

REDEEMING JUSTICE

Terrell Carter, Rachel López & Kempis Songster

ABSTRACT—Approximately three decades ago, two of us, Terrell Carter and Kempis Songster, were sentenced to life in prison without the possibility of parole. The U.S. Supreme Court has said that this sentence, effectively an order to die in prison, represented a legal determination that we were irredeemable. In this Article, with insights from our coauthor and friend, human rights scholar Rachel López, we ask: What does it mean for the law to judge some human beings as incapable of redemption? Isn't the capacity for change core to the human condition and shouldn't that be reflected in the law?

This Article marries human rights law with our lived experience to argue that the capacity for redemption is an innate human characteristic. By documenting the dehumanizing effect of codified condemnation and the struggle for humanity after a person has been found irredeemable in a court of law, we seek to show why all humans should have a legal right to redemption—a right embedded in the Eighth Amendment through the latent concept of human dignity.

The reading of the Eighth Amendment we call for would require a dramatic reimagination of the U.S. criminal legal system into one that elevates humanity, not deprives it. One that creates opportunities for healing and human development, not denies it. One that facilitates the human capacity for redemption, not forbids it. One, in other words, that recognizes that change is always possible.

Redeeming justice thus requires that legal systems not make unalterable decisions about a human being's capacity for change. At a bare minimum, this means that all sentences should be reviewable and release possible after someone redeems herself. No person should be permanently deprived of her hope for freedom.

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resentenced and finally released pursuant to the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that mandatory life sentences for juveniles violate the Eighth Amendment. He now lives in Philadelphia with his wife and son and is the Director of the Healing Futures Restorative Justice Diversion Program, a partnership between the Youth Art & Self-Empowerment Project (YASP) and the Philadelphia District Attorney's Office.

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INTRODUCTION

“Do you think that there are any human beings who are not capable of redemption?” queried Justice Samuel Alito during oral argument on Election Day in November 2020.¹ Before the Court was the case of Brett Jones, who had been sentenced to life in prison without the possibility of parole (LWOP) at age fifteen.² The U.S. Supreme Court was deciding whether, because Jones was a juvenile, his judge was required to find him “permanently incorrigible,” in essence incapable of rehabilitation, before imposing that sentence on him.³

¹ Nina Totenberg, *Supreme Court Examines When Juveniles May Be Sentenced to Life Without Parole*, NPR (Nov. 3, 2020, 5:13 PM) (internal quotation marks omitted), <https://www.npr.org/2020/11/03/930892945/supreme-court-examines-when-juveniles-may-be-sentenced-to-life-without-parole?t=1604835753796> [<https://perma.cc/P5GX-BXDH>].

² *Id.*

³ Petition for a Writ of Certiorari at i, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (No. 18-1259), 2019 WL 1453516, at *i. The petitioner argued that a finding of permanent incorrigibility was required after *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016), which specified that sentencing juvenile defendants to LWOP was prohibited “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.”

So, what to make of Justice Alito's question: Are there some humans who are incapable of redemption? Two of us have been told that we were. Sentenced to LWOP nearly three decades ago, we were deemed irredeemable in a court of law. To use the Supreme Court's own words, our sentence "forfeits altogether the rehabilitative ideal."⁴ It was "an *irrevocable* judgment about [our] value and place in society."⁵ We were said to have no value to add and no place in free society. To us, such a sentence feels more like death than life and is more aptly called death by incarceration, or DBI.

We adamantly resist such legally codified condemnation. The capacity for change is, as we will demonstrate below, core to the human condition, and all people, regardless of their age, should have a basic human right to pursue personal redemption. It is our conviction that all humans have the inner capacity to forgive and be forgiven, to transform and be transformed, and that the law should reflect these innate qualities⁶—that all human beings have a right to redemption.

How do we know this? Because we have changed.⁷ Our lives expose the flaws in these unalterable decisions about the human capacity for change. Our path to redemption cracks the veneer of this legally codified condemnation. Through a collective process with other incarcerated individuals, we formed the Right to Redemption Committee (R2R Committee) and struggled to come to terms with past wrongs, finding a path to redemption in a legal system that saw none. The Committee discovered that redemption was not something that the state could give or take away. Rather, redemption, the Committee concluded, is only realized through personal responsibility and growth. While understanding that redemption is deeply personal and individualized, we witnessed how the state, as the custodian of liberty, had the power either to obstruct or, alternatively, to

⁴ *Graham v. Florida*, 560 U.S. 48, 74 (2010); *Miller v. Alabama*, 567 U.S. 460, 473 (2012) (internal quotation marks omitted) (quoting *Graham*, 560 U.S. at 74).

⁵ *Graham*, 560 U.S. at 74 (emphasis added).

⁶ This understanding of redemption was forged with the insights of Angelys Torres, Sara Curley, and Reece McGovern, who worked closely with members of the Right to Redemption Committee (R2R Committee) as law students in the Andy and Gwen Stern Community Lawyering Clinic.

⁷ In this way, we are drawing from the tradition of critical race theory (CRT), which often employs "legal storytelling" to offer "counter-accounts of social reality by subversive and subaltern elements of the reigning order." Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 135 (2020) (citing first RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 178 (3d ed. 2017); then citing *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); and then citing Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437–38 (1989)).

facilitate, a path toward redemption. The law can either restore faith and hope in second chances, or it can deny them.

* * *

After three decades of serving a DBI sentence, I (Kempis Songster, known as Ghani to my friends) had my redemption legally recognized by the state. After the U.S. Supreme Court concluded in *Miller v. Alabama* that mandatory life sentences for juveniles amounted to cruel and unusual punishment,⁸ I was one of 224 people to be resentenced and ultimately released in Pennsylvania, the state with the highest number of people sentenced as juveniles to life in prison.⁹ Once deemed so dangerous that I could never be free, I am now fully devoted to restorative-justice practices and direct Healing Futures, a diversion program for youth created as a partnership between the Youth Art & Self-Empowerment Project (YASP) and the Philadelphia District Attorney's Office. I have never committed another crime.

I am not alone. A 2020 study conducted by researchers at Montclair State University found that only 1.14% of the 174 people released in Philadelphia post-*Miller* have recidivated.¹⁰ Put another way, the state's initial instinct about these offenders' possibility for redemption was wrong nearly 99% of the time. This finding contradicts fixed understandings of the dangerousness of "violent offenders" that permeate the law. It also raises considerable doubt about the state's aptitude to make static determinations about future dangerousness at the time of sentencing. Our coauthor, Terrell Carter, affectionately known as Rell, remains behind bars because he was twenty-two years old at the time of his crime.¹¹ He is a living testament to how flawed the state's predetermined assessments of future worth and redeemability are, but I will let Rell speak for himself.

⁸ See *Miller v. Alabama*, 567 U.S. 460, 490 (2012).

⁹ Andrea Finney, *Juvenile Lifers Back in Society, Paving Way for Release of Other Young Offenders*, CBS LOC. 21 NEWS (Jan. 27, 2020), <https://local21news.com/news/local/juvenile-lifers-back-in-society-paving-way-for-release-of-other-young-offenders> [<https://perma.cc/6AF4-T2U7>].

¹⁰ TARIKA DAFTARY-KAPUR & TINA ZOTTOLI, MONTCLAIR STATE UNIV., RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 10 (2020), <https://digitalcommons.montclair.edu/cgi/viewcontent.cgi?article=1084&context=justice-studies-facpubs> [<https://perma.cc/CBN9-CZPE>].

¹¹ Neuroscientists have concluded that humans do not reach full social and emotional maturity at that age. See Lucy Wallis, *Is 25 the New Cut-Off Point for Adulthood?*, BBC NEWS (Sept. 23, 2013), <https://www.bbc.com/news/magazine-24173194> [<https://perma.cc/9P24-P2DE>]; cf. M. Brent Donnellan, Xiaojia Ge & Ernst Wenk, *Cognitive Abilities in Adolescent-Limited and Life-Course-Persistent Criminal Offenders*, 109 J. ABNORMAL PSYCH. 396, 398 (2000) (considering individuals as adolescent-limited offenders "if the first arrest occurred after age 17 and commission of criminal offenses stopped by the age of 25" because delinquent juveniles "may have had an 'extended' adolescence due to incarceration").

* * *

While incarcerated, I have been committed to becoming the best version of myself. It hasn't been easy. I struggled with coming to grips with what I had done because I was so focused on the unfairness of the judicial process that it left no room for me to consider anything or anyone else. It wasn't until I had a conversation with my very good friend, Ghani, that I was finally able to realize the impact of my actions. As we talked, Ghani could see that I was having difficulty reconciling my accountability with the unfairness I experienced in the judicial process, so he said to me, "Rell, imagine you having a hearing that will determine whether or not you can get out of prison. What you say to a panel of judges that will determine whether or not you should be allowed to go home. It's your time to speak, to convince these judges that you deserve a second chance. Right before you utter a word, an elderly woman stands up in the courtroom and says to you, 'But you killed my son.' What would you say to that mother?"

It was at that moment that I understood. At that moment the selfish bubble that I had been living in burst wide open, exposing me to the pain that I was responsible for bringing into the world. I realized that I didn't exist in a world populated by just me, that my actions had consequences that stretched beyond myself and the moment in which they occurred. From then on, I have been committed to becoming the best version of myself, which would not have been possible had I not been able to come to grips with my past wrongs.

Since that realization, I have used my time in prison to participate in activities towards that end. I just recently graduated from Villanova University, and I am currently in pursuit of a master's degree. I've also immersed myself in learning the art of creative writing so that I can tell my story in hopes that my experiences can be the tools that someone can use to save themselves. These learning experiences allowed me to grow, mature, and realize my full potential. As the current chairman of the R2R Committee, I use my position to mentor young men on the inside, to provide hospice care to those with terminal illnesses, and generally to help as many people as possible. This has become my purpose—my primary reason for being. Yet, as this Article details, because of my determinate life sentence, the state has no meaningful mechanism to modify my sentence to reflect the changes I have made in my life simply because I was over the age of eighteen at the time of my crime.

* * *

We founded the R2R Committee with others in State Correctional Institution (SCI) Graterford, a state prison outside Philadelphia, as a vehicle for challenging this legal damnation of the human capacity for change.¹² Because the Committee understood this capacity as a core part of humanity not just belonging to the incarcerated but to all members of the human species, we adopted a human rights frame. That is not to say that everyone will change, but rather that the right to redemption represents the principle that if someone does redeem himself, then he should be considered for release.¹³ The Committee therefore concluded that our LWOP sentences violated the Eighth Amendment of the U.S. Constitution, which bars cruel and unusual punishment, because they infringed our human right to redemption.¹⁴

Although we did not know it at the time of forming the R2R Committee, the European Court of Human Rights (ECtHR), a court that the U.S. Supreme Court has looked to in the past for guidance,¹⁵ was simultaneously conceptualizing a right strikingly congruent with the R2R Committee's independently conceived right to redemption. Specifically, the ECtHR held that "it would be incompatible with . . . human dignity . . . to deprive a person of his freedom forcefully without at least providing him with the chance to regain that freedom one day."¹⁶ For this reason, in the ECtHR's seminal case, *Vinter v. United Kingdom*, the court concluded that life sentences must allow for the "reducibility of the sentence."¹⁷ In other words, all life sentences must be regularly reviewed in order to take into account "any changes in the life prisoner" and "progress towards rehabilitation" so significant that "detention can no longer be justified on legitimate

¹² In this way, we view our scholarship as part of an emerging field of movement-law scholarship aimed at investigating and analyzing the law and legal systems alongside social movements. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021) ("In this Article, we identify a methodology for working alongside social movements within scholarly work. We argue that legal scholars should take seriously the epistemological universe of today's left social movements, their imaginations, experiments, tactics, and strategies for legal and social change. We call this methodology *movement law*. Movement law is not the study of social movements; rather, it is investigation and analysis with social movements. Social movements are the partners of movement law scholars rather than their subject.").

¹³ See Judith Lichtenberg, *Against Life Without Parole*, 11 WASH. U. JURIS. REV. 39, 59 (2018).

¹⁴ We note the right to redemption is likely applicable to other lengthy sentences as well as the death penalty but chose to focus our inquiry on LWOP because of Rell's and Ghani's lived experience with this sentence.

¹⁵ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (examining analogous cases at the ECtHR, such as *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), when finding that a Texas statute making it a crime for two people of the same sex to engage in consensual acts of sodomy in the privacy of their own home was unconstitutional).

¹⁶ *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 347.

¹⁷ *Id.* at 349.

penological grounds.”¹⁸ The ECtHR found that a life sentence amounts to inhuman or degrading treatment or punishment if the sentence holds no possibility of review or prospect of release.¹⁹

In subsequent cases, the ECtHR noted “a trend towards placing more emphasis on rehabilitation” in criminal punishment.²⁰ This global trend continues to grow. As we document in this Article, diverse jurisdictions across the world are increasingly understanding life sentences that lack any prospect of release and possibility of review as an affront to human dignity and therefore constituting inhuman and degrading punishment.²¹ As of 2012, LWOP sentences are only legal in thirty-eight of the world’s 193 countries.²² The Vatican has also removed the life sentence from its criminal code, with Pope Francis calling it “a secret death penalty” and urging its abolition.²³

This jurisprudence, reflecting the right to redemption and the broader trend toward outlawing unalterable life sentences on the basis of human dignity, is consequential in the context of the U.S. Constitution’s Eighth Amendment, which forbids cruel and unusual punishment. Significantly, it places a redemptive reading of the Eighth Amendment within reach. The key is the link to human dignity. As other legal scholars have underscored, the concept of human dignity is latent in the Eighth Amendment.²⁴ This embedded concept is the bedrock on which a redeeming justice could be built. After all, understandings of the Eighth Amendment are not fixed in time; they draw from “evolving standards of decency that mark the progress of a maturing society.”²⁵ In evaluating the “evolving standards of decency,”

¹⁸ *Id.*

¹⁹ *See id.* at 350. Article 3 of the European Convention on Human Rights states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” EUROPEAN CONVENTION ON HUMAN RIGHTS Art. 3 (1950).

²⁰ *Harakchiev v. Bulgaria*, 2014-III Eur. Ct. H.R. 391, 445.

²¹ *See infra* Section IV.C.

²² *See* CONNIE DE LA VEGA, AMANDA SOLTER, SOO-RYUN KWON & DANA MARIE ISAAC, CTR. FOR L. & GLOB. JUST., UNIV. S.F. SCH. L., CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 25 (2012), http://www.antoniocasella.eu/archica/Cruel-And-Unusual_2012.pdf [<https://perma.cc/GBE9-G6XG>].

²³ *See* Pope Francis, *Encyclical Letter, Fratelli Tutti of the Holy Father Francis on Fraternity and Social Friendship*, HOLY SEE (Oct. 3, 2020) (internal quotation marks omitted), https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_encyclica-fratelli-tutti.pdf [<https://perma.cc/F4EA-MJ6E>]; *see also* Pope Francis, *Address to the Delegates of the International Association of Penal Law*, HOLY SEE (Oct. 23, 2014), https://www.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.pdf [<https://perma.cc/G3FZ-SKAK>] (“A life sentence is just a death penalty in disguise.”).

²⁴ *See, e.g.*, Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2140–42 (noting that the Court has described human dignity as “the touchstone of the Amendment’s prohibition”).

²⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

the U.S. Supreme Court has looked to international and foreign jurisdictions for instruction in the past.²⁶ Consequently, the right to redemption, recognized in other jurisdictions outside of the United States, could be read into the latent concept of human dignity in the Eighth Amendment, thereby intertwining conceptions of human dignity worldwide. In this way, the law could be interpreted in a manner that affirms humanity rather than denies it. Restoring hope, both in and through the law, is possible. In the current moment, when many are questioning the underlying assumptions, inequalities, and biases that have driven this country toward a carceral state that imprisons 2.3 million people,²⁷ embracing this principle seems more urgent than ever.

This Article proceeds in four Parts. Part I memorializes our path to redemption, collectively discovered with other members of the R2R Committee. It speaks fundamental truths about the dehumanizing effect of codified condemnation and the struggle for humanity when the state has deemed a person legally irredeemable. It also articulates the Committee's understanding of the right to redemption and how DBI denies this human right. Part II traces the emergence of the redemptive rights in human rights law that developed in parallel with the Committee's conceptualization of the right to redemption. It focuses in particular on the robust jurisprudence in the ECtHR, which in many ways echoes the R2R Committee's understanding of the right. Part III demonstrates how the United States is grossly out of line with these human rights standards. It demonstrates this misalignment through a state-by-state analysis, highlighting sentencing schemes in which the avenues for review and release are particularly capricious, uncertain, and opaque. In total, we have identified at least twenty-five jurisdictions in the United States that fail to meet international human rights standards. Finally, Part IV sets a path forward for redeeming justice in the United States. This last Part charts a way for the right to redemption to be incorporated into and reconciled with existing Eighth Amendment jurisprudence, thereby giving substance to the Court's rhetorical evocation of human dignity in Eighth Amendment case law.

I. THE RIGHT TO REDEMPTION

Having been deemed irredeemable and condemned to die in prison, Rell and Ghani joined together with others in SCI Graterford, a state prison outside Philadelphia, to develop a concept that would vindicate our humanity

²⁶ See *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005).

²⁷ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INST. (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/C665-89C6>].

and defy our legally codified condemnation. Behind prison walls, an idea took root that would motivate our lives' mission: all human beings have the innate capacity for change and consequently the right to redemption.²⁸ Serving a life sentence without the possibility of parole, or DBI, felt like a daily affront to this right. The R2R Committee soon concluded that the state making a one-time, irrevocable damnation of our lifetime capacity for change was a violation of our human rights and reflected this belief when drafting our mission statement, seen in Figure 1.²⁹ Two years later, the ECtHR would come to the same conclusion.

In this Part, written from the perspective of Rell and Ghani, we trace the birth of the R2R Committee and the foundational ideas that emerged from its members. We describe how the Committee conceptualized redemption and its attendant rights. We also document the dehumanizing effect of codified condemnation and the struggle for humanity in the face of a legal system that told us that we were irredeemable. These personal accounts of the U.S. criminal legal system reveal how indefinite confinement can needlessly deny opportunities for individual and communal righting of past wrongs.

²⁸ Other legal scholars have evoked redemption in the criminal law context, but we are the first to argue that *all* human beings have a right to redemption, explicitly adopting a human rights frame. The R2R Committee's articulation of the right to redemption also predates this scholarship. *See, e.g.*, Katherine Hunt Federle, *The Right to Redemption: Juvenile Dispositions and Sentences*, 77 LA. L. REV. 47, 72–73 (2016) (contending that those sentenced to LWOP as juveniles should have a right to redemption); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 963 (2013) (arguing for “a redemption-focused approach to criminal records”).

²⁹ *See* RIGHT TO REDEMPTION, <https://right2redemption.com/> [<https://perma.cc/PU2W-KAPN>]. Throughout this Article, we provide our understanding and characterization of R2R's policies and principles based on our close affiliation with the organization.

FIGURE 1: RIGHT TO REDEMPTION MISSION STATEMENT



RIGHT TO REDEMPTION

MISSION STATEMENT

RIGHT TO REDEMPTION
LIFER'S INCORPORATED

CHAIRPERSON
Terrell "Red" Carter

CO-CHAIRPERSON
D. Saadiq Palmer

SECRETARY
Vernon Robinson

TREASURER
Vacant

AFFAIRS COORDINATOR
Vacant

SENEGANT OF ARMS
Arnur "Art" Wyche

MEMBERS
Andre Austin
Darn Barber
Charles "Li Charlie" Bassett
Rose Boyd-Talver
Sylvia Boykin
Daria Carrington
Brian Charles
Charles "Kareem" Diggs
Rose Dinkins
Rodney "Shaheed" Derrickson
Darrick U. Hall
Scott "Slim" Harmon
Kenny Holmes
Robert "Saleem" Holbrook
Robert "Bobby" Labarr
Heather Lavelle
Jose Lopez
Kerry "Shakabonna" Marshall
Andre Martin
Sasha Miller
John "Yanya" Moore
Robert Pezeca
Lawrence "Salim" Rhoads
Earl Rice
Patricia Romer
Felix "Phil" Rosado
Kareem Sampson
Thomas Schik
David "Wavy" Sheppard
Kempis "Ghani" Songster
George "Jidje" Trudell
Damytell "Ameenu" Vaughter
Clinton "Nikechi" Walker
Tyree Wallace
Mark Williams

RIGHT TO REDEMPTION (**R2R**) is a crusade to end the sentencing of human beings to life in prison without the possibility of parole—or death by incarceration—in the Commonwealth of Pennsylvania particularly, and in American society at large. **R2R** aims to affect the passing of retroactive *Parole-Eligibility-for-Lifers* Bill to bring Pennsylvania's sentencing schemes and practices toward felony cases in harmony with the evolving standards of decency of the Global Community.

