090330fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande).

69. Kupers, “What to Do with the Survivors?,” 1010.

70. Terry A. Kupers, “Rape and the Prison Code,” in *Prison Masculinities*, ed. Don Sabo, Terry A. Kupers, and Willie London (Philadelphia: Temple University Press, 2001), 114–15.

For further discussion of the prison culture of hypermasculinity, see Sharon Dolovich, “Strategic Segregation in the Modern Prison,” *American Criminal Law Review* 48 (2011): 11–19.

71. Derrick Corley, “Prison Friendships,” in Sabo, Kupers, and London, *Prison Masculinities*, 106.

72. See Stephen “Donny” Donaldson, “A Million Jockers, Punks, and Queens,” in Sabo, Kupers, and London, *Prison Masculinities*, 119 (explaining that punks are “prisoners who ‘have been forced into a sexually submissive role,’ usually through rape or convincing threat of rape”) (quoting Wayne S. Wooden and Jay Parker, *Men behind Bars: Sexual Exploitation in Prison* (New York: Da Capo, 1982)).

73. See Kupers, “Rape and the Prison Code,” 114.

74. Don Sabo, “Doing Time, Doing Masculinity: Sports and Prison,” in Sabo, Kupers, and London, *Prison Masculinities*, 64.

75. Corley, “Prison Friendships,” 106.

76. *Ibid.*, 107.

77. Sabo, “Doing Time, Doing Masculinity,” 65.

78. See Allen J. Beck and Paige M. Harrison, *Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, December 2007; revised April 9, 2008), 2, 6 (of the 146 prison facilities participating in the national inmate survey on sexual victimization in prison, 6 facilities had no reports of sexual victimization).

79. See James E. Robertson, “‘Fight or F . . .’ and Constitutional Liberty: An Inmate’s Right to Self-Defense When Targeted by Aggressors,” *Indiana Law Review* 29 (1995): 339 n. 3 (“[I]n the prison vernacular, [prison correctional officers] seem to offer little assistance to inmates except the age-old advice of ‘fight or fuck.’”) (quoting Helen M. Eigenberg, “Rape in Male Prisons: Examining the Relationship between Correctional Officers’ Attitudes toward Rape and Their Willingness to Respond to Acts of Rape,” in *Prison Violence in America*, ed. Michael C. Braswell, Reid H. Montgomery, Jr., and Lucien X. Lombardo (Cincinnati, OH: Anderson, 1994), 159).

80. See James Gilligan, *Violence: Reflections on a National Epidemic* (New York: Vintage, 1996), 163.

81. See Alice Ristroph, “Sexual Punishments,” *Columbia Journal of Gender & Law* 15 (2006): 150.

82. Donaldson, “A Million Jockers, Punks, and Queens,” 120. This assumes, of course, that a person threatened with rape has the time to choose a protector before he is raped and thereby recast in the prison culture as the property of his rapist.

83. *Ibid.*, 119 (explaining that punks are, “for all practical purposes, slaves and can be sold, traded, and rented or loaned out at the whim of their ‘Daddy’”); see also *No Escape: Male Rape in U.S. Prisons* (New York: Human Rights Watch, April 1, 2001), 71–72 and generally (documenting cases of sexual slavery in prisons in various states).

84. Older prisoners, prisoners known to be connected to powerful people inside or outside the facility, and others who for whatever reason are respected and left alone may be able to shield themselves from the sexual violence of prison culture.

85. See Judith Herman, *Trauma and Recovery* (New York: Basic Books, 1992), 74 (explaining that “[p]rolonged, repeated trauma . . . occurs only in circumstances of cap-

tivity”) (quoted in Nell Bernstein, *All Alone in the World: Children of the Incarcerated* (New York: New Press, 2005), 182).

86. Agamben, *Homo Sacer*, 105. As Agamben explains, the state of exception, the sphere of pure sovereign power, “is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice” (ibid., 83 (emphasis omitted)). See also Lorna A. Rhodes, “Supermax Prisons and the Trajectory of Exception,” *Studies in Law, Politics, and Society* 47 (2009): 196–98.

