

## *Regarding the Other Death Penalty*

Kempis Songster, Terrell Carter, and Rachel López<sup>1</sup>

### INTRODUCTION

In his compelling new book, *Invisible Atrocities*, Randle DeFalco explores the function of the aesthetics of violence in international law.<sup>2</sup> In particular, he questions international law's preference for sanctioning spectacular demonstrations of violence, rather than more banal, bureaucratic actions that cause massive scales of suffering and misery.<sup>3</sup> The book resonated with us, because we've seen the same dynamic at work in U.S. criminal law with respect to society's views on two forms of the death penalty enacted by the carceral state: capital punishment and life without parole.

Two of us, Kempis Songster and Terrell Carter (affectionately known as Ghani and Rell), intimately understand the invisibility of the harm described by DeFalco. Our sentence—a sentence of life without parole—was sold by the anti-death penalty movement as the more humane alternative to capital punishment.<sup>4</sup> Yet, since our miserable state of existence serving a life without parole tainted a word so full as “life,” we believe that this sentence is more aptly understood as death

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<sup>1</sup> Kempis Songster served thirty years in prison before being 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 and the Philadelphia District Attorney's Office. Terrell Carter is Community Fellow of Law and Learning at Drexel University. After being incarcerated for three decades, he was released in July of 2022 after Tom Wolf, the Governor of Pennsylvania, commuted his life without parole sentence. He is the author of three published novels and a graduate of Villanova University. Rachel López is an Associate Professor of Law at the Thomas R. Kline School of Law at Drexel University. The title of this review is a nod to Susan Sontag's essay, *Regarding the Pain of Others*, which discusses when and why visibilizing atrocity can elicit humane thought and protest.

<sup>2</sup> See generally, RANDLE DEFALCO, *INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE* (2022).

<sup>3</sup> *Id.* at 249.

<sup>4</sup> Peter Hodgkinson, *A Matter of Life and Death: The Effect of Life-without-Parole Statutes on Capital Punishment*, 119 HARVARD L. REV. 1838 (2006) (“Abolitionists have blitzed both legislatures and the media with pleas to adopt life-without-parole statutes in order to reduce executions . . . arguing that “[t]he sentence of life without parole is a stronger, fairer, and more reliable punishment.””).

by incarceration.<sup>5</sup> Taking inspiration from DeFalco’s book, we aim to visibilize the slow, but fatal violence of death by incarceration.

## I. The Invisibility of Death by Incarceration

DeFalco’s book spoke to us because like other visible atrocities he describes, the death penalty is a horrific spectacle of violence.<sup>6</sup> Its harms are obvious to observers, who have a visceral reaction to its execution.<sup>7</sup> By contrast, the effects of death by incarceration are felt over time and remain unseen to outsiders since prisons are often in remote locations and visitation is limited.<sup>8</sup> They are hidden harms.

What is less discussed is the role that the global anti-death penalty and human rights movement played in painting this sentence as a more humane sentence than the death penalty.<sup>9</sup> The abolitionist focus on the barbarity of death penalty rendered the harms of life without parole largely “invisible” as a site of concern for human rights activists. This strategy was “remarkably successful.”<sup>10</sup> So, while the death penalty was abolished or declined in most states, LWOP ballooned to a level unparalleled in human history.<sup>11</sup>

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<sup>5</sup> Terrell Carter, Rachel López, and Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 318 (2021).

<sup>6</sup> AMERICAN CIVIL LIBERTIES UNION, THE CASE AGAINST THE DEATH PENALTY (2012), available at <https://www.aclu.org/other/case-against-death-penalty> (documenting the barbarity of all the forms of executions used to effectuate the death penalty).

<sup>7</sup> Chiara Eisner, *Carrying out executions took a secret toll on workers — then changed their politics*, NPR, Nov. 16, 2022, available at <https://www.npr.org/2022/11/16/1136796857/death-penalty-executions-prison>.

<sup>8</sup> SENTENCING PROJECT, NOTHING BUT TIME: ELDERLY AMERICANS SERVING LIFE WITHOUT PAROLE 8-10 (2022), available at <https://www.sentencingproject.org/app/uploads/2022/10/Nothing-But-Time-Elderly-Americans-Serving-Life-Without-Parole.pdf>; Sonya Porter, John Voorheis, & William Sabol, *Correctional Facility and Inmate Locations: Urban and Rural Status Patterns*, U.S. CENSUS, July 2017), available at <https://www.census.gov/content/dam/Census/library/working-papers/2017/adrm/carra-wp-2017-08.pdf>.

