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Tinkering With Life: A Look At The Inappropriateness Of Life Without Parole As An Alternative To The Death Penalty

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Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty

ASHLEY NELLIS*

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INTRODUCTION

Advocacy campaigns to eliminate the death penalty in the United States have made significant advances in recent years. Death sentences have been outlawed in five states since 2001,¹ and even in the thirty-four states where they are still allowed, many states have not carried out an

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1. See An Act Revising the Penalty for Capital Felonies, 2012 Conn. Legis. Serv. 8 (West); Act of Mar. 9, 2011, 2011 Ill. Laws 7778 (codified at 725 ILL. COMP. STAT. ANN. 5/119-1 (West 2008 & Supp. 2011)); Act of Dec. 17, 2007, ch. 204, 2007 N.J. Laws 1427 (codified at N.J. STAT. ANN. § 2C:11-3 (West 2005 & Supp. 2012)); Act of Mar. 18, 2009, ch. 11, 2009 N.M. Laws 133 (codified as amended in scattered sections of ch. 31 of N.M. STAT. ANN.); *People v. LaValle*, 817 N.E.2d 341, 359, 365–68 (N.Y. 2004) (holding that the deadlock instruction of the New York death penalty statute violated the New York Constitution and that legislative action was needed to remedy the death penalty statute as a whole); see also *People v. Taylor*, 878 N.E.2d 969, 975 (N.Y. 2007) (vacating the death sentence of the final prisoner remaining on New York's death row and remanding for resentencing).

execution in years.² Still, the United States keeps terrible company with other nations including China, Iran, Saudi Arabia, and Iraq, ranking fifth worldwide in the number of executions in 2011.³ In that year, the United States was the only western democracy to carry out executions.⁴

The declining use of executions in the United States shows that as a practice it is slowly falling out of favor in growing proportions of the country.⁵ The momentum of death penalty abolition and reform work can be attributed largely to a combination of the accomplishments of the innocence movement, the demonstrated exorbitant cost of the sentence, and the lengthy appeals process.⁶ It has become increasingly difficult to justify the death penalty's continued use in spite of differing views one may hold on punishment more generally. Those who raise concerns about efficacy now join with those who oppose the death penalty on moral grounds to create a sizable, diverse portion of the American public. The strategies utilized by the death penalty abolition campaign have broadened its support network by reaching out to atypical allies and have succeeded in making death sentences less palatable to a wider audience.⁷ Over the same period of time, the sentences of life without possibility of parole ("LWOP") have soared.⁸

LWOP is often touted as the humane alternative to the death penalty, yet many of the problematic aspects of the death penalty are also applicable to this sentence. The rapid growth in LWOP sentences has occurred with little acknowledgement, much less opposition.

Strategies to abolish the death penalty can be improved upon by viewing the successful elimination of the death penalty as just the first step on the road to the reformation of extreme sentences altogether. In this view, the efforts to eliminate the death penalty are not in conflict with efforts to eliminate LWOP. And while LWOP is certainly not the

2. See Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 147–49 (2010) [hereinafter Steiker & Steiker, *Cost and Capital Punishment*].

3. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS: 2011, at 55 (2012), available at <http://www.amnesty.org/en/library/asset/ACT50/001/2012/en/241a8301-05b4-41c0-bfd9-2fe72899cda4/act500012012en.pdf>.

4. *Id.* (listing all the countries for which there was a reported execution in 2011).

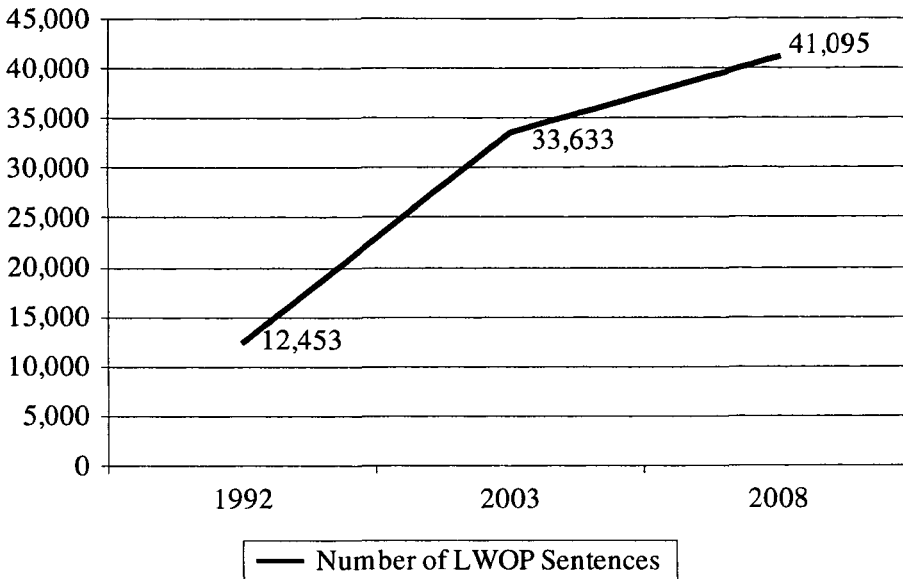
5. For annual data, see the Death Penalty Information Center: <http://www.deathpenaltyinfo.org/executions-year>.