R2R believes, and appeals to the *United Nations Human Rights Council* to recognize, that the damnation of a human being of any age to spend the rest of his or her natural life in prison without even the possibility of a parole hearing review is a negation of the distinctly human capacity for redemption, a denial of the individual's core humanity, and a violation of an inalienable human right.

R2R will tout the unsung wonders of the many men and women sentenced to life without parole, who have convicted themselves to a life of sacrifice and service and have become agents of restoration in the communities they have wounded. To afford erred souls the opportunity to continue righting themselves through serving humanity instead of just serving time is a key step in humanity's march toward a more livable world.

Therefore, **R2R** calls on forces of goodwill everywhere to come together, consolidate, and champion the human right to redemption and dignity in any case or circumstance; to advance the idea of forgiveness for those deemed worthy; and, to help the criminal justice system and the public see the rightness of embracing the prospect of redemption over unceasing retribution.

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Sponsoring Organizational Member of CADBI – Coalition to Abolish Death by Incarceration

A. The Formation of the Right to Redemption Committee

In 2011, a group of dedicated men formed a new committee, the Right to Redemption Committee, within Lifers Incorporated at one of Pennsylvania's historically largest prisons, Graterford.³⁰ At the time of its

³⁰ Lifers Incorporated (Lifers Inc.) is an organization formed by incarcerated people in order to secure parole eligibility for those serving mandatory LWOP sentences in Pennsylvania. See LIFERS INC.,

inception, the morale of the men condemned to die behind Graterford's forty-foot walls was at an all-time low. During this period, there was an intense sense of urgency because death had become a familiar occurrence. In the early days of R2R, we were still relatively young men who were just beginning to understand the inevitability of our sentences. At the time, it seemed as if every other week one of the condemned would finally succumb, their life journey ending in the misery of existing in a life stripped of all hope. Time after time, we bore witness as the men we all knew, men whom we had grown to love, men who mentored us and watched us with pride as we matured into positive men in an extremely negative environment, were wheeled out of their prison cells on stretchers, stiff and eyes dim. Prison nurses and sometimes correctional officers frantically applied chest compressions in a futile attempt to reignite the light in those dim eyes. But the spark had dissipated, their life journeys coming to a close, bringing about the promise of their court-ordered condemnation.

There was this unspoken truth that we all shared. We knew that if nothing changed in the near future regarding our condition, then we would all have to face the bleak reality of dying alone in prison without ever having the opportunity to try to make up for the harm that we caused. We all knew that it was only a matter of time before each and every one of us would be taking that sightless ride on a penitentiary gurney. This unspoken truth fueled the urgency that brought us together—a group of men who made a commitment to ourselves, to each other, and to the nearly 4,500-plus souls condemned to die in Pennsylvania's prisons,³¹ to do whatever we could to help bring about an end to the inhuman practice of sentencing human beings to DBL.

At the time of R2R's formation, the Graterford chapter of Lifers Inc. was, as described by then-president Mr. Wayne Battle when he recruited us to the R2R Committee, in a state of flux—lost. After year upon year of failing to secure parole eligibility, a disease of complacency set in. There was this insidious, subconscious loss of hope that slowly eroded the joy of life and drained the energy necessary for the monumental struggle of ending LWOP prison sentences. We had become lost in the how-to and blind to the fact that the means had become the end, and the actual goal of abolishing mandatory LWOP became a moving target that was becoming more and more distant.

<https://www.lifersincpa.org> [<https://perma.cc/ZBC3-36YP>]. Graterford closed in 2018 and was replaced by a new facility at the same location. See *SCI Phoenix*, PA. DEP'T OF CORR., <https://www.cor.pa.gov/Facilities/StatePrisons/Pages/Phoenix.aspx> [<https://perma.cc/82P6-ZLHQ>].

³¹ ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 8 (2009), <https://www.sentencingproject.org/publications/no-exit-the-expanding-use-of-life-sentences-in-america> [<https://perma.cc/4LP6-JT2L>].

In a moment of clarity, Mr. Battle shook off the malaise of failure and became determined to get the organization back on track. He believed that the best way to do so would be by forming a new committee that would focus exclusively on securing parole eligibility for the thousands sentenced to mandatory LWOP prison sentences. With Mr. Battle's newfound determination and narrowed focus, the R2R Committee was born.

Once formed, our group's first task was to figure out what its core values would be. What would be the space from which we would operate? Who did we want to be? One of the few things that we knew at that point was that we had to take a different approach than the one that had brought nothing but failure and death—an approach that for decades had provided no relief for the thousands of men, women, and children condemned to spend the rest of their lives in prison.

In the conversations that ensued, the very first thing that we realized was the importance of language—how we were existing in a language that created a prison within a prison. We realized that language shaped our reality and that the first wall that had to be deconstructed was the one language built within us through the words that we used to describe ourselves and our condition. Through these months-long, extremely intense conversations, we came to recognize the difficulty of condemning someone if you can see your humanity reflected in him. We began to see how the terms that we used to describe ourselves and our struggle removed us from the ranks of humanity, making it virtually impossible for people to see a reflection of their humanity when they looked at us. We saw how we became the “other,” not belonging to the human family, thereby somehow deserving to be thrown away and discarded forever. We saw that if we continued to use others' definitions of who we were, then no matter how far removed we were from the person who caused so much pain, no matter how much we transformed, no matter the determination that we had to be the best version of ourselves, no matter the certificates, the degrees, and the lives that we affected in positive ways, we would always be chained and shackled to the worst moment of our lives.

We became acutely aware of how labels and their connotations can define the entirety of who we are by a tragic moment that only lasted for a flash out of a lifetime and, as a result, imprison us more effectively than iron bars or stone walls ever could. Our lives in prison were filled with stereotypes, classifications, labels, and oversimplifications of individual human beings created for convenience, expediency, and even political and economic advantage: “criminals,” “superpredators,” and “convicted felons.” These words denied who we were as human beings and left no space for alternative narratives.

We realized that commoditization, dehumanization, and even warehousing of human beings were characteristics of a world where individual stories were hidden under blanket indictments. However, we came to understand that human behavior is more complex than society's damning labels would have us believe. From this new awareness came a drive to undertake the arduous task of redefining ourselves and our struggle. Each of us had our own story to tell. However, we needed a story in which we were the "heroes," not the "villains." This narrative shift helped us to realize our full potential and escape judgment on the basis of a partial or imagined narrative.

As a result, we stopped referring to ourselves as "convicts," "lifers," "prisoners," "inmates," or any other self-deprecating label that imprisons us within the worst expression of ourselves. We stopped describing our condemnation as life without parole. We concluded that there is a beauty represented in the word "life" that our damnation would corrupt. So instead, we chose a term that more accurately represented our wretched situation—death by incarceration (DBI). After that very difficult first step of redefinition, our journey towards redemption began.

In order to redeem yourself, you must first acknowledge that you have done something wrong. This seemingly simple idea turned out not to be so simple at all. Through our dialogue of discovery, we would find that we were tainted by an adversarial system of "justice" that made accepting responsibility and trying to make amends feel like a liability.

Like all things American, the criminal legal system is highly competitive. It is an "us v. them" system in which you either win or lose. The flaw in this way of operating is that winning becomes the sole objective, leaving "justice" broken, bloody, and bruised by the wayside. No person or thing is immune from this cultural influence. As a group, we had to come to grips with how we were also affected by this highly flawed system of "justice."

Through our ongoing conversations, we discovered that, at the moment of arrest, we became players in a game of life or death in which the stakes could not be higher. To win meant living, getting our lives back; while to lose meant hopelessness and death, because to live a life without hope is to live a life with the kind of emptiness that can only be found in a grave. So we denied. We imagined narratives that gave us the best chance at winning, convinced that, when we entered those hallowed halls of justice, our lies disguised as the truth would save us, carrying us to victory. The process was so highly competitive that there was no space for nuance, regret, reconciliation, or healing. It was either guilt or innocence, death or life. You either lost or you won.

Nothing prepared us for when the lies didn't work—when the judge pronounced with finality that we were guilty right before condemning us to die in prison. Life as we knew it had come to an end. As we grappled with the pain of what we had lost, it didn't take us long to realize that the game was rigged, stacked against us, and that we never had a chance at winning. Our constitutionally protected right to a fair trial was compromised by racism and poverty.

We realized that there existed within the process a pernicious, deliberate indifference to fairness and equality that was so all-consuming that it made it hard for us to see ourselves and the parts we played in these human tragedies. What we had done became invisible, caught in a game of winning and losing. Atonement was not a conscious thought at all.

Instead, we clung to our claims of innocence and focused on the unfairness of the process. We could only see how our court-appointed attorneys never visited us before our trials began, how they never performed any investigations or interviewed any witnesses, how the assistant district attorneys and police officers would withhold and fabricate evidence and coerce false testimony and confessions.

Winning soon became our sole focus. It was our only means of holding on to the fragile hope that we would one day have a second chance at life. The harm that we caused became lost in the fight for our lives. Blinded by this game of winning and losing, we leaned heavily on the walking sticks of our denial of guilt, believing that it was the only path that did not end in the loss of all hope, despair, and death by incarceration.

As we walked through this process together, we developed a greater understanding of the impact that this flawed hypercompetitive system of “justice,” this us v. them dynamic, had on us. We were able to come to grips with the realization that the criminal legal system embedded within us a selfishness—a sense of entitlement—that only allowed us to see how we were wronged. We were so consumed by these justified feelings of injustice that we were blinded to the wrong we had done. Our dialogue allowed us to see—to realize—that we did not live in a world populated only by ourselves and that our actions had consequences reaching far beyond what had happened to us. Our conversations allowed us to move beyond ourselves and see the pain that we were responsible for. It opened up a space within us where we strived to make right what we had done wrong and make amends to the communities, and, if possible, to the families that we had harmed. We realized that this conscious decision—this need to make amends—was something uniquely human. But we also realized that to be condemned to die in prison stripped us of the ability to exercise this distinctly human

characteristic. We saw how this condemnation not only blocked the path to redemption but also scorched and razed it to the ground.

As a Committee, we reflected on the tremendous harm we had caused to the communities we came from and concluded that we needed to atone—to make amends—for the harm we caused. We also understood that the righting of the wrongs of our past may be something forever out of our reach. But at the same time, we realized that our communities were in desperate need of our help, because within our communities were other young men and women just like our former selves whom we had the ability to reach. Atonement for us meant trying to save as many of those at-risk lives as we possibly could. Yet our condemnation separated us from those communities, both physically and mentally, because inherent to a DBI sentence is the belief that we can never be trusted, that we will never be better than our worst actions, and that we must therefore be separated from our communities to keep them safe. But having demonstrated that we are not the same, and that we are willing to atone, to redeem ourselves, how can we if we are forever locked into the box of the worst expression of ourselves?

We decided that we wanted to be a group that reminded people of this characteristic—this need to atone—that separated us from animals. We wanted to remind people that every man, woman, and child has an absolute right to redemption and that no other human being or system could take that away. So we decided that this idea would shape us and keep us from becoming lost in the means. We decided to call ourselves Right to Redemption—a constant reminder of the pain for which we were responsible, but also a reminder that every one of us belonging to this sometimes-loving, sometimes-hateful, sometimes-estranged human family has an inherent capacity to try to make amends for that pain.³² We decided

³² In a recent article, Professor Anna Roberts critiques the use of redemption in legal scholarship because, in her view, it implies that those who have been convicted of a crime are sinful. Anna Roberts, *Convictions as Guilt*, 88 *FORDHAM L. REV.* 2501, 2538 (2020) (“And an argument for redemption or rehabilitation seems to assume that one committed a crime and that, in doing so, one sinned or revealed that one is sick and thus needs fixing.”). Our understanding of redemption could not be farther from this characterization. In forming the R2R Committee, we chose the word redemption not because it was a perfect term but because it was the best term in the English language to express our belief that we all make mistakes and that we all have the capacity to learn from them. We intentionally characterized the right to redemption as a human right because we believe that all human beings (not just those convicted of a crime) have an innate capacity for change. Professor Roberts further claims that by evoking redemption, legal scholars “risk obscuring flaws in the conviction-production process and reinforcing harmful stereotypes about where guilt resides.” *Id.* at 2502. Similarly, Professor Michael Pinard claims that redemption “does not describe, reflect, or otherwise relate to those who have been prosecuted because of their race, poverty, and criminalization. The processes of atoning, repairing, and transforming have no application to them.” Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 *N.Y.U. L. REV. ONLINE* 119, 134 (2020). We contend that it is possible to recognize, as we profoundly

that what we called ourselves should be an embodiment of our struggle to restore our natural right to be fully human—a right that was taken away when we were condemned to die in prison.

B. Paths to Redemption

While our process was inherently and necessarily collective, we discovered that this journey to redemption is fundamentally a personal one. Redemption itself is not a thing that can be codified. It cannot be forced upon an individual. It must come when someone realizes the pain he is responsible for. Otherwise, how can someone right a wrong when there is no acknowledgment of the wrong? How can one redeem oneself if there isn't an intent to do so? Redemption is a personal choice, and it arrives at different times for different people.

* * *

Rell describes his relationship with redemption this way:

The idea of redemption has come to define me: it is something I embody, it is what I think, what I breathe, and it has become the sustenance that fuels me to struggle on as the smothering darkness of condemnation snuffs out the light of hope. As the chairman of Right to Redemption, the conversations of discovery and growth that I was a part of freed me from the absolute confinement of a DBI prison sentence. It has liberated me in the sense that I was able to demolish the invisible walls that I had unwittingly helped to construct—walls that had imprisoned me within a game that I could not win.

As the walls of self-pity held together by the mortar of my lies crumbled around me, I was able to see how I had cocooned myself in this space of ironic reversal of perspectives where I became the “good guy.” Everything that represented the state and the people who I had harmed became the “bad guys” in this cosmic battle of good v. evil. What I had done, my transgression, and the pain I had caused others became like a distant memory, clinging to the edges of my consciousness as I fought to overcome the evil machinations of the state.

The idea of redemption saved me. It saved me from this narrowly defined existence of us vs. them, of vengeance masquerading as justice. The right to redeem oneself has become as precious to me as the right to live free,

do, that the criminal legal system is often racist and fundamentally flawed, while at the same time to wish that we were not shedders of anyone's blood. We must hold space for this complexity too.

because the idea of redemption has awakened in me this incredible sensitivity to a harm that, without my actions, could not exist in the world. It has awakened in me this burning desire to right my wrongs and to give back to the community that I so selfishly have taken so much from.

Without the idea of redemption being an intricate part of who I am, I would still be locked within cages of self-pity and falsehoods. I would be forever blocked from acknowledging the pain I caused, thereby allowing the state to masquerade in a guise of justice so that it can then rationalize forever denying me, and thousands just like me, the right to exercise that distinct human capacity that we all share—the ability to atone.

* * *

For Ghani, it's about seeing himself more fully and understanding his greater purpose in the world:

For me, redemption became the reclaiming of all the dimensions of my humanity, all the nuances that contributed to my commission of an irreversible act, so that I can know for myself that I am more than what I was in prison for. I have a purpose on this earth that is more than to take another human life. I have a responsibility to not be confined to my lowest and darkest moment. I have a journey to a destiny beyond condemnation to DBI. I have a profound duty to discharge to the universe. For, certainly, the cosmic implications of the blood that will forever stain my hands is not lost on me. I maintain that I left a tear in the fabric of life that will never be mended—a hole in the cosmos that will never be filled. But I am not accountable to the system that condemned me. I am accountable to the family I thrust into a state of permanent loss, to my own family that I had dishonored, to the community of which I had not been a better teenaged member, and to my peers and younger children for whom I had failed as an example.

Over the years spent in the dark recesses of tombs called prisons, and in coffins called cells, I traveled along the walls of my consciousness in search of the truth of myself. Torch lights were offered to me by well-meaning old-heads, and light emanated from books that became windows in the walls of my consciousness and helped me to find my way to several conclusions. One conclusion was that nothing kills the soul more quickly and absolutely than a secret about a murder—and, if the murder is known, the denial of it. What if I had gone a month, or six months, or a year, with the secret of what I had done? What would I have had to tell myself, and how would I have had to act, in order to make myself appear normal? What would I have become the longer I wore that mask? I learned to appreciate having

gone for not more than a week before what I had done was discovered. And during that week, I felt the strain of having to put on a facade for the people around me. Had I gone longer maintaining that facade, what would I have become?

Whatever innocence I had was gone, never to return, no matter how much and how badly I wished it would. It drowned in the blood of my worst wrongdoing. But I COULD and MUST regain my humanity and moral rectitude. That's what I told myself. No other struggle was more worthwhile. I could and must water the seeds that I knew were still in the soil of my soul. And those seeds could sprout and blossom into something, someone, worthy of being called a community member, citizen, brother, friend, neighbor, advocate, husband, and now father.

* * *

As we have set out above, the path to redemption is a deeply personal one. Redemption is *not* something that the state can give or take away. Rather, it can only facilitate or obstruct it. As with other human rights, the right to redemption rests with the individual, not the state. The right does not cease to exist because the state refuses to recognize it. At the same time, the state can play an important role in helping people to exercise this right by creating the space, opportunity, and encouragement for them to arrive at redemption on their own. Indeed, as we describe in Part II, under human rights law, the state has a duty to do so.

C. The U.S. Criminal Legal System's Iron Bed

Yet, in our experience, the U.S. criminal legal system has not fulfilled its obligation to facilitate the redemption of those within its custody. Instead, it was an impediment on our road to redemption. Instead of cultivating transformation or encouraging us to make amends, the carceral state locked us in the worst expression of ourselves. No avenue was built into the criminal legal process for recompense, reconciliation, healing, and hope, which families and communities enclosed by all forms of violence so desperately need. Below, Ghani fittingly describes the U.S. criminal process as Procrustean.

* * *

Procrustes was the bandit in the Greek tale of the hero Theseus.³³ Procrustes would invite travelers to spend the night in his inn, but once they checked in, he would force them to lie down on his iron bed, binding them with chains. For those who were shorter than the length of the bed, Procrustes would stretch them on a rack until they equaled the length of the bed. For those who were too tall, Procrustes would cut off their extremities to make them fit the bed. In either case, the end result was death. In the same way, the U.S. criminal legal system ruthlessly forces everyone into the same mold of “criminal,” “superpredator,” “prisoner,” and “inmate.” It treats all of us the same without regard for our special circumstances and individual characteristics, effectively chaining millions to an iron bed and robbing them of the chance of redemption. That iron bed is manifest in our mandatory sentencing schemes, particularly mandatory life without parole.

This perspective is lifted higher by Danielle Sered, founder and director of Common Justice and author of the groundbreaking book *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair*.³⁴ According to Sered, “In our zero-sum system, complexity is a liability.”³⁵ Complexity is inefficient; it slows down the carceral machinery; it takes resources. The system tries to remove the aspects of human beings that make us more than empty vessels and refuses to acknowledge our capacity to change and grow into responsible and contributing members of the human family. For the sake of efficiency, it develops a story of “criminals” and “violent offenders” that prevents us from being seen in the world as what all human beings are—uniquely flawed, but also capable of flourishing, loving, and healing.

For me, *Miller v. Alabama*, supported by *Montgomery v. Louisiana*, became a crack and fissure in the foundations of the Procrustean bed and forced the state to see me as I really am.³⁶ In *Miller*, the U.S. Supreme Court ruled it unconstitutional to sentence adolescents to mandatory life without parole.³⁷ The Court mandated that a wider latitude of mitigating factors must now be considered by sentencing judges who might otherwise condemn a

³³ For more information about the tale of Procrustes, see The Editors of Encyclopaedia Britannica, *Procrustes: Greek Mythological Figure*, BRITANNICA, <https://www.britannica.com/topic/Procrustes> [<https://perma.cc/9HPB-G4WX>].

³⁴ DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 22 (2019).

³⁵ *Id.*

³⁶ *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 733–34 (2016). In many jurisdictions, including Pennsylvania, LWOP sentences are mandatory, which means that the sentences are automatic for certain crimes without ever taking into account the individual circumstances of the defendants. William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1058, 1064 (2015).

³⁷ *Miller*, 567 U.S. at 465.

teenager to die in prison,³⁸ thereby introducing complexity into the system. According to the Court, this decision reflected “the evolving standards of decency that mark the progress of a maturing society.”³⁹ The Court reserved LWOP for those rare cases when juvenile defendants’ crimes reflect “permanent incorrigibility.”⁴⁰

In the resentencing of condemned children, it became the job of the defense to lift up the complexity of the defendant and her narrative. Mitigation experts were called forward to join defense teams.⁴¹ Mitigating narratives thus came to the fore in the criminal legal process where they had previously been left untold. Mitigation reports became an indispensable part of the resentencing hearings of people who were sentenced to LWOP for crimes committed when they were juveniles.⁴² These experts came to help liberate condemned children from the Procrustean bed by telling the story of the individual that was never told or even considered. We reclaimed the complexity, the nuance. We told the stories of the hero’s journey. We told our stories.

