LIFE WITHOUT PAROLE

AMERICA'S NEW DEATH PENALTY?

EDITED BY CHARLES J. OGLETREE, JR., AND AUSTIN SARAT

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Life without Parole

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To Pam, for your enduring support of the many challenging efforts I pursue. You are the greatest. (C.O.)

To Ben, with hope that you will grow up in a more forgiving and humane world. (A.S.)

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Introduction

Lives on the Line: From Capital Punishment to Life without Parole

CHARLES J. OGLETREE, JR., AND AUSTIN SARAT

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.
>
> —Justice Stewart, *Woodson v. North Carolina*

> Life without parole is a very strange sentence when you think about it. The punishment seems either too much or too little. If a sadistic or extraordinarily cold, callous killer deserves to die, then why not kill him? But if we are going to keep the killer alive when we could otherwise execute him, why strip him of all hope?
>
> —Robert Blecker, quoted in Adam Liptak, "Serving Life with No Chance of Redemption," *New York Times*, October 5, 2005

Writing in October 2005, *New York Times* reporter Adam Liptak observed that "in just the last 30 years, the United States has created something never before seen in its history and unheard of around the globe: a booming population of prisoners whose only way out of prison is likely to be inside a coffin. . . . Driven by tougher laws and political pressure on governors and parole boards, thousands of lifers are going into prisons each year, and in many states only a few are ever coming out, even in cases where judges and prosecutors did not intend to put them away forever."[1] In fact, in every decade over the last third of the 20th century, at least eight states joined the list of those authorizing sentences of life without parole (LWOP) as part of their criminal code (see figure I.1).

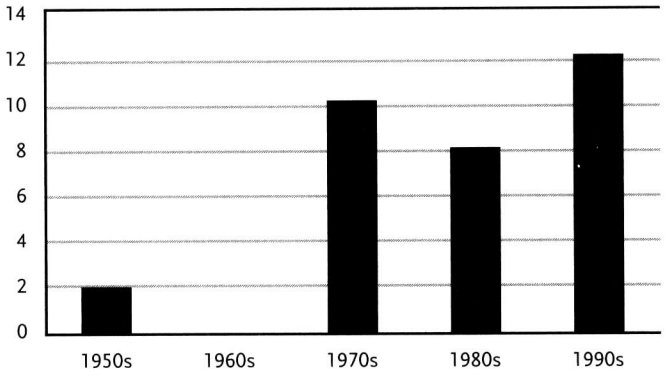

Fig. I.1. State enactment of LWOP statutes in the United States over time. *Source*: Steven Mulroy, "Avoiding 'Death by Default': Does the Constitution Require a 'Life without Parole' Alternative to the Death Penalty?," 79 *Tulane Law Review* (2005): 450n. 32.

As a result of these legislative changes, LWOP sentences increased exponentially.[2] Between 1992 and 2008, the LWOP population in the United States increased 230%,[3] so that today more prisoners are serving life terms than ever before (see figure I.2).[4]

Yet life sentences in general, and LWOP in particular, are by no means new to the American experience. LWOP has been a feature of American penal practice for almost a century. Some of its earliest uses are found in habitual criminal statutes, today known as "three-strike laws." For example, Ohio's 1929 habitual criminal statute provided that those sentenced "serve a term of his or her natural life."[5] Such statutes have been a significant source of the recent growth in the LWOP population. Thus, "Alabama's habitual offender statute caused the 'life without possibility of parole' population to increase by an average of 277 persons per year between 1981 and 1986."[6] Table I.1 summarizes current three-strike laws, the felonies they include, and the number of people sentenced to LWOP under them. Only states with three-strike laws that mandate LWOP are represented.