87. Agamben, *Homo Sacer*, 104–05.

88. See Jonathan Simon, “Dignity and Risk: The Long Road from *Graham v. Florida* to Abolition of Life without Parole,” this volume, 304.

89. One might well wonder what social benefits come from imposing such limits. But the presence of strategies that operate to constrain meaningful reentry absent plausible justifications for ongoing exclusion is the hallmark of an exclusionary system.

90. See Nellis and King, *No Exit*, 9–10 and figure 2.

91. Ibid., 6, table 1. The exception is Alaska.

92. Ibid. The six states are Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota.

93. Ibid., 3.

94. Indeed, according to the Sentencing Project, “during the 1990s the growth of persons serving life without parole [was] precipitous, an increase of 170%, between 1992 and 2003. Overall, one of every six lifers in 1992 was serving a sentence of life without parole. By 2003, that proportion had increased to one in four.” Marc Mauer, Ryan S. King, and Malcolm C. Young, *The Meaning of “Life”: Long Prison Sentences in Context* (Washington, DC: Sentencing Project, May 2004), 11.

95. See Nellis and King, *No Exit*, 7, figure 1, and 10, figure 2.

96. See 15 California Code of Regulations (CCR) § 2281(c)(1), (c)(3), (d)(2), (d)(9) (2008); 15 CCR § 2402 (c)(1), (c)(3), (d)(2), (d)(9) (2008).

97. See 15 CCR § 2281(a) (2008); 15 CCR § 2402(a) (2008).

98. The relevant statute provides that “[o]ne year prior to the inmate’s minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall . . . meet with the inmate and shall normally set a parole release date.” Cal. Penal Code § 3041(a).

99. See Keith Wattley, *Introduction to Life Sentences in California* (presentation at UCLA School of Law, November 10, 2010). According to one survey of 300 lifers in custody, only 2 had been granted release dates by the state parole board, while a further 6 had had their parole denials overturned by the courts. See Jennifer Chaussee, “For Paroled Lifers, Release Dates May Come Only with the Courts,” *Capitol Weekly*, January 13, 2011, [http://www.capitolweekly.net/article.php?\\_c=zoljk3t6h7py52&xid=zezqccws115jop&done=zoljrhdo6nhzvs](http://www.capitolweekly.net/article.php?_c=zoljk3t6h7py52&xid=zezqccws115jop&done=zoljrhdo6nhzvs).

100. Nellis and King, *No Exit*, 6.

101. See Ashley Nellis, “Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States,” *Federal Sentencing Reporter* 23 (October 2010): 28–29.

102. Ibid.

103. Wattley, *Introduction to Life Sentences in California*. But see Swarthout v. Cooke, 131 S. Ct. 859 (2011) (holding that California’s “some evidence” standard is not constitutionally required, thereby foreclosing the federal courts from reversing California parole

denials unless a prisoner has not been “allowed an opportunity to be heard” or “provided a statement of the reasons why parole was denied”).

104. Cal. Penal Code § 3041.5(b)(2) (2007).

105. Cal. Penal Code § 3041.5(b)(2)(A)–(B) (2007).

106. Cal. Penal Code § 3041.5(b)(3)(A)–(C) (2010).

107. Cal. Penal Code § 3041.5(b)(A)–(C) (2010).

108. Keith Wattley, personal communication, February 4, 2011 (reporting that the breakdown of the 6,760 prisoners who received parole denials in California in 2009 in terms of number of years until their next parole hearing date was as follows: 3 years: 1,942; 5 years: 4,229; 7 years: 303; 10 years: 191; 15 years: 91).

109. N.C. Gen. Stat. § 14-2 (1974).

110. North Carolina Fair Sentencing Act (1981), N.C. Gen. Stat. § 15A-1340, enacted as Chapter 760 of the 1979 Session Laws. For further background on this act, see Dee Reid, “The Fair Sentencing Act: Setting the Record Straight,” *North Carolina Insight* 9 (March 1987): 42–49.

111. See Bruce Mildwurf, “Sentencing Policy at Center of Convicts’ Release,” Associated Press, October 23, 2009 (updated November 19, 2009), <http://www.wral.com/news/state/story/6272596/>.