D. Redeeming the U.S. Criminal Legal System

In considering how the right to redeem oneself might be incorporated into our country’s laws, we have to examine the underlying assumptions of the system more broadly and deeply. We must be willing to take a hard look at long-held, unquestioned beliefs to examine what they really mean and if those meanings reflect our moral compositions.

The law is the codification of rules agreed upon by the community, which are used to maintain order in society. They also entail the consequences for those who break those agreed-upon rules. The foundation upon which the law rests is the concept of justice. A law that exists without justice is simply tyranny.

³⁸ *Id.* at 489.

³⁹ *Id.* at 469 (citation omitted).

⁴⁰ *Id.* at 479–80; *Montgomery*, 136 S. Ct. at 733–34. *But cf.* *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (concluding that a finding of permanent incorrigibility is not required before sentencing a juvenile to LWOP)

⁴¹ Prior to *Miller*, any testimony by experts about the mitigating circumstances of a juvenile’s youth at trial would be immaterial in jurisdictions where LWOP sentences were mandatory sentences. *See Miller v. Alabama*, 567 U.S. 460, 473 & 465 (2012) (explaining that mitigating evidence at sentencing was irrelevant pre-*Miller* because judges did not have discretion to alter their sentence in light of mitigating evidence in jurisdictions where life-without-parole prison sentences were mandatory, and consequently holding that judicial discretion to transfer a juvenile to an adult court was not enough protection to satisfy the Eighth Amendment)

⁴² For example, Ghani’s mitigation report was indispensable at his resentencing hearing. *See* Kempis Songster, Mitigation Report and Reentry Plan, prepared by the Youth Sentencing & Reentry Project (YSRP).

What is justice, this idea that we use to ground the laws that govern us? What is our motivation for punishing another for a wrong or injury? Looking at the laws and structures that exist in our country, a theme emerges: Justice is often conflated with vengeance.⁴³ For some, vengeance satisfies feelings of helplessness. It mitigates feelings of victimization. To exact vengeance is to “empower.” That is the justification of the victim becoming the victimizer. But in this world of hurting those who hurt you, there is this ever-expanding pool of victims drowning in waters of pain. As a society of people who pride themselves on using laws founded on principles of justice, it is important that we closely examine how we define what justice is and not confuse moral rightness and equity with vengeance. This is paramount because laws are simply words printed on paper, making them only as good as the people who are charged with enforcing them. If the people who enforce the law believe that justice and vengeance are synonymous, then the outcomes to which we hold them accountable will reflect that.

What does the law look like when it is soaked in vengeance? It is the whispered echo of the Old Testament’s eye for an eye, tooth for a tooth that takes on the form of statutes bereft of forgiveness and second chances. It is statutes that issue punishments that smother hope and deny any chance at redemption.⁴⁴ It is the law that mandates DBI, condemning human beings to die behind towering concrete and razor wire without a second thought. These laws keep people locked away forever with the worst expression of themselves and do not account for the possibility of transformation with time.

As a society we have become mired in this Old-Testament, historical conception of punishment. But how does this 2,000-year-old paradigm reconcile with the words of the U.S. Supreme Court in the twenty-first century in *Graham v. Florida*, which states that “[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society”?⁴⁵ If punishment is rooted in the ancient soils of an eye for an eye, maintaining its conceptual integrity throughout the centuries, what does that say about the progression of our society?

⁴³ Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499, 1528 (2017). (“And, as a number of commentators have suggested, the increasingly influential ‘victims’ rights’ movement has been motivated in large part by some victims’ desire to utilize the criminal justice system for just such vengeful motives.”).

⁴⁴ *Id.* (explaining that states that adopt vengeance-based justifications for criminal punishment prioritize victims’ desire for revenge over other reasons for lessening the imposition of punishment on offenders).

⁴⁵ 560 U.S. 48, 58 (2010) (internal quotations omitted).

Can law viewed through this prism of vengeance be mature and evolved? How can it reflect redemption? We will answer that question by asking another: If we satisfy our pain by causing pain to others, thereby creating laws inundated with cycles of trauma and no opportunity to heal, would those laws reflect anything redemptive? Would those laws be just?

Graham also stressed “the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.”⁴⁶ Mandatory DBI flies directly in the face of this principle because it ignores one of the most distinguishing characteristics about human beings—the capacity to atone.

II. THE HUMAN RIGHT TO REDEMPTION

At the same time the R2R Committee was developing its conception of the right to redemption, other legal systems around the world were simultaneously developing juridical concepts strikingly similar to ours. As the Committee did, these jurisdictions linked hope to human dignity, concluding that all human beings have a fundamental right to hope and that the existence of this right forestalls DBI.

This Part, written with insights from Rachel López, a human rights scholar, documents how the R2R Committee’s understandings of redemption and its attendant rights align with international human rights law. The significance of classifying the right to redemption as a human right means that the right belongs to the individual, not the state. The state does not have the power to give or take away this right. While there may be instances in which the state denies the right, the right itself rests with the individual as part of her essence of being human. It is inalienable.

A. *The Legal Right to Redemption*

1. *ECtHR’s Right to Redemption*

At the same time that the R2R Committee was delineating its own understanding of the right to redemption, the ECtHR was grappling with whether there was a similar right embedded in human rights law. Specifically, that court decided a series of cases that examined whether “hope” is a vital aspect of the human experience, specifically in the context of DBI sentences.⁴⁷ Like the R2R Committee, the ECtHR understood the

⁴⁶ *Id.* at 59.

⁴⁷ Adriano Martufi, *The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?*, 25(6) MAASTRICHT J. EUR. & COMP. L. 672, 676–77 (2018); see, e.g., *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 358 (Power-Forde, J., concurring) (“The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person.”).

concept of “hope” as being intertwined with belief in the capacity for change.⁴⁸ At their core, the decisions of the ECtHR affirm our central thesis: all human beings have the capacity for change.

The ECtHR operationalized this belief in its landmark case, *Vinter v. United Kingdom*, which concluded that “all prisoners, including those serving life sentences, [must] be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”⁴⁹ Absent the possibility of release on the basis of rehabilitation, the court concluded, life sentences run afoul of Article 3 of the European Convention on Human Rights (ECHR), which prohibits inhuman and degrading treatment or punishment, much like the Eighth Amendment to the U.S. Constitution.⁵⁰ The court went so far as to characterize sentencing schemes that result in people, like the men of the R2R Committee, not “knowing whether, at an unspecified future date, a mechanism might be introduced which would allow [them], on the basis of that rehabilitation, to be considered for release” as “capricious.”⁵¹

Vinter expressly linked such torturous punishment to the impossibility of atonement, saying “if [an individual] is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence.”⁵² This holding echoes the experiences of the men of the R2R Committee, who felt that “if nothing changed in the near future regarding our condition [namely, our DBI sentences], then we would all have to face the bleak reality of dying alone in prison without ever having the opportunity to try to make up for the harm we caused.”⁵³

Like the Committee, the *Vinter* court grounded its decision in respect for and protection of human dignity, a concept described as being at the “very essence” of the ECHR (and which, as we will discuss more in Part IV, also underlies the Eighth Amendment).⁵⁴ The court affirmed what we already

⁴⁸ *Vinter*, 2013-III Eur. Ct. H.R. at 358.

⁴⁹ *Id.* at 347 (majority opinion). Alternatively, the court also noted that a whole life sentence is “a poor guarantee of just and proportionate punishment” because of its variable duration. *Id.* at 346–47. Essentially, the longer a person lives, the more severe his sentence is. *Id.* at 346.

⁵⁰ *Id.* at 346, 349–50 (“Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.”).

⁵¹ *Id.* at 350.

⁵² *Id.* at 346.

⁵³ *See supra* Section I.A.

⁵⁴ *Vinter*, 2013-III Eur. Ct. H.R. at 347; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; *see also infra* Part IV.

know: human beings do not lose their capacity for change, no matter what crimes they have committed. As we explained in Section I.A, the “need to make amends [is] something uniquely human.”⁵⁵ It is deeply connected to human dignity.⁵⁶

Thus, in order to account for change over time, the *Vinter* court concluded that punishment should reflect what criminologists call the “progression principle,” which means that as an individual progresses through the criminal legal system, the objective of his sentence should change over time.⁵⁷ Initially, a sentence might be grounded in retribution, and therefore be more restrictive, but at later stages, the emphasis should be on preparation for release.⁵⁸ In other words, at the core of the progression principle is the belief that individuals, even those in carceral settings, can change over time. In this way, the court, like the R2R Committee, had a very individualized conception of rehabilitation, understanding it to be a personal process and movement toward change.⁵⁹

Going another step further, *Vinter* effectively held that the administration of sentences must reflect this progression of the human person over time.⁶⁰ In reaching this conclusion, the court reasoned that in order to detain someone, there must be a legitimate penological justification, such as retribution, deterrence, public protection, or rehabilitation.⁶¹ In line with the progression principle, the grounds for detention are not static; rather, they shift over time.⁶² What might have constituted a legitimate ground for detention early on may become unjust over time, particularly the longer detention goes on.⁶³ Without regular review of the state’s justification for someone’s continued detention, these shifts cannot be fully appreciated.⁶⁴ For that reason, authorities must periodically review a sentence to assess “whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.”⁶⁵ The essence of the *Vinter* decision is the following:

⁵⁵ See *supra* Section I.A.

⁵⁶ See Amanda Ploch, *Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives*, 44 J. INT’L L. & POL. 887, 900–02 (2012).

⁵⁷ *Dickson v. United Kingdom*, 2007-V Eur. Ct. H.R. 99, 112–13, 116.

⁵⁸ *Id.* at 113.

⁵⁹ See Martufi, *supra* note 47, at 681.

⁶⁰ *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 349.

⁶¹ *Id.* at 346.

⁶² *Id.*

⁶³ *Id.* at 346, 349.

⁶⁴ *Id.* at 346.

⁶⁵ *Id.* at 349.

in light of the evolving reasons for punishment, all sentences must be both reviewable and reducible, both *de jure* and *de facto*.⁶⁶ Sentences should not be one-size-fits-all Procrustean beds, as unalterable DBI sentences in the United States are.

The ECtHR's conceptualization of rehabilitation reflects how the R2R Committee described the path to redemption. Just as the R2R Committee did, the ECtHR linked rehabilitation to personal responsibility.⁶⁷ Specifically, the court envisioned rehabilitation occurring from "re-socialisation through the fostering of personal responsibility" over the course of a prison sentence.⁶⁸ Or, as we described in Section I.B, redemption "must come when someone realizes the pain they are responsible for." Since rehabilitation, according to the court, is considered personal and individual, the ECtHR does not guarantee a right to rehabilitation *per se*.⁶⁹ Rather, states have a positive obligation to promote rehabilitation, meaning that they must provide those who have received life sentences with "a real opportunity to rehabilitate themselves."⁷⁰ States must facilitate redemption, not obstruct it.

The ECtHR has characterized this duty to promote rehabilitation as "an obligation of means, not one of result."⁷¹ In practice, this characterization requires states to empower individuals "to the extent possible within the constraints of the prison context, to make such progress towards rehabilitation that it offers him or her the hope of one day being eligible for parole or conditional release."⁷² Although not required, the court stated that one way to accomplish this would be by setting up and regularly reviewing an individualized program that would encourage the individual "to lead a responsible and crime-free life."⁷³ In perhaps its strongest articulation of the state's duties, the ECtHR concluded that the "emphasis on rehabilitation and reintegration has become a mandatory factor that the member [s]tates need to take into account in designing their penal policies."⁷⁴

The ECtHR jurisprudence also reinforces the R2R Committee's conceptual analysis of redemption as a right in that the court framed these requirements as bestowing certain rights on those in custody (along with corresponding obligations on the state). Specifically, the court held that the

⁶⁶ *Id.* at 346.

⁶⁷ Martufi, *supra* note 47, at 680–88.

⁶⁸ Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99, 112.

⁶⁹ Harakchiev v. Bulgaria, 2014-III Eur. Ct. H.R. 391, 445.

⁷⁰ *Id.*

⁷¹ Murray v. Netherlands, App. No. 10511/10, ¶ 104 (Apr. 26, 2016), <http://hudoc.echr.coe.int/fre?i=001-138893> [<https://perma.cc/VGB6-EBVD>].

⁷² *Id.* ¶ 103.

⁷³ *Id.*

⁷⁴ Khoroshenko v. Russia, 2015-IV Eur. Ct. H.R. 329, 373.

right to a review entails “an actual assessment” of information relevant to preestablished criteria, meaning that review must be meaningful and in accordance with established law.⁷⁵ Moreover, the ECtHR held that individuals sentenced to life imprisonment have a right to know “at the outset of [their] sentence, what [they] must do to be considered for release and . . . when a review of [their] sentence will take place or may be sought.”⁷⁶ The power to exercise this right is born at the moment of sentencing.⁷⁷ Consequently, when the state provides no path to release, the individual has the right to contest her sentence at that moment, rather than wait until a later stage of her incarceration.⁷⁸ In contrast, the incarcerated members of the R2R Committee still have no idea what they must do in order to be considered for release, nor when, if ever, a review of their sentence will take place. They have no pathway to exercise their right to redemption.

2. Council of Europe

The *Vinter* court relied heavily on the standards set by the Council of Europe, the body that created the ECtHR to enforce the human rights obligations arising from the European Convention on Human Rights.⁷⁹ The Council of Europe first denounced DBI over forty years ago, when it commissioned a study that concluded that “it is inhuman to imprison a person for life without the hope of release.”⁸⁰ The following year, the Committee of Ministers of the Council of Europe went further still, passing a resolution urging member states to ensure “long-term sentences are imposed only if they are necessary for the protection of society.”⁸¹ In simplest terms, lengthy sentences should no longer be justifiable by retribution alone.

⁷⁵ *Murray*, App. No. 10511/10, ¶ 100.

⁷⁶ *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 350.

⁷⁷ *Id.* (“Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.”).

⁷⁸ *Id.*

⁷⁹ *See id.* at 347–48 (“Council of Europe instruments . . . also demonstrate, firstly, that commitment to rehabilitation is equally applicable to life sentence prisoners; and secondly, that, in the event of their rehabilitation, life sentenced prisoners should also enjoy the prospect of conditional release.”). For an explanation of the relationship between the Council of Europe and the European Court of Human Rights, see *A Convention to Protect Your Rights and Liberties*, COUNCIL OF EUR. (last visited Aug. 20, 2021), <https://www.coe.int/en/web/human-rights-convention#:~:text=The%20European%20Court%20of%20Human,in%20the%20member%20state%20concerned> [<https://perma.cc/K99T-DGTP>].

⁸⁰ SANDRA FREDMAN, *COMPARATIVE HUMAN RIGHTS LAW* 173 (2018) (quoting SUB-COMM. NO. XXV OF EUR. COMM. ON CRIME PROBS., *THE GENERAL REPORT ON THE TREATMENT OF LONG-TERM PRISONERS* 77 (1975)).

⁸¹ Council of Europe, Committee of Ministers, *On the Treatment of Long-Term Prisoners*, Res. No. (76) 2 at 1 (Feb. 17, 1976), <https://rm.coe.int/16804f2385> [<https://perma.cc/P64W-2YJY>]. The

To root out sentences solely based on retribution as soon as practicably possible, the resolution also encouraged states to examine sentences “as early as possible to determine whether or not a conditional release can be granted,” recommending that they be reviewed after eight to fourteen years of detention and regularly reviewed thereafter.⁸² In addition, in Recommendation 2003(22) on conditional release, the Committee of Ministers affirmed the need for conditional release to be available for all sentences, including life sentences.⁸³ It viewed this guarantee as a way to reduce the harmful effects of imprisonment.⁸⁴ The Committee of Ministers further recommended that all individuals should know at the start of their sentences either the minimum term after which they will become eligible for release and the criteria they would need to satisfy to be granted release, or the fixed term of their sentences after which they are entitled to release.⁸⁵

In addition to these recommendations, the Committee of Ministers has adopted multiple affirmations of its commitment to the rehabilitative ideal of punishment, going beyond the review of sentences and outlining what prisons that embrace the rehabilitative ideal should aspire to do. Specifically, in 2003, ten years prior to *Vinter*, it passed two recommendations that laid out a blueprint for prisons that hardly resemble the places where we resided for decades in the United States. First, Recommendation 2003(23) on the management of life and other long-term sentences advised that officials should strive to, among other things, “counteract the damaging effects of life and long-term imprisonment” and “increase and improve the possibilities for [those serving these sentences] to be successfully resettled in society and to lead . . . law-abiding li[ves] following their release.”⁸⁶

Committee of Ministers “is the Council’s decision-making body and is made up of the ministers of foreign affairs of each member state or their permanent diplomatic representatives in Strasbourg. The Committee of Ministers decides Council of Europe policy and approves its budget and programme of activities.” For more information, see *The Council of Europe in Brief*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/structure> [<https://perma.cc/G6KJ-TGKF>].

⁸² Council of Europe, *supra* note 81, at 2.

⁸³ Council of Europe, Committee of Ministers, *On Conditional Release (Parole)*, Recommendation Rec(2003)22 (Sept. 24, 2003), <https://rm.coe.int/16800ecb5d> [<https://perma.cc/3PV6-LK5Z>]. The Committee’s Recommendation defined conditional release as the early release under individualized post-release conditions and requiring more than the possibility of an amnesty or pardon. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Council of Europe, Committee of Ministers, *On the Management by Prison Administrations of Life Sentence and Other Long-Term Prisoners*, Recommendation Rec(2003)23 (Oct. 9, 2003), https://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/Umluvy/vezenstvi/R_2003_23_management_of_life_sentence_and_long-term_prisoners.pdf [<https://perma.cc/9JBG-55WS>].

Second, in carrying out these aims, the Committee of Ministers recommended that states abide by a set of principles, which further re-enforce the teachings of the R2R Committee, including the following:

- The Individualization Principle: “Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence”
- The Normalization Principle: “Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community”
- The Responsibility Principle: “Prisoners should be given opportunities to exercise personal responsibility in daily prison life”
- The Progression Principle: “Individual planning for the management of the prisoner’s life or long-term sentence should aim at securing progressive movement through the prison system”⁸⁷

Notably, the ECtHR echoed the above objectives and two of these principles, the individualization and progression principles, when coming to its decision in *Vinter*.⁸⁸

In line with the insights of the R2R Committee, these principles would infuse the U.S. criminal legal system with complexity and hold space for individual circumstances. In the words of the R2R Committee, prison would not be a Procrustean bed that treats everyone the same. Instead, the plans for each person’s sentence would be individualized so that they best facilitate that person’s path to personal redemption. Yet, these aspirations could not be further from the experiences of the R2R members in U.S. custody. Still, they are instructive because they provide a roadmap for how the right to redemption could be incorporated more broadly into U.S. correctional institutions, should we more sincerely adhere to the rehabilitative ideal.

B. The U.S. Commitment to the Rehabilitative Ideal

The United States has already committed to the rehabilitative ideal of criminal punishment, as a general principle, through the international human rights instruments that it has signed and ratified. Specifically, the International Covenant on Civil and Political Rights (ICCPR), which is

⁸⁷ *Id.* app. at 3–5, 8.

⁸⁸ *Vinter v. United Kingdom*, App. Nos. 66069/09, 130/10, and 3896/10, ¶ 61 (July 9, 2013), https://echr.coe.int/documents/reports_recueil_2013-iii.pdf [<https://perma.cc/8DDS-HA6Z>]. The excerpt published in print did not contain this paragraph, so we have cited the complete online version.

binding on the United States, guarantees respect for detained individuals and ensures their humane, restorative treatment as follows.⁸⁹ First, Article 10(1) provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁹⁰ Second, Article 10(3) provides that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”⁹¹ The General Comment No. 21 on Article 10 by the U.N. Human Rights Committee, the treaty body that monitors the implementation of the ICCPR, further clarified that “[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.”⁹²

In addition to this guidance on Article 10, in General Comment No. 35 on Article 9 of ICCPR, which protects the right to liberty and security of person, the U.N. Human Rights Committee noted that “[c]onsideration for parole [and] other forms of early release must be in accordance with the law.”⁹³ This meant, the Human Rights Committee specified, that release cannot be denied on arbitrary grounds, and that granting early release should be predicated on the individual’s rehabilitation and whether the individual poses any threat to public safety.⁹⁴

The U.N. Human Rights Committee has also dealt with individual complaints regarding the legality of life sentences. For example, in *Blessington v. Australia*, the Committee found that sentencing two adolescents to life imprisonment violated the ICCPR.⁹⁵ Although this case was related to juvenile life sentences, the Committee made several observations about life sentences more broadly. Like the ECtHR in *Vinter*, the Committee specified that human rights law requires that there must be more than just a theoretical possibility of review and release for those serving

⁸⁹ The International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. Despite these binding obligations, there are numerous obstacles to their enforcement. See generally David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995).