In addition to LWOP's early, and continuing, association with habitual criminal statutes, it has, since the middle of the 20th century, been used regularly as a sentence in murder cases.[7] Indeed one of the most conspicuous factors in the growth of LWOP as a sentence in those cases has been an alliance of death penalty abolitionists and conservative, tough-on-crime politicians. For abolitionists, life without parole, as James Liebman notes,

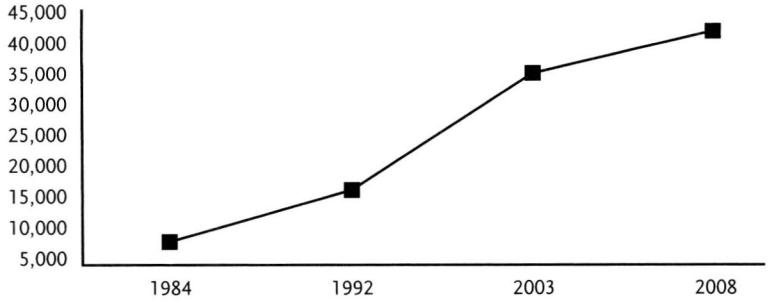

Fig. I.2. Growth in LWOP population in the United States, 1984–2008. *Sources*: Figures from 1984: Donald Macdonald and Leonard Morgenbersser, "Life without Parole Statutes in the United States," NYS Department of Correctional Services, Division of Program Planning, Research, and Evaluation, 1984; figures from 1992: Kathleen McGuire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics 1992*, Bureau of Justice Statistics, 1993; figures from 2003: Marc Mauer, Ryan S. King, and Malcolm C. Young, "The Meaning of 'Life': Long Prison Sentences in Context," Sentencing Project, May 2004; figures from 2008: Ashley Nellis and Ryan King, "No Exit: The Expanding Use of Life Sentences in America," Sentencing Project, 2009.

"has been absolutely crucial to whatever progress has been made against the death penalty. The drop in death sentences [from 320 in 1996 to 125 in 2004] would not have happened without LWOP."[8] Or, as Liptak writes, the growth of LWOP "is in some ways an artifact of the death penalty. Opponents of capital punishment have promoted life sentences as an alternative to execution. And as the nation's enthusiasm for the death penalty wanes amid restrictive Supreme Court rulings and a spate of death row exonerations, more states are turning to life sentences."[9]

For some advocates of LWOP, it is a milder alternative to the unique harshness of capital punishment. As one oft-repeated phrase puts it, "death is different." For death penalty abolitionists, the availability of LWOP as an alternative sanction for serious crimes can be a powerful tool in arguing against morally fraught state killing. A recent poll found that 70% of Californians are in favor of the death penalty.[10] Offered LWOP as an alternative, however, only 41% favored the death penalty for first-degree murder.[11] Strong majoritarian support for capital punishment, this seems to suggest, can be undermined effectively by upholding LWOP as a viable alternative.

For strict retributivists, on the other hand, precisely because "death is different," capital punishment is the sole appropriate response to certain crimes, such as murder.[12] However, while justice sometimes requires death, it also

TABLE I.1

State Three-Strike Laws Requiring Mandatory LWOP

State	*"Strike Zone"*	*Number of Strikes*	*Number Sentenced*
Georgia	Murder, armed robbery, kidnapping, rape, aggravated child molesting, aggravated sodomy, aggravated sexual battery	Two	
	Any felony*	Four	7,631**
Indiana	Murder, rape, sexual battery with a weapon, child molesting, arson, robbery, burglary with a weapon or resulting in serious injury, drug dealing	Three	38
Louisiana	Murder, attempted murder, manslaughter, rape, armed robbery, kidnapping, serious drug offenses, serious felony offenses,	Three	N/A
	Any four felony convictions with at least one on the above list	Four	
Maryland	Murder, rape, robbery, first- or second-degree sexual offense, arson, burglary, kidnapping, carjacking, manslaughter, use of firearm in felony, assault with intent to murder, rape, rob, or commit sexual offense; separate prison terms required for each offense	Four	330
Montana	Deliberate homicide, aggravated kidnapping, sexual intercourse without consent, ritual abuse of a minor	Two	0
	Mitigated deliberate homicide, aggravated assault, kidnapping, robbery	Three	
New Jersey	Murder, robbery, carjacking	Three	10
North Carolina	47 violent felonies; separate indictment and finding that offender is "violent habitual offender"	Three	22
South Carolina	Murder, voluntary manslaughter, homicide by child abuse, rape, kidnapping, armed robbery, drug trafficking, embezzlement, bribery, certain accessory and attempted offenses	Two	14
Tennessee	Murder, aggravated kidnapping, robbery, arson, rape, rape of child; prior prison term required	Two	14
	Same as above, plus rape, aggravated sexual battery; separate prison terms required	Three	
Utah	Any first- or second-degree felony	Three	N/A