112. *State v. Bowden*, 193 N.C. App. 597, 668 S.E.2d 107 (November 4, 2008). Although Bowden had done 30 and not 40 years when he filed his habeas petition, he had earned enough time off his sentence under companion programs to qualify him for release.

113. *Bowden*, 668 S.E. 2d at 109, note 1 (explaining that N.C. Gen. Stat. § 15A-2002 (2007) currently provides that “a sentence of life imprisonment means a sentence of life without parole”).

114. Robbie Brown, “North Carolinians Bridle over Plan to Free Inmates,” *New York Times*, October 17, 2009.

115. See Nellis, “Throwing Away the Key,” 28 (reporting that “recidivism rates are low among [released] older inmates, including lifers,” because of “the duration of their imprisonment, the maturity they are likely to gain in prison, and their age upon reentry into the community”). Nellis describes the results of two such studies. First, “a study in Ohio of twenty-one people released in 2000 who were 50 years of age or older and had served twenty-five years or more at the time of release found that none of these individuals committed a new crime during the three years after their release” (*ibid.*, 29). Second, in Pennsylvania, “the recidivism rate of individuals convicted of new offenses who were 50 years of age or older and released in 2003 was 1.4% in the first twenty-two months after release” (*ibid.*, 29).

116. The relevant figure included both the “day-for-a-day” credit created by the 1981 statute as well as other credits accumulated through the state’s parole regulations. See *Bowden*, 668 S.E.2d at 108–10.

117. Although the state’s supreme court upheld the *Bowden* decision, the governor had another chance when the next affected prisoner filed for release. This time, the state prevailed, and the resulting North Carolina Supreme Court opinion foreclosed the release of any other affected prisoners. See *Jones v. Keller*, 364 N.C. 249, 698 S.E.2d 49 (2010).

118. Ken Smith, “Perdue Has No Plans to Release Life Inmates,” Associated Press, October 22, 2009 (updated November 19, 2009), <http://www.wral.com/news/state/story/6261276/>.

119. Brown, “North Carolinians Bridle.”

120. See Simon, “Dignity and Risk,” 304.

121. Recall that the average sentence for the more than 460,000 people sent to prison in 2006 was 4 years and 11 months. See note 3 above and accompanying text.

122. See Part III above.

123. This is especially likely to be the case with older inmates. See Goodwill Industries International, *Road to Reintegration: Ensuring Successful Community Re-entry for People Who Are Former Offenders*, June 10, 2009, 4–5, 9; “Help for Older Ex-Prisoners,” *Christian Science Monitor*, January 14, 2002.

124. See Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (Chicago: University of Chicago Press, 2007), 24; Becky Pettit and Christopher J. Lyons, “Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration, by Race, Class, and Criminal Involvement,” in *Barriers to Reentry? The Labor Market for Released Prisoners in Post-industrial America*, ed. Shawn Bushway, Michael A. Stoll, and David F. Weiman (New York: Russell Sage Foundation, 2007), 203–05 (“Employers express a reluctance to hire inmates, and ex-inmates face earning penalties of between 10 to 30 percent.” (citations omitted)).

125. See Nancy G. La Vigne, Elizabeth Davies, Tobi Palmer, and Robin Halberstadt, *Release Planning for Successful Reentry: A Guide for Corrections, Service Providers, and Community Groups* (Washington, DC: Urban Institute Justice Policy Center, September 2008), 10–11 (explaining the financial implications of incarceration for individuals relying on state assistance and other reasons why former prisoners tend to face financial difficulties upon release).

126. True, in 2008, President George W. Bush signed the Second Chance Act of 2007, Pub. L. 110-199, April 9, 2008, 122 Stat. 657 (see also 42 U.S.C. § 17501 et seq.). And certainly, this law is welcome. But its practical effects have thus far been limited. See Jessica S. Henry, “The Second Chance Act of 2007,” *Criminal Law Bulletin* 45 (Summer 2009): 430–32. And given how much is spent annually on incarceration across the country, the total funding of \$360 million authorized thus far to implement this law is ultimately a drop in the bucket (ibid.).