⁹⁰ ICCPR, *supra* note 89, art. 10(1).

⁹¹ *Id.* art. 10(3).

⁹² U.N. Hum. Rts. Comm., ICCPR, General Comment No. 21 on art. 10, ¶ 10 (Apr. 10, 1992). For more information about the purpose and function of the U.N. Human Rights Committee, see *Introduction of the Committee*, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> [<https://perma.cc/M8S5-4UTU>].

⁹³ U.N. Hum. Rts. Comm., ICCPR, General Comment No. 35 on art. 9, U.N. Doc. CCPR/C/GC/35, ¶ 20 (Dec. 16, 2014).

⁹⁴ *Id.* ¶¶ 20–21.

⁹⁵ Communication No. 1968/2010, United Nations Human Rights Committee [U.N. Hum. Rts. Comm.], ¶¶ 7.12, 8 (Nov. 3, 2014).

life sentences.⁹⁶ Rather, the review procedure must allow for a thorough evaluation of the detained person's progress towards rehabilitation and the state's justification of his continued detention.⁹⁷ Echoing Article 10(3) of ICCPR, the Committee affirmed that no penitentiary system should be strictly retributory, and that it should essentially seek the prisoner's reformation and social rehabilitation.⁹⁸

III. DBI IS A VIOLATION OF THE HUMAN RIGHT TO REDEMPTION

Out of line with its commitment to the rehabilitative ideal under international human rights law, the United States has taken a decidedly retributivist approach to criminal punishment. The U.S. criminal legal system regularly makes everlasting judgments that leave little to no room for reconsideration. Once someone is deemed irredeemable, the legal machinery is set in motion, and it is nearly impossible to change its course. This Part explains what drives that machinery, state by state. Using the jurisprudence outlining the human right to redemption described above as its frame, this Part demonstrates how, in the majority of jurisdictions in the United States, a life sentence truly does mean death by incarceration, no matter how someone evolves over time.

A. DBI Under the Eighth Amendment

The U.S. Supreme Court's own descriptions of LWOP illustrate why the United States' conception of LWOP is out of line with human rights principles, particularly the rehabilitative ideal described in Part II.⁹⁹ The perpetual condemnation and hopelessness of DBI sentences, which we describe in Part I, is not happenstance; it is sanctified in legal doctrine.¹⁰⁰

As a matter of law, according to the U.S. Supreme Court, LWOP sentences eschew the rehabilitative ideal protected and promoted by human rights law. By the Supreme Court's own admission, LWOP denies hope

⁹⁶ *Id.* ¶ 7.7.

⁹⁷ *Id.* ¶ 7.8.

⁹⁸ *Id.*

⁹⁹ For a comprehensive review of the U.S. Supreme Court's jurisprudence related to LWOP, see Nadia Bernaz, *Life Imprisonment and the Prohibition of Inhuman Punishments in International Human Rights Law: Moving the Agenda Forward*, 35 HUM. RTS. Q. 470, 470–80 (2013).

¹⁰⁰ Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 76 ("Hope, or its denial, distinguishes LWOP from other prison sentences—not irrevocability, and not any necessary difference in the actual length of incarceration."). Furthermore, at the federal level, the U.S. Congress has expressly acknowledged that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582; see also Lichtenberg, *supra* note 13, at 48 n.42.

eternally.¹⁰¹ In *Graham*, the Court characterized LWOP as “depriv[ing] the convict of the most basic liberties without giving hope of restoration,” and held such sentences were cruel and unusual for juveniles who committed nonhomicide offenses.¹⁰² Such infinite deprivation is permissible for others, because, to the Court’s mind, these sentences reflect “an irrevocable judgment about [an offender’s] value and place in society.”¹⁰³ In essence, a decision about a person’s worth has been stamped and sealed by the state without any further need for reconsideration.

By design, LWOP sentences are not meant to facilitate rehabilitation. The U.S. Supreme Court said as much, concluding in *Graham* and reiterating in *Miller* that an LWOP sentence “forfeits altogether the rehabilitative ideal.”¹⁰⁴ With rehabilitation off the table, the state’s responsibility to these individuals is limited to feeding, housing, and providing limited healthcare to them, devoid of the individualization and regular assessments necessitated by human rights law.¹⁰⁵

Following that line of reasoning, the Court in *Miller* concluded that the Eighth Amendment “forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” because of the difficulty of distinguishing between “transient immaturity” and “irreparable corruption” in people of that age.¹⁰⁶ In *Jones v. Mississippi*, a case decided by the U.S. Supreme Court last Term, the Court was asked to decide whether this language is tantamount to a permanent-incorrigibility rule, as some states have adopted in the wake of *Miller*. Namely, the issue considered by the Court was “[w]hether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.”¹⁰⁷ The Court ultimately concluded that such a finding was too difficult for courts to make and thus not required, but did not preclude states from adopting more rigorous requirements.¹⁰⁸ But any rule requiring a court to find someone permanently

¹⁰¹ *Graham v. Florida*, 560 U.S. 48, 79 (2010) (“Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.”); see also *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989) (noting that an LWOP sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days”).

¹⁰² *Graham*, 560 U.S. at 69–70; see also *Ristorph*, *supra* note 100, at 76–77.

¹⁰³ *Graham*, 560 U.S. at 74.

¹⁰⁴ *Id.*; *Miller v. Alabama*, 567 U.S. 460, 473 (2012) (quoting *Graham*, 560 U.S. at 74).

¹⁰⁵ *Berry*, *supra* note 36, at 1057.

¹⁰⁶ *Miller*, 567 U.S. at 479–80.

¹⁰⁷ Petition for a Writ of Certiorari at i, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (No. 18-1259).

¹⁰⁸ *Jones v. Mississippi*, 141 S. Ct. 1307, 1315, 1318 (2021).

incorrigible would be fundamentally at odds with the rehabilitative ideal enshrined in the ICCPR, to which the United States is bound.

The U.S. Supreme Court's discussions of LWOP also affirm the authors' characterization of LWOP as akin to death by incarceration. While the Court had previously put the death penalty in a category of its own, proclaiming that "death is different"¹⁰⁹ from other types of punishment, more recently, it has drawn parallels between LWOP and death sentences, pointing out that LWOP sentences "share some characteristics with death sentences that are shared by no other sentences."¹¹⁰ Specifically, under the law, LWOP sentences—like death sentences—represent an irrevocable determination that the condemned lack any ability to redeem themselves.¹¹¹ In the plurality opinion in *Graham*, Justice Anthony Kennedy was not persuaded that the possibility of executive clemency mitigated "the harshness of the sentence," because the possibility was so remote.¹¹²

B. DBI in the United States

Furthermore, unlike much of the rest of world (as we will detail further in Part IV), the United States has made a decisive turn toward life sentences, with the number of people serving life sentences more than quadrupling since 1984.¹¹³ As of the last available tally in 2016, there were nearly 162,000 people serving a life sentence—amounting to one in every nine people in prison.¹¹⁴ Almost a third (over 50,000) are serving LWOP sentences, leaving no possibility of parole.¹¹⁵ This statistic represents a sharp increase from the past—in 1992, there were only 12,000 people serving LWOP sentences in the United States.¹¹⁶

The dramatic rise of life sentences can be attributed to three factors: (1) the abolition of parole and embrace of truth-in-sentencing and three-strikes laws, (2) the increase in mandatory sentences, particularly under "habitual offender" laws, and (3) the use of LWOP as the alternative to the

¹⁰⁹ *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

¹¹⁰ *Graham v. Miller*, 560 U.S. 48, 69 (2010).

¹¹¹ See *Miller*, 567 U.S. at 474–75 (first quoting *Graham*, 560 U.S. at 69; and then citing *Solem v. Helm*, 463 U.S. 277, 300–01 (1983)).

¹¹² *Graham*, 560 U.S. at 70.

¹¹³ NAZGOL GHANDNOOSH, SENT'G PROJECT, DELAYING A SECOND CHANCE: THE DECLINING PROSPECTS FOR PAROLE ON LIFE SENTENCES 3 (2017), <https://www.sentencingproject.org/publications/delaying-second-chance-declining-prospects-parole-life-sentences/> [https://perma.cc/MPM6-PQCX].

¹¹⁴ ASHLEY NELLIS, SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 5 (2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/#III.%20Life%20by%20the%20Numbers%20> [https://perma.cc/4LBG-NHKJ].

¹¹⁵ *Id.* at 9.

¹¹⁶ *Berry*, *supra* note 36, at 1059.

death penalty.¹¹⁷ The turn to life imprisonment also follows a broader shift in the United States from a focus on rehabilitation to one bent on retribution and incapacitation during the crime waves of the 1970s and 1980s.¹¹⁸

The vast majority of people serving LWOP sentences are concentrated in a few states; Florida (16.7%), Pennsylvania (10.1%), California (9.6%), Louisiana (9.1%), and the federal system (7.2%) account for just over half (52.7%) of the nationwide LWOP population.¹¹⁹ “In Delaware, Louisiana, Massachusetts, and Pennsylvania more than 10 percent of the state prison population is serving a life sentence with no chance for parole.”¹²⁰ In ten states—Arizona, Florida, Illinois, Iowa, Louisiana, Maine, Pennsylvania, South Dakota, Virginia, and Wisconsin—all life sentences exclude the possibility of parole.¹²¹ In all but one state—Alaska—LWOP is a possible sentence, making DBI a possibility in nearly all fifty states in the United States.¹²² Unlike the death penalty, which has high reversal rates, reversal of LWOP sentences are rare, if not impossible, occurrences.¹²³ Consequently, in most jurisdictions in the United States, executive clemency is often the only path to escaping DBI for those serving LWOP sentences.¹²⁴

Clemency can take many forms, but commutations, and in some states pardons, are the only avenues to permanent release for someone serving LWOP.¹²⁵ Pardons absolve convicted persons of guilt and relieve all or some of the legal disabilities arising from the pardoned conviction, often restoring rights, such as the right to vote, the ability to hold public office, and the right

¹¹⁷ *Id.* at 1059, 1064.

¹¹⁸ *Id.* at 1059.

¹¹⁹ NELLIS, *supra* note 114, at 9.

¹²⁰ *Id.*

¹²¹ *Id.* at 34 n.12. In Arizona, the legislature technically abolished parole in 1993; however, Arizona courts still regularly sentenced people to life with a chance of parole. In 2018, Arizona passed a law that would provide for parole for those sentenced to life with parole through the clemency process. Michael Kiefer, *Governor Signs Bill Reinstating Chance of Parole in Some Murder Cases*, AZCENTRAL.COM (last updated May 1, 2018, 7:00 PM), <https://www.azcentral.com/story/news/local/arizona-investigations/2018/05/01/governor-signs-bill-reinstating-chance-parole-some-murder-cases/571147002/> [<https://perma.cc/6UF7-VRPN>].

¹²² Daniel Nichanian, *Reformers Target Life Imprisonment and Sentences of Life Without Parole*, APPEAL (Feb. 28, 2019), <https://theappeal.org/politicalreport/reformers-target-life-imprisonment-and-sentences-of-life-without-parole/> [<https://perma.cc/A28Y-76N8>] (noting that Alaska’s ninety-nine-year sentence is the functional equivalent of LWOP).

¹²³ *See* Berry, *supra* note 36, at 1057 & n.35.

¹²⁴ *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 15:1 (“After exhaustion of judicial remedies, executive clemency remains the only avenue of sentence review.”).

¹²⁵ *See, e.g.,* Weldon v. State, 800 P.2d 513, 514 (Wyo. 1990) (highlighting that because good-time credit does not apply to life incarceration in Wyoming, only the executive’s commutation power can release an offender under such a sentence before her natural death). Clemency can take the form of a pardon, commutation, remission, or reprieve. Remission involves the forgiveness of court-imposed fines or fees. Reprieve is only a temporary suspension of sentence. *See* CAMPBELL, *supra* note 124.

to bear arms.¹²⁶ Pardons are typically considered an act of mercy or forgiveness by the executive branch.¹²⁷ In the many states, however, in order to apply for a pardon, the applicant must have completed his sentence, thereby rendering this form of clemency a nonstarter for those currently incarcerated in those states.¹²⁸ This leaves commutation, which results in the reduction of a judicially imposed sentence, as the only possible avenue of release for those serving LWOP in many states.¹²⁹

C. *DBI Infringes on the Human Right to Redemption*

Yet, clemency in most (if not all) jurisdictions in the United States does not satisfy the requirements laid out in the case law of the ECtHR, which is considered persuasive authority by the U.S. Supreme Court and holds particular significance in Eight Amendment cases.¹³⁰ As described in Part II, one of the most central aspects of the right to redemption is that there must be a possibility of review and a path to release based on an individual's rehabilitation. As will be detailed in Section III.D, the clemency processes in many U.S. states substantially lack tangible opportunities for review and release.

While governments are afforded a “margin of appreciation” in designing the mechanism for review, the ECtHR specified that for the review to comport with human rights law, certain minimum standards must be met.¹³¹ To start with, the review must allow for consideration of “any changes in the life prisoner and progress towards his or her rehabilitation [that] are of such significance that continued detention is no longer justified on legitimate penological grounds.”¹³² As a general rule, this review “must be based on rules having a sufficient degree of clarity and certainty” and release based

¹²⁶ CAMPBELL, *supra* note 124, § 15:2.

¹²⁷ See, e.g., *Mason v. State*, 103 So. 2d 337, 341 (Ala. Ct. App. 1956) (“A pardon cannot wipe out the historical fact of the conviction . . . it involves forgiveness, and not forgetfulness.”); *R.J.L. v. State*, 887 So. 2d 1268, 1281 (Fla. 2004) (“A pardon is the equivalent of forgiveness for a crime, it does not declare the pardoned individual innocent of the crime.”); *State v. Blanchard*, 100 S.W.3d 226, 231 (Tenn. Crim. App. 2002) (“A pardon involves forgiveness and not forgetfulness and it does not wipe the slate clean.” (quoting *State v. Skinner*, 632 A.2d 82, 84 (Del. 1993)) (internal quotation marks omitted)); *In re Sang Man Shin*, 206 P.3d 91, 91 (2009) (stating that “a pardon is an act of forgiveness”); *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y. 1918) (describing a pardon as an act of “grace and mercy”).

¹²⁸ See *50-State Comparison: Pardon Policy & Practice*, RESTORATION RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2> [https://perma.cc/YK26-L4UU].

¹²⁹ See CAMPBELL, *supra* note 124, § 15:1.

¹³⁰ See *infra* Part IV.

¹³¹ *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 349.

¹³² *Murray v. Netherlands*, App. No. 10511/10, ¶ 100 (Apr. 26, 2016), <http://hudoc.echr.coe.int/fre?i=001-138893> [https://perma.cc/VGB6-EBVD].

on “objective, pre-established criteria.”¹³³ In *Vinter*, the ECtHR also noted that international and comparative law support “the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter.”¹³⁴ Simply put, review mechanisms must be regular, predictable, and certain.¹³⁵ In addition, even when a review mechanism is in place, a scheme must allow for the actual reduction of sentences; in other words, when someone has no realistic opportunity for release, her punishment is inhuman and degrading under Article 3 of the ECHR.¹³⁶ Thus, in assessing reducibility, the ECtHR has found that mechanisms resulting in no or only very few releases are suspect.¹³⁷ In the words of the R2R Committee, mechanisms that afford no possibility of actual release amount to death by incarceration.

In *Hutchinson v. United Kingdom*, the ECtHR specifically addressed under what circumstances executive clemency guaranteed enough process and a sufficient possibility of release to comply with these human rights standards. Examining the United Kingdom’s clemency process, the *Hutchinson* court determined that review of life sentences by the executive branch and release under “exceptional circumstances” is not a per se violation of Article 3.¹³⁸ In assessing why the United Kingdom’s clemency process did not run afoul of Article 3, the court examined four factors: (1) the nature of review, (2) the scope of review, (3) the criteria and conditions for review, and (4) the timeframe of review.¹³⁹

First, in assessing the nature of review, the *Hutchinson* court concluded that “the executive nature of a review is not in itself contrary to the requirements of Article 3.”¹⁴⁰ This conclusion was based on the margin of appreciation allotted to states in designing their mechanisms for review.¹⁴¹

¹³³ *Id.*

¹³⁴ *Vinter*, 2013-III Eur. Ct. H.R. at 350.

¹³⁵ *Id.* at 350–51.

¹³⁶ *See id.* at 346.

¹³⁷ *Murray*, App. No. 10511/10, ¶ 100 (“Finally, in assessing whether the life sentence is reducible *de facto* it may be of relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon.”) (citation omitted).

¹³⁸ *Hutchinson v. United Kingdom*, App. No. 57592/08, ¶¶ 49–50, 55 (Jan. 17, 2017), <http://hudoc.echr.coe.int/eng?i=001-170347> [<https://perma.cc/TZ2Z-PX4U>]. Legal scholar William Berry has previously argued that LWOP violates the human rights standards concretized in *Vinter*. *See* Berry, *supra* note 36, at 1073. However, since *Hutchinson* has concluded that release through executive review processes like clemency can provide sufficient possibility of review and release, Professor Berry’s claim requires more scrutiny and nuance.

¹³⁹ *Hutchinson*, App. No. 57592/08, ¶¶ 46–69.

¹⁴⁰ *Id.* ¶ 50.

¹⁴¹ *Id.* ¶ 45.

At the same time, the court in *Hutchinson* placed great importance on the fact that all executive reviews were subject to judicial review and such reviews had to be in compliance with Article 3 so that the executive branch's discretion was not unfettered.¹⁴²

Second, with regard to the scope of review, the ECtHR in *Hutchinson* reiterated that only allowing release on "compassionate grounds" for those with terminal conditions would be insufficient.¹⁴³ As the court underscored in *Vinter* (which also examined the United Kingdom's clemency scheme), criminal law schemes must also permit actual reduction of a sentence in light of rehabilitation.¹⁴⁴ The ECtHR, however, noted that the subsequent case law in the United Kingdom had clarified that the "exceptional circumstances" warranting release under the U.K. scheme included "exceptional progress towards rehabilitation," so it was not out of line with Article 3 of the ECHR.¹⁴⁵

Third, when examining whether the criteria and conditions for review are sufficient under Article 3, the ECtHR clarified that "[t]he relevant question is whether those serving life sentences in the domestic system can know what they must do to be considered for release, and under what conditions the review takes place."¹⁴⁶ Although the court noted that variation is permitted and a high degree of precision is not required to comply with human rights law, a review scheme must have "a degree of specificity or precision as to the criteria and conditions attaching to sentence review, in keeping with the general requirement of legal certainty."¹⁴⁷ In its analysis, the *Hutchinson* court recalled past cases in which the national scheme fell short of this threshold, citing the following features: (1) absence of a legal obligation for the executive to give reasons for its decisions;¹⁴⁸ (2) "lack of publicly-available policy statements";¹⁴⁹ (3) "the complete lack of formal and informal safeguards";¹⁵⁰ and (4) the "absence of a sentence review mechanism operating on the basis of objective, pre-established criteria."¹⁵¹

¹⁴² *Id.* ¶¶ 46–53.

¹⁴³ *Id.* ¶¶ 55–56.

¹⁴⁴ *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 349 ("Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.").

¹⁴⁵ *Hutchinson*, App. No. 57592/08, ¶¶ 55, 57.

¹⁴⁶ *Id.* ¶ 58 (citation omitted).

¹⁴⁷ *Id.* ¶ 59.

¹⁴⁸ *Id.* ¶ 59 (citing *Magyar v. Hungary*, 2014-I Eur. Ct. H.R. 449, 460).

¹⁴⁹ *Id.* ¶ 59 (citing *Harakchiev v. Bulgaria*, 2014-III Eur. Ct. H.R. 391, 444).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (quoting *Trabelsi v. Belgium*, 2014-V Eur. Ct. H.R. 257, 334 (internal quotations omitted)).

With regard to the U.K. system of review under scrutiny in *Hutchinson*, the court specified that its determination that the criteria and conditions for review met the Article 3 requirements hinged on two considerations. First, the ECtHR was persuaded in light of recent case law that, going forward, the U.K. scheme would be guided by the human rights standards laid out by the ECtHR.¹⁵² Second, since the executive branch was required to provide justifications for its decisions and such decisions were reviewable by the judiciary, the ECtHR believed that the criteria for release would be further fleshed out in the future.¹⁵³

In *Hutchinson*, the court also reiterated its holding in past decisions that if individual reasons for grants or denials are not given, the state must ensure transparency through other means.¹⁵⁴ For example, the court recounted how, in *Harakchiev and Tolumov*, Bulgaria had achieved this by establishing a Clemency Commission, which had to consider international human rights law, in addition to other practices that made its operations less opaque.¹⁵⁵ These practices included “the publication of the criteria that guide [the Clemency Commission] in the examination of clemency requests, the reasons for its recommendations to the Vice-President to exercise the power of clemency in individual cases, and relevant statistical information.”¹⁵⁶ In addition, the executive order that established the clemency process could be challenged in a court of law.¹⁵⁷ The court considered these safeguards enough to ensure “the consistent and transparent exercise of presidential powers.”¹⁵⁸

In contrast, the ECtHR criticized the previous administration under President Georgi Parvanov, which governed Bulgaria from 2002 to 2012, for being “quite opaque.”¹⁵⁹ This administration did not make any policy statements about the clemency process available to the public or provide any reasons whatsoever for individual clemency decisions.¹⁶⁰ The ECtHR found that this “complete lack of formal or even informal safeguards,” coupled with the absence of cases resulting in actual release, meant that the petitioner’s sentence was de facto irreducible, and therefore in violation of Article 3.¹⁶¹

Finally, with regard to the fourth factor considered, the timeframe for review of life sentences, the ECtHR specified that there is no fixed timeframe

¹⁵² *Id.* ¶ 63.