<sup>9</sup> CHRISTOPHER SEEDS, DEATH BY PRISON, THE EMERGENCE OF LIFE WITHOUT PAROLE AND PERPETUAL CONFINEMENT 4 (2022); DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW 55-56 (2002) (explaining how “many abolitionists have adopted a conscious strategy of supporting life without parole and other harsh crime-control measures as a deliberate way of neutralising claims that abolitionists are ‘soft on crime’”).

<sup>10</sup> Hodgkinson, *supra* note 4, at 1839 (“The result has been a strange pairing of death penalty abolitionists with pro-incarceration activists and legislators, joining to push life-without-parole statutes through state legislatures. Working together, they have been remarkably successful.”)

<sup>11</sup> SEEDS, *supra* note 9. In fact, many of the most prominent early thinkers on criminology, like Cesare Beccaria, William Tallack, and John Stuart Mill, considered a life sentence to be harsher than a death sentence. For instance, Tallack

With the death penalty abolitionist movement's success, not only did the use of LWOP grow, but the nature of the sentence changed as well.<sup>12</sup> To assuage the public, advocates explained that it was not necessary to execute those who committed murder, we could perpetually incarcerate them instead.<sup>13</sup> It was this concurrence of the anti-death penalty movement with the age of tough on crime laws of the 1990s that transformed life sentences into death by incarceration, which unlike the life sentences of the past, provided no prospect of release.<sup>14</sup>

Those serving life without parole sentences were confounded by the anti-death penalty movement's role in their condemnation and suffering. As our co-author Ghani explains:

*One of the most challenging phenomena in the landscape of the struggle to end life sentences is that some of the strongest advocates of life sentences were opponents of the death penalty. They argued to the world that LWOP is a more "humane" and "less expensive" alternative to the death penalty.*

*We saw the opponents of the death penalty as our allies. We rooted for them to be victorious, because the death penalty is wrong. But we believed that they could win the moral, philosophical, and legal battle against the death penalty without throwing people condemned to life without parole under the bus. So why would they do that to us? Are we not just as condemned to die in prison as people sentenced to death row? Is not death the aim of both sentences? Do opponents of the death penalty not care that "life" sentences are just as final and fatal as death sentences?*

To Ghani's questions, DeFalco's book provides at least a partial answer. DeFalco traces a reticence to understanding forms of harm that are "slow, attritive, or otherwise appear banal in nature as human rights violations..."<sup>15</sup> As DeFalco outlines, when we think of atrocious acts, we expect them to be visually horrifying, outraging, and "utterly

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came to understand life sentences without the possibility of release to be cruel and unusual punishment and recommended that the maximum sentence for any criminal offense be a twenty-year term of imprisonment. Craig S. Lerner, *Life Without Parole As A Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1107-10 (2013).

<sup>12</sup> Hodgkinson, *supra* note 4, at 1839 ("Life in prison has never really meant life in prison—at least not for the last century."); VAN ZYL SMIT *supra* note 9, at 57-8; SEEDS, *supra* note 9, at 6.

<sup>13</sup> *Id.* at 3-4 & 71-87.

<sup>14</sup> *Id.* at 6.

<sup>15</sup> DEFALCO, *supra* note 2, at 53.

revolting.”<sup>16</sup> To use the words of international criminal law, they must “shock the conscience.”<sup>17</sup>

Viewed under this light, the aesthetics of suffering death by injection delivers, lingering in the corners of our minds.<sup>18</sup> Like the other invisible atrocities depicted in DeFalco’s book, onlookers are horrified to hear the stories or see the images of capital punishment that “assault their eyes.”<sup>19</sup> In line with what DeFalco describes, there is a “discomfort factor” at work.<sup>20</sup> An uncharitable view would be that their opposition to the death penalty was more about them than about those of us who suffer the worst harms of the carceral system.<sup>21</sup> However, the truth is that our sentence was difficult even for us to comprehend. Like other invisible atrocities, such sentences are a slow burn, with their true essence only revealing itself over time.

Even Rell describes how as a young man sentenced to death by incarceration, he too struggled to comprehend the finality and fatality of the sentence:

*It was an ironic existence: a man convicted of causing someone death, who was condemned to die in prison, but could not conceptualize what death was. My youth blinded me to that part of reality. I was stuck, trapped in this superficial understanding, far removed from its impact. My younger brother was murdered at the age of twenty-three, a few years later my father died suddenly, and with time all my grandparents passed on too, but time, space, and circumstance removed me from fully understanding these losses. I found myself existing in a plane of detachment. Time and space created a distance that made my loved ones feel like strangers to me; circumstances facilitated this feeling because I felt forced to tuck away my vulnerabilities which effectively arrested my capacity to grieve. I*

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<sup>16</sup> *Id.* at 41.