127. As Webb Hubbell put it in an op-ed in the *San Francisco Chronicle* shortly after his release from federal prison in 2001, these restrictions—collectively “called the mark of Cain . . . in the prison reform movement”—are commonly referred to as “civil disabilities” but “[m]ore realistically” would be known as “civil death,” a condition that, for many of us, offers little option but to return whence we came: to prison.” Webb Hubbell, “The Mark of Cain,” *San Francisco Chronicle*, June 10, 2001.

128. See Pager, *Marked*, 24. For detailed discussion of the various forms these burdens can take, see Michael Pinard, “Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity,” *New York University Law Review* 85 (May 2010): 489–94.

129. American Bar Association, Task Force on Collateral Sanctions, *Introduction: Proposed Standards on Collateral Sanctions and Administrative Disqualification of Convicted Persons*, draft, January 18, 2002, quoted in Marc Mauer and Meda Chesney-Lind, introduction to *Invisible Punishment*, 5.

130. Ibid.



131. See Gabriel J. Chin, “Race, the War on Drugs, and the Collateral Consequences of a Drug Conviction,” *Journal of Gender, Race & Justice* 6 (Fall 2002): 260.
132. *Ibid.*, 253, 259. In addition, noncitizens increasingly face deportation upon the completion of their sentences—another form of wholesale exclusion (*ibid.*, 253).
133. To make matters worse, in many jurisdictions, parents must reimburse foster parents, and even the government, for support their children received during their incarceration. Unable to meet these unrealistic demands, many parents find their parental rights permanently terminated. See Bernstein, *All Alone in the World*, 154–55.
134. See the project’s website: <http://isrweb.isr.temple.edu/projects/acproject/>.
135. Gabriel Chin, “Citizenship and Community,” panel presentation, “Symposium: The Constitution in 2020: The Future of Criminal Justice,” Florida State University College of Law, Tallahassee, Florida, October 8, 2010.
136. Cal. Bus. & Prof. Code, § 4842(d) (2010).
137. See G. Chin, “Race, the War on Drugs,” 259 (citing 21 U.S.C. § 862(a)(1)(A) (1999)).
138. *Ibid.*, 259–60.
139. Bruce Western and Becky Pettit, “Incarceration and Social Inequality,” *Daedalus* (Summer 2010): 8.
140. *Ibid.*
141. *Ibid.*, 8, 14–16.
142. Beckett and Herbert, *Banished*.
143. *Ibid.*, 37.
144. *Ibid.*, 45–46.
145. *Ibid.*, 46. Such restrictions may also be imposed as a condition of probation or pretrial release (*ibid.*, 45–46).
146. Katherine Beckett and Steve Herbert, “The Punitive City Revisited: The Transformation of Urban Social Control,” in Frampton, López, and Simon, *After the War on Crime*, 114. See also Beckett and Herbert, *Banished*, 48–49.
147. Beckett and Herbert, *Banished*, 47.
148. *Ibid.*, 51.
149. *Ibid.*
150. *Ibid.*, 33. Indeed, the removal of such individuals from the shared public space is arguably the motivating impulse behind the “broken windows” approach popularized by James Q. Wilson and others. The ostensible aim of that policing strategy was to reduce crime by targeting the physical signs of disorder—graffiti, broken windows, abandoned buildings, etc. But as Beckett and Herbert astutely observe, in practice, the targets of broken-windows policing are not features of the “built environment” but “disreputable or obstreperous or unpredictable *people*: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed” (*ibid.*, 33 (quoting James Q. Wilson and George F. Kelling, “Broken Windows: The Police and Neighborhood Safety,” *Atlantic Monthly*, May 1982, 32) (emphasis added)).
151. As Beckett and Herbert observe, one consequence of the exclusionary mechanisms they describe is that “those who are unwanted—which includes those who merely offend our aesthetic sensibilities—feel continually harassed and unwelcome. The moral division between the respectable and not-so-respectable is reinforced daily by a spatial division between the included and the excluded.” Beckett and Herbert, *Banished*, 21–22.

152. If a prisoner's offense does have any bearing on his or her prison experience, it is likely the opposite of that imagined by retribution or deterrence, since it is typically prisoners who have committed serious violent crimes and therefore are perceived as possible threats who receive the most respect from both correctional officers and fellow inmates. For more on this point, see Sharon Dolovich, "Cruelty, Prison Conditions, and the Eighth Amendment," *New York University Law Review* 84 (October 2009): 919–20.