¹⁵³ *Id.* ¶ 64.

¹⁵⁴ *Id.* ¶ 61.

¹⁵⁵ *Id.* ¶ 61 (citing *Harakchiev*, 2014-III Eur. Ct. H.R. at 412–16).

¹⁵⁶ *Harakchiev*, 2014-III Eur. Ct. H.R. 391 at 443.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 444.

¹⁶⁰ *Id.* at 410–11, 444.

¹⁶¹ *Id.* at 444.

for review, but reiterated *Vinter*'s finding that human rights law and comparative law supported a review "no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter."¹⁶²

The ECtHR has already found that the U.S. federal review scheme does not comply with the standards of Article 3 articulated in its jurisprudence. In *Trabelsi v. Belgium*, the court examined whether Belgium had violated the prohibition on cruel and inhumane treatment when it extradited an individual to the United States who could possibly be subjected to LWOP.¹⁶³ The ECtHR recognized that under the U.S. scheme, release was possible for Nizar Trabelsi under certain circumstances.¹⁶⁴ Namely, his sentence could theoretically be reduced (1) if he provided substantial assistance in the investigation or prosecution of someone else, (2) for compelling humanitarian reasons, (3) through commutation of his sentence, or (4) via presidential pardon.¹⁶⁵ Noting that all these procedures were "very general and vague," however, the court concluded that none of these mechanisms provided a "prospect of release" sufficient to satisfy the requirements of Article 3.¹⁶⁶ More precisely, the court held so because no review mechanism existed under the U.S. federal scheme that required authorities to assess, based on "objective, pre-established criteria," whether someone had "changed and progressed to such an extent that continued detention [could] no longer be justified on legitimate penological grounds."¹⁶⁷ While not expressly articulated, reading these cases together, the court seems most concerned with schemes that place too much discretion in the hands of the executive branch and therefore could easily be subject to abuse.

D. State-by-State Analysis of Clemency

In light of this jurisprudence and the fact that the majority of people serving LWOP sentences in the United States serve them in state correctional facilities, we conducted a state-by-state analysis of each state's clemency process to see which states fail to provide either a prospect of release or possibility of review under human rights law. To determine whether these jurisdictions provided a sufficient "possibility of review," we examined the following standards laid out in *Hutchinson*: (1) whether the executive branch's decision-making in the clemency process is not unfettered (e.g., are

¹⁶² *Hutchinson v. United Kingdom*, App. No. 57592/08, ¶¶ 68–69 (Jan. 17, 2017), <http://hudoc.echr.coe.int/eng?i=001-170347> [<https://perma.cc/TZ2Z-PX4U>].

¹⁶³ *Trabelsi v. Belgium*, 2014-V Eur. Ct. H.R. 257, 307.

¹⁶⁴ *Id.* at 333.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 333–34.

¹⁶⁷ *Id.*

their decisions subject to judicial review?) (nature of review); (2) whether criminal law schemes permit release in light of rehabilitation (scope of review); (3) whether those serving LWOP know what they must do to be released (e.g., are there preestablished criteria for release known at the time of sentencing? or, alternatively, does the executive branch provide individualized reasons for its decisions?) (criteria and conditions of release); and (4) whether there is a preestablished time frame for review, not later than twenty-five years after sentencing, and periodic reviews thereafter (the timeframe of review). In addition, to determine whether there is a sufficient “prospect of release” in these states, we also examined whether clemency provided a realistic opportunity for release as required by *Vinter*.¹⁶⁸ As specified in *Murray*, mechanisms resulting in no or few releases are suspect in this regard.¹⁶⁹ Based on publicly available information, as well as the applicable laws and policy statements on clemency, we determined that there are at least twenty-five jurisdictions in the United States that contravene these human rights standards.¹⁷⁰

As a starting point, however, we note that while we focus on these twenty-five jurisdictions, nearly every jurisdiction in the United States is suspect under the human rights standards articulated by the ECtHR. As explained in Section III.C, although review of sentences by the executive branch is not a per se violation of Article 3, the executive’s decisions cannot be unfettered.¹⁷¹ Indeed, one of the central reasons that the ECtHR found that the United Kingdom’s clemency scheme was in compliance with human rights standards was that all executive reviews were subject to judicial review.¹⁷² This feature is not present in U.S. clemency processes. Rather, at the state and federal levels, the executive branch has near-unfettered

¹⁶⁸ *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 346.

¹⁶⁹ *Murray v. Netherlands*, App. No. 10511/10, ¶ 100 (Apr. 26, 2016), <http://hudoc.echr.coe.int/fre?i=001-138893> [<https://perma.cc/VGB6-EBVD>] (“Finally, in assessing whether the life sentence is reducible *de facto* it may be of relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon.”) (citation omitted).

¹⁷⁰ These jurisdictions include Alabama, Arizona, Connecticut, Florida, Georgia, Idaho, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Vermont, and the federal jurisdiction. A chart with a state-by-state analysis of clemency is on file with author Rachel López.

¹⁷¹ *Hutchinson v. United Kingdom*, App. No. 57592/08, ¶ 50 (Jan. 17, 2017), <http://hudoc.echr.coe.int/eng?i=001-170347> [<https://perma.cc/TZ2Z-PX4U>]. Legal scholar William Berry previously argued that LWOP violated the human rights standards concretized in *Vinter*. Berry, *supra* note 36, at 1068–73. However, after *Hutchinson* concluded that release through executive review processes like clemency could provide sufficient possibility of review and release, such a claim requires more scrutiny and nuance.

¹⁷² *Hutchinson*, App. No. 57592/08, ¶ 46–53.

discretion to grant or deny clemency, without any oversight by the other branches.¹⁷³ Unless clemency decisions run afoul of the U.S. Constitution, they are generally not subject to judicial or legislative review.¹⁷⁴ As the U.S. Supreme Court put it, “pardon and commutation decisions have not traditionally been the business of courts.”¹⁷⁵ In addition, access to the pardon and commutation process is considered a privilege, not a right.¹⁷⁶ Consequently, the U.S. Supreme Court has held that those serving life sentences have no due process right to obtain the reasons that state pardon boards denied their requests for commutation,¹⁷⁷ a factor frequently considered by the ECtHR. Thus, in order to accord with the human rights standards laid out above, states must provide sufficient safeguards and ensure transparency through other means.¹⁷⁸ As will be detailed below, these additional safeguards are generally not present in U.S. clemency processes.

Adding further to these human rights concerns, clemency decisions in the United States tend to be very political.¹⁷⁹ The American Bar Association (ABA) has described clemency decisions as “often perceived [by the

¹⁷³ See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (“[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.” (citations omitted)); *Bundy v. State*, 497 So.2d 1209, 1211 (Fla. 1986) (reflecting the traditional hands-off policy of the judiciary towards executive prerogatives of clemency); *Carroll v. Raney*, 953 S.W.2d 657, 660–61 (Tenn. 1997) (noting that the Governor has constitutional authority to commute a sentence for sexual assault to “22 years to life” despite the relevant statute’s precluding indeterminate sentencing); *McLaughlin v. Bronson*, 537 A.2d 1004, 1006–07 (Conn. 1988) (holding that because the pardon power vests in the legislature it could establish a court of pardons from which there is no right to judicial review); see also Jing Cao, *Commuting Life without Parole Sentences: The Need for Reason and Justice over Politics* 60–62 (2015) (S.J.D. dissertation, Fordham Law School) (describing clemency as “a standardless process” that is likely to cause confusion and undermine fairness in sentencing).

¹⁷⁴ Cao, *supra* note 173, at 60.

¹⁷⁵ *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

¹⁷⁶ See ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 15:1 (2020).

¹⁷⁷ *Dumschat*, 452 U.S. at 466–67.

¹⁷⁸ See *Hutchinson v. United Kingdom*, App. No. 57592/08, ¶ 61 (Jan. 17, 2017), <http://hudoc.echr.coe.int/eng?i=001-170347> [<https://perma.cc/TZ2Z-PX4U>].

¹⁷⁹ See Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 *FED. SENT’G. REV.* 153, 153–55 (2009); see also Rachel Leingang, *Ducey Record on Pardons, Commutations Not Forgiving*, *AZ CAPITOL TIMES* (Mar. 9, 2018), <https://azcapitoltimes.com/news/2018/03/09/arizona-doug-ducey-pardons-commutations-not-forgiving/> [<https://perma.cc/QF6K-9LEA>] (“The political implications of granting pardons, and especially commutations, can’t be ignored, and they exist regardless of party affiliation, said Donna Hamm, the director of Middle Ground Prison Reform. Politicians are always gauging which way the wind blows and trying to avoid angering the electorate, especially if they’re planning for future offices, Hamm said. That’s why most governors or presidents have pardoned a bunch of people on their way out the door, she said.”); Dafna Linzer, *In Mississippi, Identities of Pardon Applicants Must Be Public*, *PROPUBLICA* (Jan. 12, 2012, 4:23 PM), <https://www.propublica.org/article/in-mississippi-identities-of-pardon-applicants-must-be-public> [<https://perma.cc/P79K-ZG46>] (documenting the political nature of and lack of transparency in clemency processes at both the federal and state levels).

executive branch] (rightly or wrongly) as political ‘hot potatoes’ that can be used against them if the public is not supportive.”¹⁸⁰ The ABA also warned that “politics and public opinion will almost always come into play as this critical decision is made.”¹⁸¹ For that reason, the ABA advises applicants “to remember that local politics, history, demographics, culture, and ethos are always at play when a plea for clemency is being considered.”¹⁸² This added layer of ambiguity raises concerns about whether clemency in general falls short of the guarantees to a certain and predictable process detailed in ECtHR jurisprudence.¹⁸³

In addition to these general concerns about clemency in all jurisdictions in the United States, we also examined the clemency processes in each of the fifty states and found over half to be out of line with the human rights standards outlined above. As catalogued below, four states provided no path to release whatsoever for those sentenced to LWOP, while four others excluded rehabilitation as grounds for release. In nine states, a grant of clemency for those serving LWOP was so rare that it was practically impossible to obtain. In five other states, the clemency process was so opaque that those seeking clemency could not possibly know what they must do to secure release. In Pennsylvania and Georgia, someone’s prospect for review and release varied wildly depending on who held the governor’s office. Finally, in Missouri and Tennessee, sentences could only be reviewed after an individual had served at least twenty years, the maximum timeframe for review recommended by the ECtHR.

1. States with No Prospect of Release (Prospect of Release)

First, a number of states provide no path to release for those sentenced to life behind bars in direct contravention of the human rights standards laid out by the ECtHR in *Vinter* and *Hutchinson*.¹⁸⁴ Nevada is one such state. There, the state Board of Pardons Commissioners is prohibited by law from commuting a LWOP sentence to one that would allow for parole.¹⁸⁵ Those serving LWOP in Nevada are also ineligible for a pardon because they have

¹⁸⁰ Memorandum on North Carolina Capital Clemency Information 7, American Bar Association (2017), https://www.capitalclemency.org/file/nc_clemency_memo-02_2017.pdf [<https://perma.cc/T8AP-YSDM>].

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 351; see also *Murray v. Netherlands*, App. No. 10511/10, ¶ 100 (Apr. 26, 2016), <http://hudoc.echr.coe.int/fre?i=001-138893> [<https://perma.cc/VGB6-EBVD>].

¹⁸⁴ Some states fall into multiple categories, but we chose to include them in the category where the violation is most apparent and egregious.

¹⁸⁵ NEV. REV. STAT. ANN. § 213.085 (2020).

not completed their sentence, an eligibility requirement in that state.¹⁸⁶ In Maine, a state where all life sentences lack the possibility of parole, those serving life sentences are categorically ineligible for either a pardon or commutation.¹⁸⁷ This bar can only be waived in exceptional cases.¹⁸⁸ Similarly, in Kansas, the governor cannot commute a LWOP sentence.¹⁸⁹ It is unclear whether the governor is also prohibited from pardoning someone with such a sentence.¹⁹⁰ In any event, pardons are extremely rare, meant only to correct “a miscarriage of justice,” and not based on a person’s individual rehabilitation as required by *Vinter*.¹⁹¹

Likewise, in Alabama, someone who is serving a life sentence that was commuted from a death sentence will never be eligible for parole.¹⁹² Such a person will also never be able to apply for a pardon unless based on a claim of innocence.¹⁹³ As a further barrier to all those serving life sentences, pursuant to the Alabama Constitution, commutation and reprieves are only available to those with death sentences.¹⁹⁴ No other authority in Alabama has the power to commute sentences, and the executive’s clemency decisions are not subject to judicial review.¹⁹⁵ Consequently, in these states, regardless of

¹⁸⁶ See NEV. BD. OF PARDONS, CRITERIA AND APPLICATION INSTRUCTIONS: COMMUNITY CASES 2 (2019), <http://pardons.nv.gov/uploadedFiles/pardonsnv.gov/content/About/CriteriaAndApplicationInstructions.pdf> [<https://perma.cc/N2HS-385W>].

¹⁸⁷ See *Executive Clemency – Pardons and Commutations*, ME. DEP’T OF CORR., <https://www.maine.gov/corrections/adult-community-corrections/pardon-board> [<https://perma.cc/J852-TSXU>].

¹⁸⁸ *Id.*

¹⁸⁹ KAN. STAT. ANN. § 22-3705(b) (2021).

¹⁹⁰ *State v. Page*, 57 P. 514, 516 (Kan. 1899) (“The effect of a pardon is to release from confinement; to restore to the status of citizenship, and to the enjoyment of civil rights.”). *But see Clemency*, KAN. DEP’T OF CORR. (July 9, 2020, 3:20 PM), <http://www.doc.ks.gov/prb/clemency> [<https://perma.cc/MJ8S-YRJ2>] (“[A] pardon does not erase the conviction from the record, remove responsibility for the crime, nor can it be the basis for a negative response to the question: ‘Have you ever been convicted of a crime?’”).

¹⁹¹ See KAN. DEP’T OF CORR., *supra* note 190. For an overview of the pardon process in Kansas and the infrequency of pardon grants, see *Kansas Restoration of Rights & Record Relief*, RESTORATION RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/kansas-restoration-of-rights-pardon-expungement-sealing> [<https://perma.cc/TZA3-NQAK>].

¹⁹² ALA. ADMIN. CODE §§ 15-22-27(b), (d) (2019).

¹⁹³ *Id.* § 15-22-27(a), (d).

¹⁹⁴ Amendment 38 of Section 124 of Article V of the Alabama Constitution provides that “[t]he governor shall have power to grant reprieves and commutations to persons under sentence of death.” ALA. CONST. art. V, § 124, amend. 38.

¹⁹⁵ See, e.g., *Wilson v. State*, 105 So. 2d 66, 70 (Ala. 1958) (“If any clemency is to be extended to the appellant, it must come from executive action.”); *Scott v. State*, 22 So. 2d 529, 531 (Ala. 1945) (observing that courts are “without authority in criminal cases to reduce the punishment fixed by the jury”); *Liddell v. State*, 251 So. 2d 601, 606 (Ala. 1971) (observing that “only the Governor has the power to grant reprieves and commutations to persons under sentence of death . . . therefore, a court has no power to . . . commute a death sentence imposed by a jury”).

the changes that a person makes in her life and her strides in taking responsibility for her actions, she will always be condemned to die in prison.

2. *States with No Prospect of Release Based on Rehabilitation (Scope of Review)*

In other states, those serving LWOP sentences might be able to secure release through the clemency process, but not on the basis of their rehabilitation, as human rights law requires. In Oklahoma, for instance, those sentenced to LWOP cannot apply for pardon and can only apply for commutation if arguing that punishment was unjust or excessive, but not on the basis of rehabilitation.¹⁹⁶ Likewise, in Vermont, someone who is currently incarcerated can apply only for a pardon, the sole clemency mechanism in that state, “in very unusual circumstances where there is independent evidence of a gross miscarriage of justice not reviewable through the courts.”¹⁹⁷ There is no mechanism that allows for release on the basis of rehabilitation in that state either.

In Louisiana, a state with the highest number of people serving LWOP (almost one in three people in Louisiana prisons) and where all life sentences lack the possibility of parole, release on the basis of rehabilitation is very unlikely, if not impossible.¹⁹⁸ First of all, those serving LWOP sentences in Louisiana are ineligible to apply for a pardon.¹⁹⁹ Second, in order to be eligible for commutation, someone must demonstrate, *inter alia*, that he “possess[es] a marketable job skill, either through previous employment history or through successful completion of vocational training while

¹⁹⁶ See OKLA. PARDON & PAROLE BD., PARDON AND PAROLE BOARD FREQUENTLY ASKED QUESTIONS ABOUT COMMUTATIONS 1 (2019), <https://www.ok.gov/ppb/documents/FAQs%20Commutations.pdf> [<https://perma.cc/7ET5-B3W6>] (“The purpose of a commutation is to correct an unjust or excessive sentence in relation to the range of punishment for the crimes of conviction. A commutation is not intended to serve as an early release mechanism.”); OKLA. PARDON & PAROLE BD., PARDON AND PAROLE BOARD FREQUENTLY ASKED QUESTIONS ABOUT PARDONS 1 (2019), <https://www.ok.gov/ppb/documents/FAQs%20Pardons.pdf> [<https://perma.cc/JCR7-24TP>].

¹⁹⁷ VERMONT GOVERNOR’S GUIDELINES FOR PARDON CONSIDERATION 1, <https://governor.vermont.gov/sites/scott/files/documents/pardon%20application.FINAL%202017.pdf> [<https://perma.cc/TK6H-FXUJ>]; *State Clemency – Vermont*, CRIM. JUST. POL’Y FOUND., <https://www.cjpf.org/clemency-vt> [<https://perma.cc/8AMU-YLKP>].

¹⁹⁸ Lea Skene, *Louisiana’s Life Without Parole Sentencing the Nation’s Highest — and Some Say That Should Change*, ADVOCATE (Dec. 7, 2019), https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html [<https://perma.cc/R52V-ETG5>]; Elizabeth Crisp & David Mitchell, *See The List: Jindal Grants Clemency to Personal Butler -- a Convicted Killer -- Plus 20 Other People*, ADVOCATE (Jan. 13, 2016), https://www.theadvocate.com/baton_rouge/news/politics/article_fac55ac5-4692-5dc5-bff7-8ca12b75947f.html [<https://perma.cc/9SS4-YGPG>].

¹⁹⁹ See *Application for Pardon Consideration*, LA. DEP’T OF PUB. SAFETY & CORR., <https://doc.louisiana.gov/imprisoned-person-programs-resources/pardons-parole/application-for-pardon-consideration/> [<https://perma.cc/BHQ8-JFST>].

incarcerated.”²⁰⁰ Consequently, rehabilitation alone is not enough. This is compounded by how rare commutations are in the state in general. From 2008 to 2016, then-Governor Bobby Jindal only commuted the sentences of three people, one of whom was his butler.²⁰¹

In New Mexico, the current Executive Clemency Guidelines specify that a commutation “will normally be considered only in cases of unusual meritorious service.”²⁰² The Guidelines offer the following examples of “unusual meritorious service”: (1) saving the life of an inmate or prison employee; (2) helping to stop an insurrection which threatens the administration’s control of an institution; and (3) risking serious bodily harm in attempting to secure the release of a hostage.²⁰³ An application for a commutation must be accompanied by a supervising authority certifying the validity of the claim of “unusual meritorious service.”²⁰⁴ Incarcerated individuals are also ineligible for a pardon.²⁰⁵ Thankfully, at least in 2016, only one person was serving LWOP in New Mexico.²⁰⁶ On the whole, the above-mentioned states are thus out of line with human rights standards, because they offer no “prospect of release” based on rehabilitation grounds alone.

3. *States with Opaque and Irregular Clemency Processes (Criteria and Conditions for Release)*

In some states, the clemency process is so opaque that it is difficult, if not impossible, for those seeking clemency to know what they must do to secure release. As set out above, this, too, is a violation of human rights standards. For instance, while those serving LWOP sentences in Maryland are technically eligible to apply for a commutation, the process for applying is completely opaque and utterly confusing.²⁰⁷ Additionally, a pardon is out

²⁰⁰ LA. PARDON BD., COMMUTATION INFORMATION AND INSTRUCTIONS, https://s32082.pcdn.co/wp-content/uploads/2019/08/application.for_.commutation.of_.sentence.pdf [https://perma.cc/WCA4-LD5J].