<sup>17</sup> Rome Statute of the International Criminal Court, preamble, opened for signature on July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

<sup>18</sup> Eisner, *supra* note 7.

<sup>19</sup> 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, 1061-62 (2015) (“Once a public exhibition which citizens travelled from miles around to witness, modern executions have become secret, medical procedures that occur in the middle of the night away from public sight. Garland argues that this shift reflects the growing queasiness and uncertainty Americans have about the idea of the state executing criminals.”); DEFALCO, *supra* note 2, at 204.

<sup>20</sup> *Id.* at 203-04.

<sup>21</sup> Berry III, *supra* note 19, 1061 (2015). (“LWOP sentences thus increasingly allowed jurors skeptical of the death penalty to have a clean conscience in not having chosen execution.”)

*became a shell of my emotional self as I marinated in this plane of existence for decades.*

Rell would not fully come to understand the full nature of his death by incarceration sentence until much later—when Art got sick.

If those of us sentenced to life without parole could not fully understand the reality of the sentence, then how could we expect others to do so. We thus settled on the belief that their reliance on life sentences as the way out of death sentences was not born from not caring but from not knowing. We believed they just did not perceive the finality and fatality of life sentences as equal to that of the death penalty. And it is not just prominent death penalty abolitionists who approve of LWOP sentences. We began to learn that the majority of American people do too.<sup>22</sup>

We and others like us in the movement to end death by incarceration realized that society would remain forever blind to our suffering unless we provided them a window into our existence of being condemned to die in prison. Through this review of DeFalco's book, we aim to reveal the true nature of LWOP sentencing, explaining why we experienced it as no more humane than a death sentence. Indeed, for many we know, it was a death sentence—one from which two of us narrowly escaped.

*A conviction that in the state of Pennsylvania means that you get out of prison in a pine wood box; there is no parole, no second chances. You only get out of prison when you die.*

## II. The Harm of Death by Incarceration

Those sentenced to death by incarceration experience the double-edged sword of the U.S. carceral state. On one hand, they often do not have access to the same medical care and programming as prisoners who have opportunities for release.<sup>23</sup> On the other, they do not have the same constitutional protections guaranteed to those sentenced to capital punishment, such as heightened due process, automatic proportionality review, and bifurcated individualized sentencing.<sup>24</sup>

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<sup>22</sup> Brenda Vogel, *Support for Life in Prison Without the Possibility of Parole Among Death Penalty Proponents*, 27 AM. J. CRIM. JUS. 263 (2003); VAN ZYL SMIT *supra* note 9, at 56,

<sup>23</sup> Rachel López, *The Unusual Cruelty of Nursing Homes Behind Bars*, 32 FED. SENT'G REP. 264, 268 (2020); SEEDS, *supra* note 9, at 2.

<sup>24</sup> *Id.*

The result is a languishing that is hard to describe if you don't see it with your own eyes. Ghani explains:

*If only people had witnessed what we were witnessing at SCI Graterford — almost every week someone being wheeled off the cell blocks on gurneys never to return. People who I had grown up with, worked out with, prayed with, studied with — people who mentored me — losing the battle to hold on to their life force behind the walls. While the last execution in Pennsylvania was in 1999, people serving “life” sentences were dying regularly. Just at Graterford, which was only one prison among the state’s twenty-eight at the time, over 100 people died during the 13 years I was confined there. A large percentage of those deaths were people serving “life” sentences. It could be argued then that “life” sentences have been more fatal than death sentences, at least in Pennsylvania.*

What these numbers alone cannot convey is how death by incarceration has become standardized—“a matter of routine.”<sup>25</sup> Once a practice that was met with skepticism, if not opposition, it has now become widely accepted.<sup>26</sup> Even as the political will to end mass incarceration grows, LWOP sentencing has not let up.<sup>27</sup> In its current instantiation, what characterizes the bloat of LWOP sentencing is not “toughness” on crime—that instinct has faded— but complacency and disregard.<sup>28</sup> The invisibility of the sentence, along with its banality, allows us to forget those locked away in rural prisons across the U.S.

Rell explains the realities of his DBI sentence like this:

*It was dark, always dark, the only light, a pale glow flickering off the walls emanating from the 40in TV mounted on the wall. Then there was the smell, a pungent, stench of decay and disease, always there, not overpowering but just enough to stay with you always. An extremely lonely place filled with a fear and an expectation of being alone forever. I had been a hospice volunteer for a few years at this point, called to duty to serve my brothers in need. Our numbers had grown over the years from a handful to over a couple dozen which was good because it gave us time to decompress. We were guardians against fear, ushers to the unknown. It was a difficult post because it called for us to provide comfort to people we knew and loved who were making a transition from this life to whatever lies beyond. I had no way of knowing at the time that upon signing up for this program that it would allow an opening to the unemotional plane that I had been*

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<sup>25</sup> *Id.* at 3, 7.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 9.