State	"Strike Zone"	Number of Strikes	Number Sentenced
Virginia	Murder, kidnapping, robbery, carjacking, sexual assault, conspiracy with these crimes	Three	328
Washington	Murder, manslaughter, rape, child molestation, robbery, aggravated assault, explosion with threat to humans, extortion, kidnapping, vehicular assault, arson, attempted arson, burglary, any felony with deadly weapon, treason, prompting prostitution, leading organized crime	Three	209
Wisconsin	Murder, manslaughter, vehicular homicide, aggravated battery, abuse of children, robbery, sexual assault, taking hostages, kidnapping, arson, burglary	Three	9
Federal government	Murder, voluntary manslaughter, assault with intent to commit murder or rape, robbery, aggravated sexual abuse, abusive sexual contact, kidnapping, aircraft piracy, carjacking, extortion, arson, firearms use, serious drug crimes	Three	35

* In Georgia, any four felonies mandate a maximum sentence, not necessarily LWOP.

** This statistic includes all those sentences in the scheme described just above; thus, the true LWOP is not known for certain. All sentence statistics as of 2004.

Source: Jennifer Walsh, *Three Strikes Laws* (Westport, CT: Greenwood, 2007), 120.

demands gradations of punishment. "If we more nearly matched crime with punishment," argues noted retributivist Robert Blecker, "we would design a pain-free death for those who killed their victims painlessly, while reserving a painful death for those who sadistically tortured their victims."[13] Collapsing these fine gradations of punishment into a single punishment, either death or life without parole, would, in this line of thinking, be a betrayal of justice.

While conservative support for LWOP seems consistent with a tough-on-crime politics,[14] support for LWOP among abolitionists requires some explanation. Part of their rationale for advocating LWOP rested on public opinion polls that showed support for capital punishment to be based, in part, on worries about the premature parole of violent felons. And what is true for the general public also seems to be true for jurors. John Blume et al., reporting on their research on capital juries, note that "future dangerousness is on the

minds of most capital jurors, and is thus 'at issue' in virtually all capital trials, no matter what the prosecution says or does not say."[15] Between 53% and 66% of jurors surveyed stated that the deliberations focused a "fair amount" on the issue of future dangerousness. Additionally, among those surveyed from cases in which the prosecution did not put future dangerousness at issue, 77% reported that personal concern that the defendant might again be a harm to society was important in how they voted.[16]

Abolitionists support LWOP to allay those worries. Some abolitionists have even gone so far as to argue that not allowing juries to consider LWOP in the sentencing phase of capital trials is unconstitutional.[17] They claim that "the absence of an LWOP option causes the death penalty to be imposed as an expedient rather than as the product of a reasoned judgment that death is the appropriate punishment."[18] They believe that without an LWOP option jurors are offered a forced choice, a choice with a bias toward death. This forced choice is of particular concern since it seems incompatible with the heightened standards of reliability required in capital sentencing by the Supreme Court's *Furman* and *Gregg* decisions.