²⁰¹ See Lea Skene & Sam Karlin, *Will Gov. John Bel Edwards Ramp Up Use of Clemency Power as Part of Criminal Justice Reform Efforts?*, *ADVOCATE* (Feb. 1, 2020, 3:45 PM), https://www.theadvocate.com/baton_rouge/news/article_9769c546-4440-11ea-a045-87b5ee818f05.html [https://perma.cc/L6L4-5C2X].

²⁰² STATE OF N.M., EXECUTIVE CLEMENCY GUIDELINES, https://www.governor.state.nm.us/wp-content/uploads/2019/05/Executive-Clemency-Guidelines_Final.pdf [https://perma.cc/HPY4-QFF7].

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ NELLIS, *supra* note 114, at 10.

²⁰⁷ See *State Clemency – Maryland*, CRIM. JUST. POL’Y FOUND., <https://www.cjpf.org/clemency-md> [https://perma.cc/LX93-L8A5] (“The Maryland Secretary of State webpage does very little to explain the pardon/commutation application process, and confusingly suggests that the process starts at that office.”)

of the question, because all people who are currently incarcerated are ineligible.²⁰⁸

In Florida, clemency is considered to be “an act of mercy.”²⁰⁹ In other words, clemency is not something that an individual can work toward throughout her sentence. Rather, it depends on the subjective compassion of the executive branch. This understanding of clemency is reflected in the rules, which are opaque, unpredictable, and uncertain. First, according to the rules governing the process, “[t]he Governor has the unfettered discretion to deny clemency at any time, for any reason.”²¹⁰ However, those serving all life sentences are categorically ineligible for a pardon.²¹¹ This leaves commutation as the only path to release for those sentenced to life imprisonment.²¹² It is also unclear how many people are granted commutations because these statistics are not publicly available.²¹³ Further contributing to this opacity, all records and documents gathered during the clemency process are considered confidential and not available to “any person except members of the Clemency Board and their staff.”²¹⁴ Consequently, when an individual is denied clemency, they have no right to know why. Essentially all of the safeguards ensuring transparency and predictability that the ECtHR deemed essential when reviewing Bulgaria’s clemency process in *Harakchiev* are absent in Florida.²¹⁵

In contravention of the human rights standard laid out in *Vinter* requiring that there be preestablished criteria for release and review processes for life sentences known at the time of sentencing, there is no formal application or guidelines governing the clemency process in Mississippi.²¹⁶ There is also no constitutional requirement that a governor

²⁰⁸ *Maryland Parole Commission FAQs Index*, DEP’T OF PUB. SAFETY & CORR. SERVS., <https://www.dpscs.state.md.us/about/FAQmpc.shtml> [<https://perma.cc/3GP8-RWWD>] (“No petition for pardon shall be considered while the petitioner is incarcerated.”)

²⁰⁹ FLA. COMM’N ON OFFENDER REV., RULES OF EXECUTIVE CLEMENCY 3, https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf [<https://perma.cc/8E2F-2H3T>].

²¹⁰ *Id.*

²¹¹ The clemency rules require completion of a sentence in order to apply for a pardon, which categorically excludes those sentenced to life imprisonment. *Id.* at 6.

²¹² FLA. COMM’N ON OFFENDER REV., *supra* note 209, at 4–6.

²¹³ The number of commutations granted in Florida is not available in any publicly available report. For all publicly available reports, see *Reports/Publications*, FLA. COMM’N ON OFFENDER REV., <https://www.fcor.state.fl.us/reports.shtml> [<https://perma.cc/PJ6W-WPNS>].

²¹⁴ FLA. COMM’N ON OFFENDER REV., *supra* note 209, at 18.

²¹⁵ See *Harakchiev v. Bulgaria*, 2014-III Eur. Ct. H.R. 391, 443.

²¹⁶ AM. BAR ASS’N, CAPITAL CLEMENCY PROJECT, MISSISSIPPI CAPITAL CLEMENCY INFORMATION MEMORANDUM 3–4 (2017), <https://www.capitalclemency.org/resource/mississippi-capital-clemency-memo/> [<https://perma.cc/3U3F-G5S6>].

respond to a clemency petition.²¹⁷ Moreover, Phillip Bryant, the Mississippi governor from 2012 to 2020, said that he would only grant commutation in the case of wrongful conviction, thereby cementing that release on the basis of rehabilitation would not be possible during his tenure.²¹⁸

The clemency process in North Carolina is also shrouded in secrecy. The process for applying and criteria for obtaining a commutation or pardon are completely opaque, with the government's website dedicated to clemency devoid of any helpful guidance about the process.²¹⁹ The only direction is provided by statute, which stipulates as follows:

Every application for pardon must be made to the Governor in writing, signed by the party convicted, or by some person in his behalf. And every such application shall contain the grounds and reasons upon which the executive pardon is asked, and shall be in every case accompanied by a certified copy of the indictment, and the verdict and judgment of the court thereon.²²⁰

In addition, the governor is under no obligation to make any information concerning a denial of clemency public.²²¹ It is thus completely unclear what grounds allow for release of someone serving a LWOP sentence in North Carolina. This, too, is out of line with past ECtHR jurisprudence, which concluded that a clemency process was deficient when the executive failed to give reasons for its decisions.²²²

The publicly available information about how to obtain either a pardon or a commutation in Nebraska is scant and the criteria are unclear as well.²²³ Additionally, clemency review has come to a near standstill since 2018.²²⁴ The backlog of clemency petitions became so egregious that a bill was

²¹⁷ *Id.* at 4.

²¹⁸ Huma Khan, *Pardon No More? Mississippi's New Governor Eyes Tougher Rules for Clemency*, ABC NEWS (Jan. 16, 2012), <https://abcnews.go.com/blogs/politics/2012/01/pardon-no-more-mississippi-new-governor-eyes-tougher-rules-for-clemency> [<https://perma.cc/RV4T-KZ79>].

²¹⁹ See *Governor's Clemency Office*, N.C. DEP'T OF PUB. SAFETY, <https://www.ncdps.gov/adult-corrections/governors-clemency-office> [<https://perma.cc/3YMW-G5QV>].

²²⁰ N.C. GEN. STAT. ANN. § 147-21 (2021).

²²¹ AM. BAR ASS'N, CAPITAL CLEMENCY PROJECT, NORTH CAROLINA CAPITAL CLEMENCY INFORMATION MEMORANDUM 5 (2017), https://www.capitalclemency.org/file/nc_clemency_memo-02_2017.pdf [<https://perma.cc/KSQ4-SD7P>].

²²² See *Hutchinson v. United Kingdom*, App. No. 57592/08, ¶ 59 (Jan. 17, 2017), <http://hudoc.echr.coe.int/eng?i=001-170347> [<https://perma.cc/TZ2Z-PX4U>].

²²³ See *Commutation of Sentence*, STATE OF NE. BD. OF PARDONS, <https://pardons.nebraska.gov/commutation-sentence> [<https://perma.cc/3MCT-6NSC>].

²²⁴ See RESTORATION OF RTS. PROJECT, *supra* note 128 (“Board processes appear to have come to a virtual standstill in 2018 after the retirement of a long-time staffer, but regular hearings may resume in 2020.”).

recently introduced that would force the Board of Pardons in Nebraska to review clemency applications every ninety days.²²⁵

4. *States with No Prospect of Release de Facto (Prospect of Release)*

In some states, clemency is so rarely granted that it is almost nonexistent, rendering such schemes problematic under human rights law because LWOP sentences are de facto irreducible.²²⁶ Being granted clemency in Arizona has been characterized as rarer than being struck by lightning, with commutation in particular being described as “all but dead.”²²⁷ Statistics support that characterization. From 2015 to 2018, the Governor of Arizona only granted one pardon and five commutations, all but one of which were for people facing imminent death who were released on compassionate grounds.²²⁸ Additionally, by law, those “sentenced to natural life” in Arizona will never be eligible for commutation, parole, work furlough, work release, or release from confinement on any basis.²²⁹ This means that obtaining a pardon, statistically an exceedingly rare prospect, is the only possible avenue for those sentenced to natural life.²³⁰

In Connecticut, commutations of life sentences were once routine.²³¹ However, in 2007, the Attorney General of Connecticut issued an opinion that reversed that trend.²³² In response to a request from the state’s Board of Pardons for clarity about its authority to commute non-parole eligible offenses, the Attorney General concluded that “[the] power to commute a parole ineligible sentence and transform it to a parole eligible sentence is

²²⁵ JoAnne Young, *Bill Would Force Nebraska Pardons Board to Meet and Consider Applications*, LINCOLN J. STAR (Jan. 24, 2020), https://journalstar.com/legislature/bill-would-force-nebraska-pardons-board-to-meet-and-consider-applications/article_a094f8d0-fd6e-5e94-9861-a9d5157d91f7.html [<https://perma.cc/CJ3T-X6FM>]; Paul Hammel, *Nebraska Pardons Board Met Only Twice Last Year, Denying People ‘A Fresh Start,’ Senators Told*, OMAHA WORLD HERALD (Jan 27, 2020), https://omaha.com/state-and-regional/nebraska-pardons-board-met-only-twice-last-year-denying-people-a-fresh-start-senators-told/article_1c1e0fbc-fc5a-579a-81d0-af4a65f7bb02.html [<https://perma.cc/K675-KD55>].

²²⁶ See *Murray v. Netherlands*, App. No. 10511/10, ¶ 100 (Apr. 26, 2016), <http://hudoc.echr.coe.int/fre?i=001-138893> [<https://perma.cc/VGB6-EBVD>] (“Finally, in assessing whether the life sentence is reducible *de facto* it may be of relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon.”).

²²⁷ Leingang, *supra* note 179.

²²⁸ *Id.*

²²⁹ Arizona law distinguishes between those subject to “natural life” and those to “life” who may at some point be eligible for release. ARIZ. REV. STAT. ANN. § 13-751 (2021) (“A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis.”).

²³⁰ See *id.*; *id.* § 31-443.

²³¹ NYU CTR. ON ADMIN. OF CRIM. L., STATE CLEMENCY PROJECT, SEARCHING FOR CLEMENCY IN THE CONSTITUTION STATE 5 (2020), https://www.law.nyu.edu/sites/default/files/CT_4_15_A%20CAACL%20Clemency_Final%20.pdf [<https://perma.cc/8EYM-NGAY>].

²³² *Id.* at 5 n.42.

barred by the express language of Conn. Gen. Stat. § 54-125a(b)(1).”²³³ Essentially, commutations of LWOP sentences are unlawful according to this opinion. While not binding, the opinion is considered “highly persuasive” and it is unclear if any LWOP sentences have been commuted since 2007.²³⁴

Pardons are not available to those serving life sentences in Hawaii, leaving commutation as the only route to release.²³⁵ On a positive note, when an LWOP sentence is imposed, as a matter of course, the court directs the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute that sentence to life imprisonment with parole at the end of twenty years of imprisonment, which is in line with the human rights standard on the timeframe for review.²³⁶ However, in FY 2019, the first year that the statistics on commutations were reported in Hawaii, not a single commutation was granted.²³⁷ The following year, however, five commutations were granted.²³⁸ It is unclear how many of those were commutations of LWOP sentences.

In Illinois, the governor only approved two commutations in 2017, three in 2016, zero in 2015, and two in 2014.²³⁹ Moreover, the state’s statistical reports on clemency do not specify whether any of these were commutations of LWOP sentences.²⁴⁰ In Massachusetts, only one commutation has been

²³³ *Id.* at 5 (quoting Office of the Attorney General State of Connecticut, Opinion No. 2007-18, 2007 WL 2800958 (Conn. A.G. Sept. 20, 2007)).

²³⁴ *Id.* at 5 & n.42.

²³⁵ See STATE OF HAW. EXEC. CHAMBERS, PARDON APPLICATION 1 (2018), <https://dps.hawaii.gov/wp-content/uploads/2018/04/Pardon-Application-.pdf> [<https://perma.cc/7QF2-67Y2>].

²³⁶ HAW. REV. STAT. ANN. § 706-656 (2021).

²³⁷ HAW. PAROLING AUTH., 2019 ANNUAL STATISTICAL REPORT, FY 2019, JULY 1, 2018 TO JUNE 30, 2019, <https://dps.hawaii.gov/wp-content/uploads/2019/12/2019-Annual-Report.pdf> [<https://perma.cc/9Q5X-CVFJ>].

²³⁸ HAW. PAROLING AUTHORITY, 2020 ANNUAL STATISTICAL REPORT, FY 2019, JULY 1, 2018 TO JUNE 30, 2020, <https://dps.hawaii.gov/hpa/files/2020/10/2020-Annual-Report.pdf> [<https://perma.cc/WR5Z-SBQZ>].

²³⁹ See STATE OF ILL., PRISONER REV. BD., 41ST ANNUAL REPORT, JANUARY 1 TO DECEMBER 31, 2017, at 13, <https://www2.illinois.gov/sites/prb/Documents/prb16anlrpt.pdf> [<https://perma.cc/9CA4-LAFF>]; STATE OF ILL., PRISONER REV. BD., 40TH ANNUAL REPORT, JANUARY 1 TO DECEMBER 31, 2016, at 16, <https://www2.illinois.gov/sites/prb/Documents/prb16anlrpt.pdf> [<https://perma.cc/S5BN-KDTQ>]; STATE OF ILL., PRISONER REV. BD., 39TH ANNUAL REPORT, JANUARY 1 TO DECEMBER 31, 2015, at 15, <https://www2.illinois.gov/sites/prb/Documents/prb15anlrpt.pdf> [<https://perma.cc/YKK7-GDNC>]; STATE OF ILL., PRISONER REV. BD., 38TH ANNUAL REPORT, JANUARY 1 TO DECEMBER 31, 2014, at 15, <https://www2.illinois.gov/sites/prb/Documents/FY14%20Annual%20Report.pdf> [<https://perma.cc/537H-9ZX7>].

²⁴⁰ The reports only list the number of commutations per year, but does not specify the length of the sentences that were commuted. *Id.*

granted since 2000.²⁴¹ More difficult still, as a matter of policy, commutations and pardons of those who are currently incarcerated are rarely granted.²⁴² Likewise, the Minnesota Board of Pardons has only granted four pardons or commutations of active sentences since at least 1992, the first year that the state's clemency statistics were publicly available.²⁴³

This trend of scant clemency grants repeats in state after state across the United States. In Montana, from 2012 to 2017, the only years for which statistics are available, not a single commutation was granted, and those currently incarcerated are ineligible for a pardon.²⁴⁴ In New Hampshire, only three pardons and two sentence commutations have been granted since 1996.²⁴⁵ Also, there are no standards of review.²⁴⁶ Rhode Island has not granted a pardon, the only form of clemency in the state, to a living person in over a decade.²⁴⁷ There are also no eligibility requirements, and the process can change at the whim of the governor.²⁴⁸

²⁴¹ NYU CTR. ON ADMIN. OF CRIM. L., STATE CLEMENCY PROJECT, WILLIE HORTON'S SHADOW: CLEMENCY IN MASSACHUSETTS 3 (2019), https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA_Accessible.pdf [<https://perma.cc/RQ26-QN84>].

²⁴² *Id.* at 2–3; GOVERNOR CHARLES D. BAKER, EXECUTIVE CLEMENCY GUIDELINES 2 (Feb. 2, 2020), <https://www.mass.gov/doc/executive-clemency-guidelines-2212020/download> [<https://perma.cc/L5RL-NTMM>].

²⁴³ See LEGISLATIVE REPORTS BY THE MINNESOTA BOARD OF PARDONS FROM 1992 to 2018, <https://mn.gov/doc/about/pardon-board/annual-reports/>.

²⁴⁴ See STATE OF MONT. BD. OF PARDONS & PAROLE, STATISTICAL DATA FISCAL YEAR 2017, https://bopp.mt.gov/_docs/StatisticalData/2017FiscalYear.pdf [<https://perma.cc/QY45-68CP>]; STATE OF MONT. BD. OF PARDONS & PAROLE, STATISTICAL DATA FISCAL YEAR 2016, https://bopp.mt.gov/_docs/StatisticalData/2016FiscalYear.pdf [<https://perma.cc/6FB2-G53U>]; STATE OF MONT. BD. OF PARDONS & PAROLE, STATISTICAL DATA FISCAL YEAR 2015, https://bopp.mt.gov/_docs/StatisticalData/2015FiscalYear.pdf; [<https://perma.cc/XS95-598P>]; STATE OF MONT. BD. OF PARDONS & PAROLE, STATISTICAL DATA FISCAL YEAR 2014, https://bopp.mt.gov/_docs/StatisticalData/2014FiscalYear.pdf [<https://perma.cc/C6N6-ERX6>]; STATE OF MONT. BD. OF PARDONS & PAROLE, STATISTICAL DATA FISCAL YEAR 2013, https://bopp.mt.gov/_docs/StatisticalData/2013FiscalYear.pdf [<https://perma.cc/M356-5HUA>]; STATE OF MONT. BD. OF PARDONS & PAROLE, STATISTICAL DATA FISCAL YEAR 2012, https://bopp.mt.gov/_docs/StatisticalData/2012FiscalYear.pdf [<https://perma.cc/D9BA-P2QK>].

²⁴⁵ N.H. Restoration of Rights & Record Relief, RESTORATION OF RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/new-hampshire-restoration-of-rights-pardon-expungement-sealing/#II_Pardon_policy_practice [<https://perma.cc/82D2-XS2G>].

²⁴⁶ *Id.*

²⁴⁷ Rhode Island Restoration of Rights, Pardon, Expungement & Sealing, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/rhode-island-restoration-of-rights-pardon-expungement-sealing/> [<https://perma.cc/PX7Y-Y7W5>].

²⁴⁸ RESTORATION OF RTS. PROJECT, *supra* note 247; 13 R.I. GEN. LAWS § 13-10-1 (2019) (stating that “any rules and regulations respecting [pardon application] filing and hearing that [the governor] may from time to time prescribe”).

5. *States Where the Clemency Is Highly Unpredictable and Political (Criteria and Conditions for Release)*

In some states, whether you are granted clemency, especially for those serving life sentences, is extremely dependent on who is in power, thereby rendering the process very unpredictable and variable. Alarming, this is the case in a number of states with a particularly high number of people serving LWOP sentences. One example of a state where clemency is very politicized is Pennsylvania, a state where approximately 5,230 people are serving LWOP sentences, making it the state with the second largest population of people serving LWOP sentences.²⁴⁹ As the Pennsylvania Board of Pardons's website clarifies, those individuals "serving life sentences must apply for commutation of their life sentence as their only means of release since there is no such thing as parole for lifers in Pennsylvania."²⁵⁰ In Pennsylvania, over a period of nearly twenty years (1995 to 2014), there were only six commutations of life sentences.²⁵¹ This is in part due to a state constitutional amendment in 1997 that required a unanimous vote from the Board of Pardons for any commutation of a life sentence.²⁵² In addition, the clemency process is extremely political, since two of the five members the Board of Pardons are elected officials (the Attorney General and the Lieutenant Governor), and the Governor must approve every commutation.²⁵³ Moreover, Republican governors in Pennsylvania are significantly less likely to grant a commutation of a life sentence than Democrats. Since 1995, only one commutation of a life sentence was granted by a Republican governor (despite there being three of them during this period).²⁵⁴ By comparison, the two Democratic governors granted twenty-seven commutations of life sentences, with twenty-two being granted under Governor Tom Wolf.²⁵⁵

²⁴⁹ See PA. DEP'T OF CORR., INMATE STATISTICS (Dec. 19, 2019), <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Budget%20Documents/2019%20Inmate%20Profile.pdf> [<https://perma.cc/LW9D-7E27>]; PA. DEP'T OF CORR., ANNUAL STATISTICAL SUPPORT 2018, <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2018%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/3TWY-M38L>].

²⁵⁰ *Clemency Applications*, PA. BD. OF PARDONS, <https://www.bop.pa.gov/application-process/Pages/clemency.aspx> [<https://perma.cc/X454-ZHEN>].

²⁵¹ *Commutation of Life Sentences (1971 - Present)*, PA. BD. OF PARDONS, <https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx> [<https://perma.cc/ENK7-7JYJ>].

²⁵² NYU CTR. ON ADMIN. OF CRIM. L., STATE CLEMENCY PROJECT, THE DEMISE OF CLEMENCY FOR LIFERS IN PENNSYLVANIA 9 (2020), https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20.pdf [<https://perma.cc/L7ZW-2752>].

²⁵³ *Id.* at 1 ("Among the five-member Board are the publically-elected [sic] Attorney General and the Lieutenant Governor, whose presence undermines the political insulation normally associated with pardon boards.").