*hiding in. But it would still take a little time for me to totally extradite myself from its sphere.*

*Being a hospice volunteer in the bowels of the beast exposed me to human frailty laid bare by disease. I had to sit by while the people I loved slowly began to break down, their physical and mental selves withering away to nothing. But even with being witness to all this I still couldn't quite remove myself from this plane of detachment I could not allow myself to be completely vulnerable, because to do so would shine a light on how wretched and hopeless a death by incarceration existence is. But then Art got sick.*

*Art, my brother, my friend, my oldhead, a man who watched me grow up in the penitentiary, a man who like myself was condemned to a sentence of death by incarceration. A man who despite his condemnation and a terminal illness found in himself enough compassion that he maintained his service to be an usher to the unknown while suffering from a terminal illness until it was physically impossible for him to continue.*

*I didn't notice the weight loss myself, at least not at first. I only noticed it after people kept commenting on how good he looked because of it. Little did we know that the barely noticeable would quickly turn drastic and that it was a precursor to something deadly. It took a couple months before he knew that he had terminal cancer of the liver and that he only had a few months left to live. Art put on a brave face when he told us the news—he even told a few jokes, but we were devastated that now one of the ushers would be ushered. When Art revealed to us that he was sick it was different. I had sat with a lot of men, each of them taking a piece of me with them, but Art was like an older brother; he slept next door to me; he gave me advice and food to eat when I was hungry. To watch him wither away, to witness the light die in his eyes as he fulfilled the promise of his condemnation killed my hope and allowed the voice of despair to gain a foothold in my consciousness. It was also the thing that dissipated that unemotional plane of existence that I had been living in.*

*Nobody wants to die alone. There is a palatable fear that exists when a human being knows that the end is near and there is no one there to see them through. I've held hands, I've sang songs, I've sat quietly, my presence just enough to provide a little solace. But what happens when there is no one, what happens when human beings are alone hidden in dark rooms that smell of rot and death knowing that they are going to die and the only people around are strangers who don't care.*

Prisons are not places for the elderly. Even the federal government acknowledges that most of their facilities are ill-equipped to meet the elderly inmates' basic health, emotional, psychological, and physical needs.<sup>29</sup> Partly for this reason, research suggests that incarcerated people “age at a rate of five-to-ten years faster than their chronological age.”<sup>30</sup> Due to this process of “accelerated aging,” the health of a 50-year-old person in prison is similar to that of a 65-year-old person on the outside.<sup>31</sup> For that reason, those 55-year-old and older are often considered to be geriatric.<sup>32</sup> Much like other invisible atrocities described by DeFalco, death by incarceration manifests as “a slow process of annihilation that reflects the unfolding phenomenon of mass murder...rather than the immediate unleashing of violence and death.”<sup>33</sup> Incarceration kills, not all at once, but steadily over time.

### III. Giving New Meaning to Life

The right to life in human rights law, too, is frequently understood as the absence of death, but that can't be all there is to life. Perhaps what is missing in all of this—in this analysis of whether harm is invisible or seen—is a more fulsome understanding of what life is. This was the realization that Ghani and Rell came to:

*As we came to terms with the reality of our sentence, we began searching for explanations for why others could not. Why were our friends who were fighting to end the death penalty perceiving life sentences as more humane? A word continued to throb in our conversations like a collective toothache: “life.” The word for the most beautiful phenomenon, from which everything that matters to human beings flows: life. How could a word like life be used to name a sentence so associated with death. We reasoned that perhaps the way we and society at large talk about the sentence we were condemned to may be shaping the way we were thinking about it, and vice versa. To appropriately describe a penalty such as we were condemned to, the*

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<sup>29</sup> López, *supra* note 23, at 268. See also Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 977 (2018);

<sup>30</sup> JOHN E. WETZEL AND MICHAEL L. GREEN, FY 2016/2017 BUDGET REQUEST, PA. DEP'T OF CORR. AND REHAB. SENATE APPROPRIATIONS COMM. HEARING, at page 8, available at <http://www.cor.pa.gov/Documents/2016-2017%20DOC%20Appropriations%20Testimony.pdf>.

<sup>31</sup> Stephanie Yarnell, Paul Kirwin & Howard Zonana, *Geriatrics and the Legal System*, 45 J. AM. ACAD. PSYCHIATRY & L. ONLINE 208, 208 (2017).