Nonetheless, some recent research raises questions about the wisdom of the abolitionist embrace of LWOP. It reveals that "the enactment of life-without-parole statutes is correlated with a small decrease in the number of death sentences handed down, but it has not led to a significant reduction in execution."[19] Additional evidence suggests that "the patterns of death sentences in different states mirror each other, regardless of whether or when those states pass life-without-parole statutes."[20] Moreover, "from 1992 to 2003, the number of prisoners incarcerated for life without parole jumped from 12,453 to 33,633. Over the same period, the number of Americans on death row increased from 2575 to 3374. In other words, while the death row population grew by 31%, the population of those incarcerated for LWOP grew 170%."[21]

Reflecting on the abolitionist embrace of LWOP, Julian Wright argues that "instead of saving lives, the sanction toughens the sentences of criminals who would not have received the death penalty under the sentencing structure" beforehand.[22] In his view, the most important result of the adoption of LWOP has been to spur life sentences for *noncapital crimes*. "Death penalty abolitionists," he says, "have a responsibility to consider carefully the effects of such laws on noncapital defendants before they engineer or encourage their passage."[23]

In spite of such concerns, abolitionists continue to provide support necessary to enact LWOP legislation. For example, in 2004, the Kansas legislature, controlled by Republicans, passed an LWOP statute authored by death pen-

alty advocates. The bill was signed into law, however, by Kathleen Sebelius, Kansas's anti-death-penalty governor.[24]

Despite LWOP's popularity among abolitionists and tough-on-crime politicians,[25] controversy surrounding it remains intense. While some maintain that LWOP is an appropriate sanction because of its deterrent and retributive functions, and defend it by arguing that its use has been partially responsible for America's declining crime rates,[26] others claim that "the movement toward reduced discretion in such cases [as LWOP] has resulted in lengthier periods of incarceration than are necessary to achieve public safety goals."[27]

Critics also highlight issues of cost. As more inmates are sentenced to life, the overall cost of imprisonment increases dramatically. Not only will it cost more to incarcerate a larger population, they suggest, but it will also become increasingly costly to house aging prisoners. Resulting in large part from the increase in life and LWOP sentences, "from 1979 through 2002, the average inmate age increased from 28.7 to 34.7 years, and this growth rate is expected to continue until 2010 when it is projected to accelerate. . . . And while prisoners over the age of fifty make up only 6% of the prison population in Georgia currently, this 6% currently consumes 12% of the prison healthcare resources."[28] The Sentencing Project estimates that it costs approximately $1 million to house a prisoner from age forty to age seventy.[29]

Moreover, incarcerating criminals until death may not be necessary to serve public safety goals. Mauer et al. survey several studies on recidivism and find that

> lifers have very low rates of recidivism, including for violent crimes. For example, in Michigan, 175 persons convicted of murder were paroled between 1937 and 1961; none committed another homicide and only four were returned to prison for other offenses. In Canada, between 1920 and 1967, 119 persons originally sentenced to death for murder had their sentences commuted to life and were eventually released on parole; one was convicted of another homicide. From 1959 to 1967, an additional 32 persons were released and by 1967 only one had been convicted of a new offense (not a murder).[30]

Studies such as these strongly suggest that LWOP sentences are excessive from a deterrence and public safety perspective.

There is also evidence that, as is the case with capital punishment, LWOP is riddled with racial disparity. "Racial and ethnic minorities," Ashley Nellis and Ryan King observe, "serve a disproportionate share of life sentences.

Two-thirds of people with life sentences (66.4%) are nonwhite, reaching as high as 83.7% of the life sentenced population in the state of New York."[31] Additionally, in 2008, the United Nations Committee on the Elimination of Racial Discrimination (CERD) expressed concern over "stark racial disparities" in the American criminal justice system, noting further that "young offenders belonging to racial, ethnic and national minorities, including children, constitute a disproportionate number of those sentenced to life imprisonment without parole."[32]

Evidence of race effects on the adult LWOP population is also troubling. Nellis and King found that "while 45% of the parole-eligible population is African American, blacks comprise 56.4% of the LWOP population."[33] Not only are blacks overrepresented initially within the life-sentenced population, this statistic indicates that blacks are deemed parole ineligible disproportionately as well. These findings of racial disparities are hardly surprising: discriminatory sentencing drives the demographics of prison populations from death row down to the county jail.