²⁵⁴ PA. BD. OF PARDONS, *supra* note 251; *Former Pennsylvania Governors*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/former-governors/pennsylvania/> [<https://perma.cc/7D6C-X9U2>].

²⁵⁵ *Id.*

Likewise, in Georgia, where 1,655 people are currently serving LWOP sentences, the efficacy of the clemency process seems to turn on who controls the governor's office.²⁵⁶ In Georgia, commutation is the only path to release for those individuals.²⁵⁷ Under Governor John Nathan Deal, in FY 2017, 1,215 commutations were granted.²⁵⁸ In stark contrast, in FY 2019, under Governor Brian Kemp, not a single commutation was approved.²⁵⁹

6. *States Without a Preestablished Timeframe for Review
(Timeframe for Review)*

On a positive note, in accordance with human rights standards, most states allow for a clemency review sooner than twenty-five years after sentencing for those who are eligible for clemency.²⁶⁰ Missouri is an outlier in this respect. An individual currently incarcerated in Missouri can only apply for clemency if she has served more than twenty-five years, has an actual innocence claim, or is over seventy years old and has served at least twelve years.²⁶¹ There is also no guarantee of how long the clemency review will take or when it will commence after someone has applied.²⁶² Consequently, as of December 2019, there was a backlog of 3,500 clemency cases.²⁶³ Thus, many seeking clemency will not start the process until well after twenty-five years from their date of sentencing. In addition, in some states with life sentences with parole, parole review is only available after twenty-five years. For example, in Tennessee, those serving life sentences can only be eligible for parole after fifty-one years.²⁶⁴

²⁵⁶ DATA MGMT. SECTION, GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE, ACTIVE LIFE WITHOUT PAROLE 4 (2020), http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_life_wo_parole_2020_07.pdf [<https://perma.cc/S68T-YD69>].

²⁵⁷ See GA. COMP. R. & REGS. 475-3-.10 (2015).

²⁵⁸ STATE BD. OF PARDONS & PAROLES, INFORMED, DATA DRIVEN PAROLE DECISIONS, ANNUAL REPORT FISCAL YEAR 2017, at 22, <https://pap.georgia.gov/publications/annual-reports> [<https://perma.cc/59XL-TJFN>].

²⁵⁹ STATE BD. OF PARDONS & PAROLES, PARTNERS IN PUBLIC SAFETY, ANNUAL REPORT FY 2019, at 25, <https://pap.georgia.gov/publications/annual-reports> [<https://perma.cc/8F82-85TL>].

²⁶⁰ A chart with a state-by-state analysis of clemency on file with author Rachel López.

²⁶¹ STATE OF MO. DEP'T OF CORR., APPLICATION FOR EXECUTIVE CLEMENCY, CONFINED APPLICANT (2020), <https://doc.mo.gov/media/pdf/application-executive-clemency-confined-applicant> [<https://perma.cc/E33J-2A4D>].

²⁶² See MO. DEP'T OF CORR., EXECUTIVE CLEMENCY, <https://doc.mo.gov/divisions/probation-parole/executive-clemency> [<https://perma.cc/699C-JBKJ>] ("There is no set time frame for completion of the clemency process and Governor decision.").

²⁶³ Editorial, *Gov. Mike Parson Is Sitting on a Backlog of 3,500 Clemency Cases. Why Won't He Act?*, KAN. CITY STAR, (Dec. 26, 2019, 11:27 AM), <https://www.kansascity.com/opinion/editorials/article238720168.html> [<https://perma.cc/A3XY-F289>].

²⁶⁴ Lichtenberg, *supra* note 13, at 42; see also Rahim Buford et al., Opinion, *Meaningful Life-Sentence Reform, Especially for Young Offenders, Needed*, TENNESSEAN (Mar. 30, 2020),

IV. HUMAN DIGNITY IN THE EIGHTH AMENDMENT

Although the United States' unwavering retributivist approach to life sentences is out of line with human rights standards and—as we will describe below—much of the rest of the world, our Eighth Amendment jurisprudence offers an escape from unending damnation for over 160,000 among us sentenced to die in prison.²⁶⁵ Human dignity, a concept embedded in the scrutiny that the Eighth Amendment requires, unifies us with the global community, both figuratively and doctrinally.²⁶⁶ Vitaly, Eighth Amendment jurisprudence is dynamic and globally oriented in ways that other areas of the law are not. Whether punishment offends human dignity is evaluated in line with the evolving standards of decency, and is, in part, understood by reference to the benchmarks set by the rest of the world. Herein lies the path to redeeming justice in the United States.

A. *Human Dignity as Fundamental to the Eighth Amendment*

Affirming that all people have the capacity for redemption is possible under the Eighth Amendment. As other legal scholars have recounted, there is a latent feature of the Eighth Amendment that could restore hope in the law: human dignity.²⁶⁷ Since human dignity is the foundation of the right to redemption in other jurisdictions, it opens the door to a redemptive reading of the Eighth Amendment.

Over the last four decades, dignity has featured prominently in the case law concerning cruel and unusual punishment, without much specificity about what it meant. A plurality of the U.S. Supreme Court first proclaimed in *Trop v. Dulles* that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”²⁶⁸ In *Estelle v. Gamble*, the Eighth Amendment was said to embody the “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”²⁶⁹ *Roper v. Simmons* affirmed that “[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the

<https://eu.tennessean.com/story/opinion/2020/03/30/meaningful-life-sentence-reform-especially-young-offenders-needed/2929179001/> [<https://perma.cc/D6C2-KC3U>] (“One of our most drastic sentencing changes came in 1995, when Tennessee doubled its life sentence, from a baseline of 25 years -- the current national average -- to a draconian 51 years. With this extreme increase, a ‘life’ sentence in Tennessee essentially came to mean the same thing as life without parole. It meant death in prison and no second chances for anyone convicted of first-degree murder.”).

²⁶⁵ NELLIS, *supra* note 113.

²⁶⁶ Ryan, *supra* note 24 (“The Court has said that dignity is the touchstone of the [Eighth] Amendment’s prohibition . . .”).

²⁶⁷ *Id.*

²⁶⁸ 356 U.S. 86, 100 (1958) (plurality opinion).

²⁶⁹ 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

dignity of all persons.”²⁷⁰ In so holding, the Court aimed “to protect the dignity of society itself from the barbarity of exacting mindless vengeance.”²⁷¹

In these cases, the Court portrays dignity as the central concept that underlies all Eighth Amendment inquiries, rather than as a set of legal requirements to satisfy. Taking the Supreme Court at its word, dignity could be used as an interpretive principle from which we could derive a set of corresponding duties or protections, thereby helping courts to adjudicate Eighth Amendment claims.²⁷² This might be counterintuitive, since the U.S. Constitution does not explicitly reference dignity amongst its provisions. However, dignity remains a core principle of the U.S. Constitution, with the U.S. Supreme Court reading dignity into the Constitution nearly a thousand times.²⁷³ As Justice William Brennan Jr. underscored, “the constitutional ideal of human dignity” is the foundation of U.S. law.²⁷⁴

Despite dignity’s omnipresence in Eighth Amendment jurisprudence, its content remains murky, confounding legal scholars and practitioners alike. So much so that scholars have come to widely divergent understandings of what dignity in the Eighth Amendment context provides, with some taking a very communitarian view of it and others a much more individualistic one.²⁷⁵ For instance, legal scholar Leslie Meltzer Henry characterized the strand of dignity in Eighth Amendment jurisprudence as an effort to protect the “collective virtue” of the human species.²⁷⁶ In Meltzer Henry’s reading of this line of cases, inhumane punishment is prohibited because it would degrade “the totality of human life.”²⁷⁷ On the other end of the spectrum, after a more holistic review of Eighth Amendment jurisprudence, including cases that do not explicitly reference dignity, legal scholar Meghan Ryan linked dignity to the individualism of the offender.²⁷⁸ Ryan ties individualism to two facets of the Eighth Amendment analysis—

²⁷⁰ 543 U.S. 551, 560 (2005).

²⁷¹ *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

²⁷² Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 681 (2008).

²⁷³ Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172–73, 178 (2011); see also *Chisholm v. Georgia*, 2 U.S. 419, 455 (1793) (“A State; useful and valuable as the contrivance is, is the *inferior* contrivance of *man*; and from his *native* dignity derives all its *acquired* importance.”).

²⁷⁴ Henry, *supra* note 273, at 171.

²⁷⁵ McCrudden, *supra* note 272, at 699 (concluding that “the predominant approach to dignity in the US Supreme Court . . . is more individualistic”); Ryan, *supra* note 24, at 2132 (finding “that Eighth Amendment dignity means the individuality of an offender must be respected”); Henry, *supra* note 273, at 220–29.

²⁷⁶ Henry, *supra* note 273, at 220–29.

²⁷⁷ *Id.* at 221.

²⁷⁸ Ryan, *supra* note 24, at 2132.

the humanness facet and the proportionality facet.²⁷⁹ The humanness facet prohibits punishments that are so extreme and horrendous that no human being, regardless of their crime, should be subjected to them.²⁸⁰ The proportionality facet, on the other hand, mandates that the offender should not receive greater punishment than he deserves.²⁸¹ In other words, the punishment must be proportionate to the crime.

These studies share an inductive approach to dignity, relying on the judicial discourse in Eighth Amendment jurisprudence to discern dignity's content. There are several limitations to exclusively employing this approach to understanding dignity's role in the Eighth Amendment. First, as openly acknowledged by several legal scholars, Eighth Amendment jurisprudence is "a mess."²⁸² Compounding that uncertainty is the lack of clarity generally about the meaning of human dignity and its implications for U.S. constitutional law.²⁸³ Moreover, from the case law alone, it is difficult to draw out how dignity relates to the standards developed by the Court, hence the wildly divergent characterization of the norm by legal scholars who have looked closely at this jurisprudence. Quite plainly, the existing case law does little to suggest how dignity is connected to the Eighth Amendment common law standards, stagnating further development of this jurisprudence.

Paradoxically, the case law seems to call for further expansion.²⁸⁴ Indeed, the U.S. Supreme Court has specified that both facets of human dignity described by Ryan are just the minimum of what dignity requires. For example, *Gregg*, a case Ryan uses as an illustration of the proportionality facet,²⁸⁵ specifies that for a punishment to accord with human dignity, it

²⁷⁹ *Id.* at 2132, 2144 ("One facet of this concentration on the individual is that the offender should not receive greater punishment than he deserves. Punishment for some other reason—such as to further society in some way—loses sight of the individual. The other facet of the focus on the individual is emphasizing the fact that the individual is a *human being*. There are some punishments that are so inhumane, so uncivilized, that no one should be punished in that manner—not even humans who have committed the vilest of offenses.").

²⁸⁰ *Id.* at 2132–33, 2146.

²⁸¹ *Id.* at 2144.

²⁸² *Id.* at 2131; see also Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 773 (2005) ("[T]he Court's analysis of human dignity in most death penalty cases is weak and meaningless."); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 681 (2005) (citation omitted) (describing the Eighth Amendment proportionality test as "messy and complex, yet largely meaningless as a constraint").

²⁸³ As underscored by legal scholar Darren Hutchinson, dignity's ambiguity and indeterminacy has also enabled conservative justices to use it to promote conservative perspectives on race and racism, like colorblind constitutionalism. Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 26, 29–30, 61 (2017).

²⁸⁴ Goodman, *supra* note 282, at 778 ("The Eighth Amendment jurisprudence demonstrates the need for the Court to develop a test or standard for consistent decision-making with regard to human dignity.").

²⁸⁵ Ryan, *supra* note 24, at 2147–48.

“means, *at least*, that the punishment not be ‘excessive.’”²⁸⁶ To that end, at a bare minimum, a punishment must be proportionate to the offense, but dignity also demands more. Likewise, in *Ford*, a case linked to the humanness facet,²⁸⁷ the Court concluded that “the Eighth Amendment’s proscriptions are *not limited* to those practices condemned by the common law in 1789.”²⁸⁸ In other words, these prohibitions are the floor, not the ceiling, of what dignity requires. Thus, looking at the existing case law alone does not illuminate the full scope of the norm and what it was meant to protect. The U.S. Supreme Court has explicitly said as much: “To enforce the Constitution’s protection of human dignity,” the Court must “look[] to the evolving standards of decency that mark the progress of a maturing society,”²⁸⁹ thereby recognizing that “[t]he Eighth Amendment is not fastened to the obsolete.”²⁹⁰ Inherently, understanding dignity requires a more profound inquisition.

B. *Reading Human Rights into the Evolving Standards of Decency*

Specifically, evaluating whether punishment is indecent²⁹¹ in the current age necessitates assessing “contemporary values concerning the infliction of a challenged sanction.”²⁹² Such an assessment requires that courts examine the “objective indicia that reflect the public attitude toward a given sanction” as a means of avoiding the transposition of a judge’s ideology into this analysis.²⁹³ In the past, the U.S. Supreme Court has often looked to the laws and practices of international and foreign jurisdictions as persuasive authority when conducting such inquiries.²⁹⁴ As the Court explained in

²⁸⁶ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (emphasis added). The Court mentioned two instances when a punishment is excessive: (1) when it inflicts unnecessary and wanton pain; and (2) when it is out of proportion with the offense. *Id.*

²⁸⁷ *Ryan*, *supra* note 24, at 2150.

²⁸⁸ *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (emphasis added).

²⁸⁹ *Hall v. Florida*, 572 U.S. 701, 708 (2014) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (internal quotation marks omitted)).

²⁹⁰ *Hall*, 572 U.S. at 708 (quotation marks omitted). *But cf.* *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (a recent Eighth Amendment decision in which the Court failed to analyze “the evolving standards of decency” when evaluating the constitutionality of Missouri’s method of lethal injection).

²⁹¹ The Court uses both the terms dignity and decency in its Eighth Amendment case law. However, the court evokes “evolving standards of decency” as a legal standard and “dignity” as an underlying rationale for the Eighth Amendment. *Hall*, 572 U.S. at 708.

²⁹² *Gregg*, 428 U.S. at 173.

²⁹³ *Id.*

²⁹⁴ *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“[A]t least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”); *see also* *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“[W]ithin the world community, the imposition

Graham v. Florida, there is a “longstanding practice in noting the global consensus against the sentencing practice in question.”²⁹⁵ The “laws and practices of other nations and international agreements” are thus instructive when interpreting the Eighth Amendment.²⁹⁶ State courts have followed suit, looking to comparative and international law sources when reviewing challenges to the constitutionality of punishment, either under the Eighth Amendment of the U.S. Constitution or the analogous provision under their state constitutions.²⁹⁷

Courts may thus look to other jurisdictions with more robust accounts of human dignity in their jurisprudence when conducting their Eighth Amendment analysis. And human rights law is a natural source.²⁹⁸ Just as human dignity is the foundational concept in Eighth Amendment jurisprudence, it is also one of the fundamental justifications for human rights law.²⁹⁹ As Eleanor Roosevelt explained, human dignity was included in the Universal Declaration of Human Rights “in order to emphasize that every human being is worthy of respect . . . [and] was meant to explain why human beings have rights to begin with.”³⁰⁰ That is not to say that the theoretical meaning of human dignity is well settled by any means; quite the

of the death penalty for crimes committed by [intellectually disabled] offenders is overwhelmingly disapproved.”); *Trop*, 356 U.S. at 102 (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”). For a comprehensive review of the citations of international and foreign sources in U.S. Supreme Court decisions, see Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 2–3 (2006). The citation of international and comparative sources in U.S. case law has also not been without its criticism. See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007). Justice Scalia, for example, was a notable critic of the practice. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (“More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”).

²⁹⁵ 560 U.S. 48, 80 (2010).

²⁹⁶ *Id.* at 82.

²⁹⁷ MARTHA F. DAVIS, JOHANNA KALB & RISA E. KAUFMAN, *HUMAN RIGHTS ADVOCACY IN THE UNITED STATES* 278 (2d ed. 2018). For a comprehensive survey of state courts looking to international human rights law to inform their decision-making, see THE OPPORTUNITY AGENDA & PHRGE, *HUMAN RIGHTS IN STATE COURTS* (2014).

²⁹⁸ Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOWARD L.J. 145, 213–14 (1984).

²⁹⁹ David Luban, *Human Rights Pragmatism and Human Dignity: A Jurisprudentially Based Inquiry into Criteria and Content*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 274 (2015). This also corresponds to Jeremy Waldron’s theory of *ius gentium*. See Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 138 (2005) (characterizing *ius gentium* as a site of “the accumulated wisdom of the world on rights and justice”)

³⁰⁰ McCrudden, *supra* note 272, at 677.

contrary.³⁰¹ In the past, however, such agreement was not needed for states to agree on common legal commitments grounded in human dignity.³⁰² Rather, by taking a human rights pragmatist's approach to the Eighth Amendment, we can deduce through an examination of human dignity's robust jurisprudence in other jurisdictions whether there is consensus about its implications.³⁰³ A human rights pragmatist derives the meaning of dignity not from theory, but from its use in practice.³⁰⁴ Using this approach, we cannot glean the meaning of human dignity from what any single judge says. Instead, in order to be incorporated into the public meaning of the phrase, it must be "taken up by the relevant communities of discourse" in the international community.³⁰⁵ One of the advantages of using this approach is that, as McCrudden points out, "different jurisdictions share a sense of what dignity requires, and this enables a dialogue to take place between judges on the interpretation of human rights norms, based on a supposedly shared assumption."³⁰⁶

The human rights pragmatist approach to human dignity is quite instructive for Eighth Amendment analyses in particular. First, the approach accords with the U.S. Supreme Court's evaluation of "evolving standards of decency," which counsels courts to look at global trends as objective indicia of what human dignity requires.³⁰⁷ In line with this jurisprudence, other conceptions of human dignity—and in particular as they relate to cruel and unusual punishment—could very well inform the bounds that this country places on punishment. Second, the concept of human dignity is intrinsically linked to prohibitions on cruel and unusual punishment.³⁰⁸ As legal scholar Jeremy Waldron explains, prohibitions on degrading treatment are closely tied to human dignity in that "they address the most direct and alarming ways in which human dignity might be assaulted—for example, conscious attempts to treat people as having a sub-human status."³⁰⁹ Third, as was

³⁰¹ Luban, *supra* note 299, at 275; see also JEREMY WALDRON & MEIR DAN-COHEN, DIGNITY, RANK, AND RIGHTS 15 (2012) ("There does not seem to be any canonical definition of 'dignity' in the law.").

³⁰² JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 284–302 (1999).

³⁰³ See Luban, *supra* note 299, at 275–76.

³⁰⁴ *Id.* at 275. In general, pragmatism is grounded in the "notion that ideas and concepts, including legal ones, are inherently 'social' and accordingly dependent on the human environment and culture in which they are produced and thrive." ANDREA BIANCHI, INTERNATIONAL LAW THEORIES 92 (2016).

³⁰⁵ Luban, *supra* note 299, at 275.

³⁰⁶ McCrudden, *supra* note 272, at 695.

³⁰⁷ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

³⁰⁸ McCrudden, *supra* note 272, at 685–88.

³⁰⁹ Jeremy Waldron, *Is Dignity the Foundation of Human Rights?*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 117, 119 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015).

discussed in Part II and will be fleshed out further below, the judicial discourse connecting human dignity with cruel and usual punishment is quite robust.³¹⁰ Indeed, human rights and constitutional courts around the world frequently evoke human dignity when determining the meaning and scope of the prohibition on inhuman or degrading treatment.³¹¹ This extensive jurisprudence makes the pragmatist approach particularly pertinent and useful.

C. *The Global Trend Toward the Right to Redemption*

Since the U.S. Supreme Court's interpretations of Eighth Amendment prohibitions are not immutable and must be understood in line with evolving standards of decency—sometimes informed by worldwide trends—looking to the human rights jurisprudence and comparative constitutional law can help us to see more clearly what human dignity requires. Indeed, globally, there is a growing consensus that LWOP sentences that lack any possibility of review and release are cruel and unusual. There is also an increased emphasis on the rehabilitative ideal. These global trends, taken together with the human rights law described in Part II, could inform more robust protections against inhuman and degrading punishment in the United States. Therefore, the jurisprudence described below represents more than just the opinions of far-flung jurisdictions—they are the antecedents for building a justice that affirms humanity and enables redemption in this country.

1. *The Right to Redemption in Europe*

As the ECtHR pointed out in *Vinter*, “a large majority of Contracting States either do not impose life sentences at all or, if they do impose life sentences, provide some dedicated mechanism, integrated within the sentencing legislation, guaranteeing a review of those life sentences after a set period, usually after twenty-five years imprisonment.”³¹² Indeed, only ten European countries permit LWOP sentences.³¹³

In Europe, Germany has been the standard-bearer for the right to redemption.³¹⁴ In 1977, the German Constitutional Court became one of the

³¹⁰ See McCrudden, *supra* note 272, at 695–96.

³¹¹ *Id.* at 686–88.