153. For example, under federal law, anyone with a felony drug conviction is automatically permanently banned from Temporary Aid to Needy Families assistance and food stamps, although no such restriction applies to people convicted of more serious crimes such as murder, rape, or armed robbery. See Gwen Rubenstein and Debbie Mukamal, "Welfare and Housing—Denial of Benefits to Drug Offenders," in Mauer and Chesney-Lind, *Invisible Punishment*, 41.

154. See Jessica S. Henry, "Death-in-Prison Sentences: Overutilized and Underscrutinized," this volume, 78–79.

155. See *ibid.*, 83–87.

156. African Americans make up almost 40% of the American prison population (see note 9 above), 45% of the parole-eligible lifers, and 56.4% of people serving LWOP sentences. See Nellis and King, *No Exit*, 11–14 and tables 3 and 4. In the juvenile LWOP (JLWOP) population, the disparity is equally pronounced. Of those juveniles serving LWOP sentences, 56.1% are African American (*ibid.*, 20–24 and table 9). In 17 states, more than 60% of the JLWOP population is African American. In Alabama, for instance, 75 of the 89 people with JLWOP sentences (84.3%) are African American, and in Maryland, 15 of the 19 (70.9%) people serving JLWOP sentences are African American. In the federal system, that number is 19 out of 35 (54.3%). In South Carolina, it is 11 out of 14 (78.6%) (*ibid.*, 23–24 and table 9).

157. The widespread assumption of a connection between penological practices and the conventional justifications for punishment seems best understood as the artifact of an inevitable overlap between the legitimate moral sentiments that motivate the impulse to punish (in particular, the desire to condemn bad acts and to deter their repetition) and the illegitimate impulse—most notably the withdrawal from certain individuals of their moral status as human—that drives the exclusionary project.

158. For an in-depth examination of what precisely is required for state punishment to be legitimate, see Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," *Buffalo Criminal Law Review* 7 (2004): 307–442.

159. For (much) more on this point, see *ibid.*

160. See 97.

161. An assertion of the moral equality of penal subjects does not preclude the imposition of (legitimate) punishment on convicted offenders for their crimes. For an extended argument defending this position, see Dolovich, "Legitimate Punishment," 336–41, 374–78.

162. See Agamben, *State of Exception*, 3–4.

163. See Czajka, "Inclusive Exclusion," 129.

164. *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring).

165. The Supreme Court has repeatedly emphasized that successful constitutional challenges to noncapital sentences are "exceedingly rare." *Ewing v. California*, 538 U.S. 11, 21 (2003) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). *Graham v. Florida*, in which

the Court held that LWOP sentences are per se unconstitutional as applied to juveniles convicted of nonhomicide offenses, was one notable exception. See *Graham v. Florida*, 130 S. Ct. 2011 (2010). But *Graham* is an outlier. In the majority of LWOP cases, there is a strong presumption of constitutionality, as *Graham's* carefully limited holding indicates.

166. See Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (New York: Little, Brown, 1995), 35–36, 249–62 (explaining the way the U.S. military had to learn how to break down the instinctive aversion of its soldiers to killing fellow human beings, an effort that bore especial fruit during the Vietnam War).

167. See I. Bennett Capers, “Defending Life,” this volume, 167–89.

168. *Ibid.*, 167.

169. *Ibid.*, 169.

170. *Ibid.*

171. See Henry, “Death-in-Prison Sentences,” 82–87.

172. See notes 118–120 and accompanying text. This dehumanization may be a function of the form of the punishment. Imprisonment entails confining people in enclosed spaces, behind bars and walls, and keeping them there against their will. This is something society does as a matter of course to animals and insects, but not to humans. Recall Agamben’s “wolfman” or “werewolf”—a decided nonhuman—who if confined, need not be spared a second thought. I thank Katie Strickland for helpful discussion on this point.

173. See Tracey L. Snell, *Capital Punishment 2009—Statistical Tables* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, December 2010), 1.

174. See Agamben, *State of Exception*, 1–4, 22.

175. Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (Washington, DC: Urban Institute Press, 2005).