However, sociologist Bruce Western argues that incarceration is not merely a symptom of social inequality but that it *creates* and *exacerbates* inequality by undermining families and further separating poor communities of color from the American mainstream.[34] Western demonstrates that incarceration is a collection of policy responses that exact their own long-term, negative effects on communities. Such policies, he argues, not only fail to protect communities from crime but also widen the inequality gap and the psychological distance between people of color who live in distressed communities and everyone else.

LWOP, more than any other form of incarceration, imposes a *permanent* disruption on marginal and minority communities. It permanently hardens the psychological degradation of distressed minority communities by conveying the message that offenders from these communities are distinctly *irredeemable*: they must be locked up forever because they could never change.

For law and order advocates, LWOP's promise of permanent containment is precisely what recommends it. Homicidal home invaders, serial rapists, terrorists, and other serious offenders are seen as so dangerous to society that community safety can be assured only by punishment that both permanently incapacitates the offender and serves as a strong deterrent to would-be criminals.[35]

For critics of LWOP, it is its mechanical and final quality that raises concerns. They contend that all mandatory LWOP sentences should be invalidated just as mandatory death penalty sentences have been. As Andrew Mun

puts it, "capital punishment and mandatory life sentences without parole share one important characteristic: the offender never regains freedom. Both punishments assume that the offender exhibits an incapacity for reform and rehabilitation."[36] Leon Sheleff argues that the U.S. Supreme Court should "consider whether life imprisonment is not in violation of the 'cruel and unusual' provision not just because it is disproportional to the crime, nor because the due process provision of the Fourteenth Amendment have been violated, but because, in and of itself, a life sentence constitutes cruelty."[37] Sheleff notes that "the Court could consider 'evolving standards of decency' and examine the evidence, admittedly limited, yet nevertheless growing, on the nature of confinement when there is no, or only little, hope of release."[38]

Until recently, such arguments seemed quite futile. Almost forty years ago, the Supreme Court ruled in *Schick v. Reed* that President Eisenhower's commutation of the defendant's death sentence to LWOP was constitutionally valid. The Court held that the "without parole" stipulation was not an abuse of discretion as the defendant charged.[39] While the Court's discussion of parole was not extensive, the ruling nonetheless provided impetus for legislatures in passing further LWOP statutes.

Five years later, in *Government of the Virgin Islands v. Gereau*, the defendant in an LWOP case argued that "the sentence's sheer length precluded any opportunity for parole and thus eliminated any incentive for rehabilitation."[40] He alleged that his sentence was cruel and unusual punishment. The Third Circuit Court of Appeals did not agree. Deferring to state legislatures, it cited *Schick* as establishing that LWOP did not violate the Eighth Amendment.

In 1985, in *U.S. v. O'Driscoll*, the Tenth Circuit ruled that LWOP was not disproportionate punishment under the Eighth Amendment when imposed on a notorious kidnapper. The precedential significance of *O'Driscoll* was the Court's ruling that the "vicious propensities of the defendant and his lack of . . . respect for human life" permitted the sentence.[41] The Court held that "retribution and rehabilitation are equally permissible goals of rehabilitation," thus invalidating the proportionality claim against LWOP.[42] In *Harmelin v. Michigan* and *Ewing v. California*, the Supreme Court continued this trend of upholding LWOP sentences.[43] Reflecting on this line of cases, Wright notes that "at the federal level [the] issue [of LWOP's constitutionality] may never have been argued thoroughly, but it has been decided definitively."[44]

Yet recent developments suggest that LWOP's constitutional status is not unshakably stable. The Supreme Court's decision in *Graham v. Florida* illustrates this fact.[45] The Court in *Graham* held that LWOP is an unconstitutionally cruel and unusual punishment when imposed on juveniles for *nonho-*