<sup>32</sup> Brie Williams, Karla Lindquist, Rebecca Sudore, Heidi Strupp, Donna Willmott, & Louise Walte, *Being Old and Doing Time: Functional Impairment and Adverse Experiences of Geriatric Female Prisoners*, 54 J. Am. Geriatric Soc. 702 (2006).

<sup>33</sup> DeFalco, *supra* note 2, at 106 (citing Sheri P. Rosenberg & Everita Silina, *Genocide by Attrition: Silent and Efficient* in GENOCIDE MATTERS: ONGOING ISSUES AND EMERGING PERSPECTIVES 107 (2013)).



*word “life” was too innocuous if not all-out misleading. So, we realized we would have to use language that conveyed the gravity of the sentence. That’s when we started referring to our legally codified condemnation as death by incarceration.*

We then asked ourselves what is needed to fully realize our humanity—to live life in a way that is not only defined as the opposite of death. One answer for all three of us is the existence of hope—a belief that things can get better. There is some precedent for hope being a bedrock of human rights. The European Court of Human Rights has recognized hope as a constitutive aspect of the human person, basing its censure of life without parole on the lack of hope it instills.<sup>34</sup>

Still hope is also illusive. It is hard to conceptualize or explain. In the last days before his release from prison, as he waited for Pennsylvania Governor Tom Wolf to sign his commutation papers, Rell explained his complicated relationship with hope like this:

*Hope can be a strange thing in the penitentiary, especially if you've been condemned to die there. It can be two things existing in the same space and time. It is the audaciousness of struggle when your circumstance is completely despondent—it is that shining light in the midst of darkness that guides you with purpose, but at the same time it can be the thing that you fear the most.*

*For 30 years I've remained hopeful—hopeful that if I continued to do the things that has allowed my transformation then one day I'd have an opportunity to live outside of prison. There is this persistent thought, though, that lurks at the edge of my awareness. It is a constant whisper, "Terrell, give up. What are you fighting for, you'll never get out of prison. This is the place where you die."*

*Hope is what keeps these thoughts from overwhelming me. It is what keeps me from falling into a black hole of despair.*

Hope found Rachel again when Rell, who was being represented by her clinic at the time, received a unanimous vote from the Board of Pardon:

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<sup>34</sup> Adriano Martufi, *The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?* 25 MAASTRICHT J. EUR. & COMP. L. 672, 676 (2018). See, e.g., ECtHR, *Vinter and Others v. United Kingdom*, App. No. 66069/09, Judgment of 9 July 2013. (Concurring Opinion of Judge Power-Forde) (“The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person.”).

*I remember feeling an inexplicable ache when I talked to Rell's family before his release. They were so sure that he was coming home. Having seen so many deserving of a second chance at life on the outside denied, and knowing the odds that he would get through to the other side, I worried their hope would only heighten their despair. I didn't want to extinguish hope, but it felt risky to raise hope too high. The day the Board of Pardons voted on Rell's case, I was surrounded by my students and the community members on the outside who supported his release. When the vote came down, we all embraced. Grown men and women cried. Others stood shocked in disbelief. I remember someone saying, "she's shaking" and realizing they were talking about me. Everything I had been holding back just came out all at once. One of my students looked at me and said, "it feels like anything is possible now." Somewhere along the way I had lost that feeling, but I am trying to hold onto it again.*

For Ghani, hope came in the form of catalyzing a movement to challenge death by incarceration sentences:

*On June 6, 2015, we launched a coalition made up of grassroots organizations to take the fight to end LWOP to a whole new level. We called ourselves the Coalition to Abolish Death By Incarceration (CADBI). The campaign for second chance legislation has grown considerably ever since. Now, opponents of the DBI head out annually from Philadelphia in a convoy of four full charter buses to meet up with caravans and convoys of people coming from Pittsburgh, Reading, Allentown, Delaware County, Chester County, Lancaster County, and other parts of the state to converge at the state capitol to demand an end to death by incarceration.*

Each of us has found hope in our own way, giving us new meaning to life. In making our search for hope more visible, we want to start a process of defining life as something more than the absence of death. We, as a human species, and as human rights advocates, are so drawn to the horrors, building entire legal systems around them. What we propose here is that instead we start to build them prospectively around what makes human life flourish.

So this is where we depart from DeFalco. Our vision for the future of law is one less centered on making invisible atrocities visible by punishing them, but rather by building legal systems around protecting the potential that human life holds—maybe that's the best way to prevent all atrocity, visible or invisible.