³¹² The *Vinter* court relied heavily on this trend among Contracting states when concluding that a right to redemption existed in human rights law. *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 348.

³¹³ Berry, *supra* note 36, at 1075 n.206. (“These countries are Bulgaria, Hungary, Lithuania, Malta, the Netherlands, Slovakia, Sweden, Turkey, Ukraine, and the United Kingdom.”)

³¹⁴ Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 96 (2011) (“Probably the most important and influential nation to give a real substance to its dignity jurisprudence is Germany.”); DIRK VAN ZYL SMIT & CATHERINE APPLETON, *LIFE IMPRISONMENT: A GLOBAL HUMAN RIGHTS ANALYSIS* 237 (2019).

first courts in the world to declare life sentences that preclude any possibility of ever regaining freedom as unconstitutional.³¹⁵ The German Constitutional Court found that if there is no hope of release, then a life sentence is at odds with the principle of human dignity enshrined in the German Constitution, which is the highest legal value in its constitutional order.³¹⁶ Harkening back to an earlier decision, the court connected human dignity to the right to the free development of one's personality, concluding that everyone should enjoy a sphere of autonomy in which they can shape their private life by developing and protecting their individuality.³¹⁷ Consequently, in the words of the court, "[i]t would be inconsistent with human dignity . . . if the state were to claim the right to forcefully strip a human of his freedom without [the human] having at least the possibility to ever regain freedom."³¹⁸ Echoing a Kantian understanding of human dignity, the court explained that the "[t]he offender may not be turned into a mere object of [the state's] fight against crime under violation of his constitutionally protected right to social worth and respect."³¹⁹

In arriving at this decision, the court derived the notion of *Behandlungsvollzug*, which is comparable to the principle of rehabilitation, from the principle of human dignity.³²⁰ Since Germany is a "social state," it concluded that the state had a duty to foster rehabilitation and reintegration,

³¹⁵ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 45 BVerfGE 187, June 21, 1977 (Ger.), translation at <http://www.hrcr.org/safrica/dignity/45bverfge187.html> ("The assessment of the constitutionality of lifetime imprisonment especially with references to Article 1.1. of the Basic Law and the principle of the rule of law (*Rechtsstaatsprinzip*) revealed that a humane execution of the lifetime imprisonment can only be assured if the sentenced criminal has a concrete and principally attainable possibility to regain freedom at a later point in time; for the core of human dignity is struck if the convicted criminal has to give up any hope of regaining his freedom no matter how his personality develops.").

³¹⁶ *Id.* Specifically, Article 1, § 1 of the German Constitution called the Basic Law states, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all public authority." Grundgesetz [GG] art. 1, § 1. Likewise, the Italian Constitution also expresses the rehabilitative ideal in criminal punishment to human dignity, stipulating in Article 27 "[p]unishment cannot consist in treatment contrary to human dignity [*senso di umanità*] and must aim at rehabilitating the condemned." AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 53 (Daniel Kayros trans., 2015) (alteration in original).

³¹⁷ Judgment of 21 June 1977, *supra* note 315; see also 35 BVerfGE 202, June 5, 1973 translation at <https://germanlawarchive.iuscomp.org/?p=62> (describing the German Constitution's protection of human dignity "as the nucleus of the system of constitutional concerns"). It bears noting that there is no corresponding right to free development of personality in other countries' constitutions. However, in *Vinter*, the ECtHR found this right to be implicit in human dignity. *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 347.

³¹⁸ Judgment of 21 June 1977, *supra* note 315 (alteration in original).

³¹⁹ *Id.* (second alteration in original).

³²⁰ KARL LAIRD, *ZEDEKIA GAINGOB AND TWO OTHERS V. THE STATE: A REPORT ON LIFE IMPRISONMENT* 51 (2016), <http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/02/Zedekia-Gaingob-v-The-State-A-Report-on-Life-Imprisonment.pdf>. [<https://perma.cc/C6LV-69C9>].

which should be a primary purpose of imprisonment, even for those serving life sentences.³²¹ For that reason, correctional facilities need to do their utmost “to offset damaging consequences caused by the loss of freedom and thereby especially counter all deforming alterations of personality.”³²² As the ECtHR concluded in *Vinter*, the German Constitutional Court concluded that the state’s duty corresponded with certain rights of the individual who is being detained. More precisely, all detained people have a “right to be prepared to reenter the society, even if he will only after a long period of atonement for his crime have the possibility to be obliged to handle a life in freedom.”³²³ It would run counter to human dignity, the court concluded, if a human being never had the possibility or hope of regaining freedom again, no matter the changes he made in his life.³²⁴

In its opinion, the German Constitutional Court went further still, reading *Behandlungsvollzug* together with *Rechtsstaat*, or the principle of legal certainty, to require a clear procedure and conditions for release to be spelled out in national legislation.³²⁵ The court also required that review be made by the judiciary.³²⁶ As a consequence, the prospect of release must be guaranteed through means other than an executive pardon.³²⁷ This opinion by the court shifted the procedure from reliance on executive pardon power to reliance on judicial review of release.³²⁸ In response to this decision, the German legislature added a paragraph to the criminal code, requiring release if: (1) fifteen years of the sentence had been served; (2) the degree of the convicted person’s guilt no longer required continued detention; (3) suspension was justified under the security interests of the general public; and (4) the imprisoned agreed.³²⁹

2. *The Right to Redemption in Latin America*

Europe is not alone. Because so few countries in Latin America employ life sentences, Latin America has been referred to as a “life imprisonment

³²¹ See *id.* at 51–52, 54; Judgment of 21 June 1977, *supra* note 315.

³²² Judgment of 21 June 1977, *supra* note 315.

³²³ *Id.*

³²⁴ *Id.* (“The assessment of the constitutionality of lifetime imprisonment especially with references to Article 1.1. of the Basic Law and the principle of the rule of law (*Rechtsstaatsprinzip*) revealed that a humane execution of the lifetime imprisonment can only be assured if the sentenced criminal has a concrete and principally attainable possibility to regain freedom at a later point in time; for the core of human dignity is struck if the convicted criminal has to give up any hope of regaining his freedom no matter how his personality develops.”)

³²⁵ LAIRD, *supra* note 320, at 51.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at 52.

³²⁹ *Id.*

almost-free zone.”³³⁰ Part of the reason for the region’s aversion to life sentences is that nearly all Latin American countries take a rehabilitative approach to punishment.³³¹ For many years in Latin America, life sentences only existed in six countries: Argentina, Chile, Cuba, Honduras, Mexico (legal only in five of its thirty-two states), and Peru.³³² This year, the region added a seventh country when Colombia made certain crimes against children punishable by life imprisonment.³³³

Even in those Latin American countries that permit life sentences, there generally still exists a possibility of review and release, such that life sentences are not unalterable. In Chile and Honduras, for example, all life sentences have a possibility of parole and are thus reviewable and reducible.³³⁴ Of those seven countries that permit life sentences, only four permit LWOP sentences (Argentina, Cuba, Peru, and four states in Mexico).³³⁵ As in many European countries, life sentences, including LWOP sentences, that forebore the prospect of release have been found to be cruel and unusual.³³⁶ The incompatibility of life imprisonment with human dignity has been at the center of these determinations.³³⁷ In Peru, for instance, the Constitutional Court held that life sentences are only constitutional insofar as they provide a judicial mechanism for review and release; otherwise, they breach the dignity and rehabilitation principles.³³⁸ In short, “the offender must have the possibility of returning to society.”³³⁹ In Argentina, the Supreme Court of Justice ruled in 2006 that life sentences that lack a judicial mechanism for release are unconstitutional because they seriously damage “the intangibility of the human being.”³⁴⁰ In only two countries, Cuba and

³³⁰ Francisco Javier de Leon Villalba, *Imprisonment and Human Rights in Latin America: An Introduction*, 98 PRISON J. 17, 26 (2018).

³³¹ See *id.* at 19; see also Beatriz López Lorca, *Life Imprisonment in Latin America*, in LIFE IMPRISONMENT AND HUMAN RIGHTS 54 (Dirk van Zyl Smit & Catherine Appleton eds., 2016).

³³² Lorca, *supra* note 331, at 43, 50.

³³³ Tatiana Arias & Stefano Pozzebon, *Colombia Changes Constitution amid Allegations of Child Rape by Soldiers*, CNN (July 23, 2020, 7:24 PM), <https://www.cnn.com/2020/07/23/americas/colombia-military-child-sex-abuse-intl/index.html> [<https://perma.cc/B4FA-BFTM>] (noting that in July of 2020, “Colombia [] introduced the possibility of a lifetime jail sentence for the rape or murder of children, following shocking allegations of child sexual assault by members of the military Until now, jailing for life was not a penalty for any crime in Colombia.”).

³³⁴ Villalba, *supra* note 330, at 26; Lorca, *supra* note 331, at 52.

³³⁵ Lorca, *supra* note 331, at 52.

³³⁶ *Id.* at 54–62.

³³⁷ *Id.* at 54.

³³⁸ *Id.* at 61.

³³⁹ *Id.*

³⁴⁰ *Id.* at 56.

Mexico (specifically, only three states in Mexico), is a life sentence without parole the only option for life sentences.³⁴¹

The understanding of resocialization as the aim of punishment derives from the American Convention on Human Rights (ACHR), one of the principal treaties that undergirds the Inter-American system of human rights.³⁴² Article 5.6 of the ACHR provides that “[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”³⁴³ In a case addressing juvenile life without parole (JLWOP), the Inter-American Commission on Human Rights further affirmed that the “fundamental goal [of punishment] is to prepare [individuals] to rejoin society, which means that sentences of incarceration must focus on ensuring that persons sentenced to prison are willing and able to conduct themselves as law-abiding members of society.”³⁴⁴ The Inter-American Court of Human Rights has also weighed in, finding that states have a special responsibility to ensure that people deprived of their liberty have the conditions necessary to live with dignity and can enjoy their other human rights to the fullest extent possible under the circumstances.³⁴⁵

The Resolution on “Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,” which are non-binding but are meant to guide states, also reflect the resocialization ideal of punishment.³⁴⁶ They are based on the concept that “punishments consisting of deprivation of liberty shall have as an essential aim the reform, social readaptation and personal rehabilitation of those convicted; the reintegration

³⁴¹ *Id.* at 52.

³⁴² Villalba, *supra* note 330, at 19–20. For an explanation of why the United States does not abide by the decisions of the Inter-American Commission and Court to the same degree as most Latin American countries, see generally Francisco J. Rivera Juaristi, *U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System*, 20 HUM. RTS BRIEF 19 (2013), <https://www.corteidh.or.cr/tablas/r30736.pdf>. [<https://perma.cc/HLR4-H6FW>].

³⁴³ Pact of San José, Costa Rica, American Convention on Human Rights art. 5.6, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143.

³⁴⁴ *Mendoza v. Argentina*, Case 12.561, Inter-Am. Comm’n H.R., Report No. 172/10, ¶ 140 (2010). For background information about the role of the Inter-American Commission on Human Rights as well as the Inter-American Court of Human Rights, see “Inter-American Human Rights System,” INT’L JUST. RESOURCE CTR., <https://ijrcenter.org/regional/inter-american-system/> [<https://perma.cc/L483-5MWT>].

³⁴⁵ See *Juvenile Reeducation Inst. v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 152–53 (Sept. 2, 2004); *Montero-Aranguren v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 87 (July 5, 2006).

³⁴⁶ Inter-Am. Comm’n H.R., Res. 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (ser. A) No. 26 (Mar. 14, 2008), <http://www.refworld.org/docid/48732afa2.html> [<https://perma.cc/PF5G-G5PT>].

into society and family life; as well as the protection of both the victims and society.”³⁴⁷

Since most Latin American states joined the Inter-American Human Rights System at the same time as they transitioned to democracy, these human rights principles became codified in their newly minted constitutions.³⁴⁸ Consequently, the resocialization principle, essentially another framing of the rehabilitative ideal that undergirds the right to redemption, remains enshrined in many constitutions in Latin America.³⁴⁹ For example, the Brazilian Constitution of 1934 expressly banned life imprisonment, providing “[t]here shall be no penalty of banishment, death, confiscation or of a perpetual character.”³⁵⁰

3. *The Right to Redemption in Africa*

Numerous jurisdictions in Africa have also found life sentences without the possibility of parole to be cruel and unusual. For instance, in *State v. Tcoeib*, the Namibian Supreme Court declared that a sentence should never be imposed if it “effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise.”³⁵¹ The Supreme Court of Namibia thus considered a life sentence without the possibility of release to be unconstitutional but concluded that the release scheme in Namibia was lawful because release was possible for those serving a life sentence.³⁵² For example, the court noted that, under the Prisons Act of 1959, the President had the power to release any person “serving any period of imprisonment” on probation or parole regardless of whether parole was foreseen at the time of sentencing.³⁵³

In Angola, all life sentences are considered unlawful, because the Angolan Constitution explicitly provides that “[n]o sentence or security measure that deprives or restricts freedom shall be perpetual in nature or of an unlimited or undefined duration.”³⁵⁴ In Angola, no one can be incarcerated

³⁴⁷ *Id.* at 1.

³⁴⁸ Villalba, *supra* note 330, at 20–21.

³⁴⁹ *Id.* at 24; Lorca, *supra* note 331, at 54.

³⁵⁰ CONSTITUIÇÃO FEDERAL [C.F.] art. 113(29) (1934) (Braz.).

³⁵¹ *State v. Tcoeib* [2001] AHRLR 158, ¶ 20 (NaSC 1996) (Namib.).

³⁵² *Id.* ¶¶ 20, 22, 23. Specifically, the court analyzed whether LWOP ran afoul of the guarantee against inhuman and degrading treatment in art. 8(2)(b) of the Namibian Constitution.

³⁵³ Prisons Act 8 of 1959 (as amended by Act 13 of 1981), Section 67(1); Republic of Namibia, STAT. ANN. art. 140(5). Prior to the founding of Namibia in 1990, the territory now known as Namibia was under the control of South Africa.

³⁵⁴ Constitution of Angola, art. 66(1), https://www.constituteproject.org/constitution/Angola_2010.pdf [<https://perma.cc/8CDT-KWVE>].

for more than thirty years regardless of age.³⁵⁵ Life imprisonment or imprisonment of unlimited or indefinite duration is also explicitly prohibited by the Constitution of Cape Verde.³⁵⁶ Moreover, in Mozambique, based on Article 61 of the Mozambique Constitution, penalties and security measures that deprive or restrict freedom in perpetuity or for an unlimited or indefinite time are also prohibited.³⁵⁷

In South Africa, although life sentences are constitutional, the South African Constitutional Court has specified that any “attempt to justify any period of penal incarceration, let alone imprisonment for life . . . , without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity.”³⁵⁸ In other decisions, the South African Constitutional Court has connected human dignity to *ubuntu*, a native African concept that also informed the R2R Committee’s conceptualization of the right to redemption.³⁵⁹ The court explains that “[g]enerally, *ubuntu* translates as *humaneness*.”³⁶⁰ The concept is grounded in the collective recognition of group solidarity and the interdependence of the members of a community.³⁶¹ It turns on the co-existence of the rights and duties of the individual alongside the communitarian rights of duties of society.³⁶² The court has concluded that “[t]reatment that is cruel, inhuman or degrading is bereft of *ubuntu*.”³⁶³

D. A Redemptive Reading of the Eighth Amendment

Taken together with the human rights law described in Part II, this comparative constitutional law provides the legal basis for redeeming justice in the United States. Through a human rights pragmatist approach to human dignity, reading the right to redemption into Eighth Amendment evaluations of cruel and usual punishment is quite conceivable. As the legal philosopher David Luban explained, a human rights pragmatist—looking to the case law

³⁵⁵ Angolan Penal Code, art. 43(2), http://www.saflii.org/ao/legis/num_act/ep76.pdf [<https://perma.cc/3WKX-D8TU>].

³⁵⁶ Constitution of Cape Verde, art. 31, https://www.constituteproject.org/constitution/Cape_Verde_1992.pdf [<https://perma.cc/7VP4-L4LS>].

³⁵⁷ Constitution of Mozambique, art. 61(1), https://www.constituteproject.org/constitution/Mozambique_2007.pdf [<https://perma.cc/UJN7-Z4XF>].

³⁵⁸ *Dodo v. State* 2001 (3) SA 382 (CC) ¶ 38 (S. Afr.), <http://www.saflii.org/za/cases/ZACC/2001/16.html> [<https://perma.cc/4KUJ-NHEM>].

³⁵⁹ *State v. Makwanyane* 1995 (6) BCLR 665 (CC) ¶ 225 (S. Afr.), <http://www.saflii.org/za/cases/ZACC/1995/3.pdf> [<https://perma.cc/WM85-EVUP>].

³⁶⁰ *Id.* at ¶ 308.

³⁶¹ *Id.* at ¶¶ 224, 308.

³⁶² *Id.* at ¶ 224.

³⁶³ *Id.* at ¶ 225.

holding that LWOP violates human dignity—would make a material inference from the features that distinguish LWOP from other life sentences, namely the impossibility of review and release, to understand what human dignity requires.³⁶⁴ At a minimum, this approach would lead us to the conclusion that LWOP infringes on human dignity because the sentence “presumes that atonement and development of the [individual]’s personality are impossible.”³⁶⁵ Read in this light, the global “trend towards placing more emphasis on rehabilitation” is quite consequential.³⁶⁶ The fact that the United States is one of the rare countries that employ life without parole—with no escape valve whatsoever—should raise considerable concerns about its habitual use.³⁶⁷ Like most jurisdictions across the globe that consider life sentences with no mechanism for review and release to be cruel and unusual, the state courts and legislatures in the United States should adopt the redemptive principles described above to ensure a possibility of review and prospect of release to forestall DBI.³⁶⁸ In particular in cases involving juveniles, states have broad discretion to adopt review mechanisms that comport with the right to redemption in light of *Jones v. Mississippi*, which specified that the Court’s decision did not “preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder . . . [including] substantive appellate review of life-without-parole sentences.”³⁶⁹

Specifically, a redemptive reading of the Eighth Amendment would incorporate the progression principle described in Part II. Instead of penological justifications being frozen in time, sentences would need to be reviewed regularly to assess the evolving justifications for confinement. In line with the margin of appreciation granted to states under international human rights law, the review could take a number of forms, including parole or clemency. Regardless of the form, any review process must follow the same human rights standards set out in Part III. That is, it must be transparent, follow clearly established criteria, not be arbitrary, and must provide a realistic possibility of release based on rehabilitation.³⁷⁰ In other words, it

³⁶⁴ Luban, *supra* note 299, at 275.

³⁶⁵ *Id.*

³⁶⁶ Harakchiev v. Bulgaria, 2014-III Eur. Ct. H.R. 391, 445.

³⁶⁷ DE LA VEGA ET AL., *supra* note 22, at 25; Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1111–21 (2013).

³⁶⁸ See DE LA VEGA ET AL., *supra* note 22, at 71; ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 486 (2015).

³⁶⁹ 141 S. Ct. 1307, 1323 (2021).

³⁷⁰ As underscored by the U.S. Supreme Court in *Graham v. Florida*, “The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of

cannot be a review in name only; it must be meaningful. This understanding accords with the U.S. Supreme Court's reasoning in *Graham*, which stipulated that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime . . . [but must] give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."³⁷¹ Guaranteeing a human right to redemption extends this opportunity to all people, not just juveniles who have committed non-homicide crimes.

In addition, the review must be regular to ensure that sentences do not become excessive the longer they endure. If penological justifications are lacking, then under the Eighth Amendment, release would be required. At its essence, the progression principle under human rights law mandates that the state revisit life sentences to ensure that the initial reason for punishment still holds and that the sentence should not be altered due to the individual's rehabilitation. When there is no way to reconsider a sentence in light of the changed circumstances of the individual, punishment becomes cruel and unusual.

CONCLUSION

As calls to reimagine the U.S. criminal legal system abound, the concepts and principles discussed in this Article are more timely than ever. Many yearn for a justice that facilitates healing and human development, rather than employing incarceration as the solution to all societal harms. The criminal legal system driven by vengeance, stereotypes, and oversimplification of the human condition will not suffice. Restructuring it will require the adoption of legal principles to guide visions of a more just society and a legal system to match.

The right to redemption outlined here provides one blueprint for escaping our carceral default. Here, we have started with DBI, but that is just the beginning. Redemptive justice stretches much further. Acceptance of the principle that all people have the capacity to evolve and change has far-reaching implications. It will require recognition of redeeming stories, like ours, which too often go untold. It will require a searching justice that restores hope and upholds human dignity. Fundamentally, redemptive justice holds space for complexity, invests in human potential, and replaces shallow vindication with deeply rooted healing.

inquiry and dialogue." 560 U.S. 48, 73 (2010). For this reason, a full definition of what it means to be rehabilitated and how to determine rehabilitation is beyond the scope of this Article.

³⁷¹ *Id.* at 75.