6. See Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH L. REV. 199, 216–18 (2008); Steiker & Steiker, *Cost and Capital Punishment*, *supra* note 2, at 118, 139.

7. See THE CONSTITUTION PROJECT, ENGAGING UNLIKELY ALLIES TO ACHIEVE CRIMINAL JUSTICE REFORM 1–2 (2011), available at http://www.constitutionproject.org/pdf/engaging_unlikelyallies.pdf.

8. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 10 fig.2 (2009).

FIGURE 2. GROWTH IN LWOP POPULATION, 1992–2008



SOURCE: ASHLEY NELLIS & RYAN S. KING, *THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA* 10 fig.2 (2009).

only sanction in need of reform, it is the most logical place to begin because of the troubling qualities it shares with the death penalty in America.

I. THE RISE OF LWOP SENTENCES

The use of life without parole sentences has increased by 300% in the past two decades.⁹ Between 1992 and 2008, the number of prisoners serving LWOP rose from 12,453 to more than 41,000.¹⁰ In sixteen states and the federal system, the discretionary parole system has been eliminated rendering all life-sentenced convicts in those jurisdictions ineligible for release.¹¹

Though LWOP is available in nearly every state,¹² such sentences are disproportionately represented in Florida, Pennsylvania, Louisiana,

9. *See id.*

10. *Id.*

11. PETER B. HOFFMAN, U.S. PAROLE COMMISSION, *HISTORY OF THE FEDERAL PAROLE SYSTEM* 1–2, 26 (2003) (discussing the abolition of parole in the federal system); *Reentry Trends in the U.S.*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/content/reentry/releases.cfm> (last updated Dec. 2, 2012).

12. *See Life Without Parole*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/life-without-parole> (last visited Dec. 2, 2012) (noting that every state except Alaska provides some form of LWOP).

California, and Michigan.¹³ Combined, these states accounted for 53.5% of all LWOP sentences nationwide in 2008.¹⁴ Racial disparities are deeply troubling: Blacks comprised 56.4% of the LWOP population nationwide in 2008, but this figure was as high as 73.9% and 73.3% in Georgia and Louisiana, respectively.¹⁵ Juveniles represent a growing segment of life-sentenced inmates who do not have the opportunity for parole, now totaling more than 2,500 prisoners.¹⁶

II. CAUSES FOR LWOP EXPANSION

Attention to the death penalty has continued to rise, yet focus on LWOP by scholars, policymakers, and sentence reform advocates has historically been minimal by comparison.¹⁷ The popularity of tough-on-crime sanctions, enhanced prosecutorial discretion, concerns about purported judicial leniency, and a temporary ban on death sentences have distracted attention from the fact that the number of people serving LWOP sentences today dwarfs the number on death row.¹⁸

A. *Tough on Crime*

One reason that the number of people serving LWOP sentences increased is that policymakers ratcheted up the severity of sentences in the 1980s and 1990s.¹⁹ Elevated crime rates and crime fears at that time contributed to a new system of punishment that prioritized the offense over the offender and pushed for increasingly lengthy stays in prison. Catch phrases such as “do the crime, do the time” and “life means life” were popularized and quickly translated into crime policies that ultimately eliminated many of the indeterminate sentencing structures that had been in place for more than a century, replacing them with determi-

13. See *infra* Figure 3.

14. See NELLIS & KING, *supra* note 8, at 8–9 tbl.2. Utah data not available at the time of this report.

15. *Id.* at 13, 14 tbl.4, 15 tbl.5.

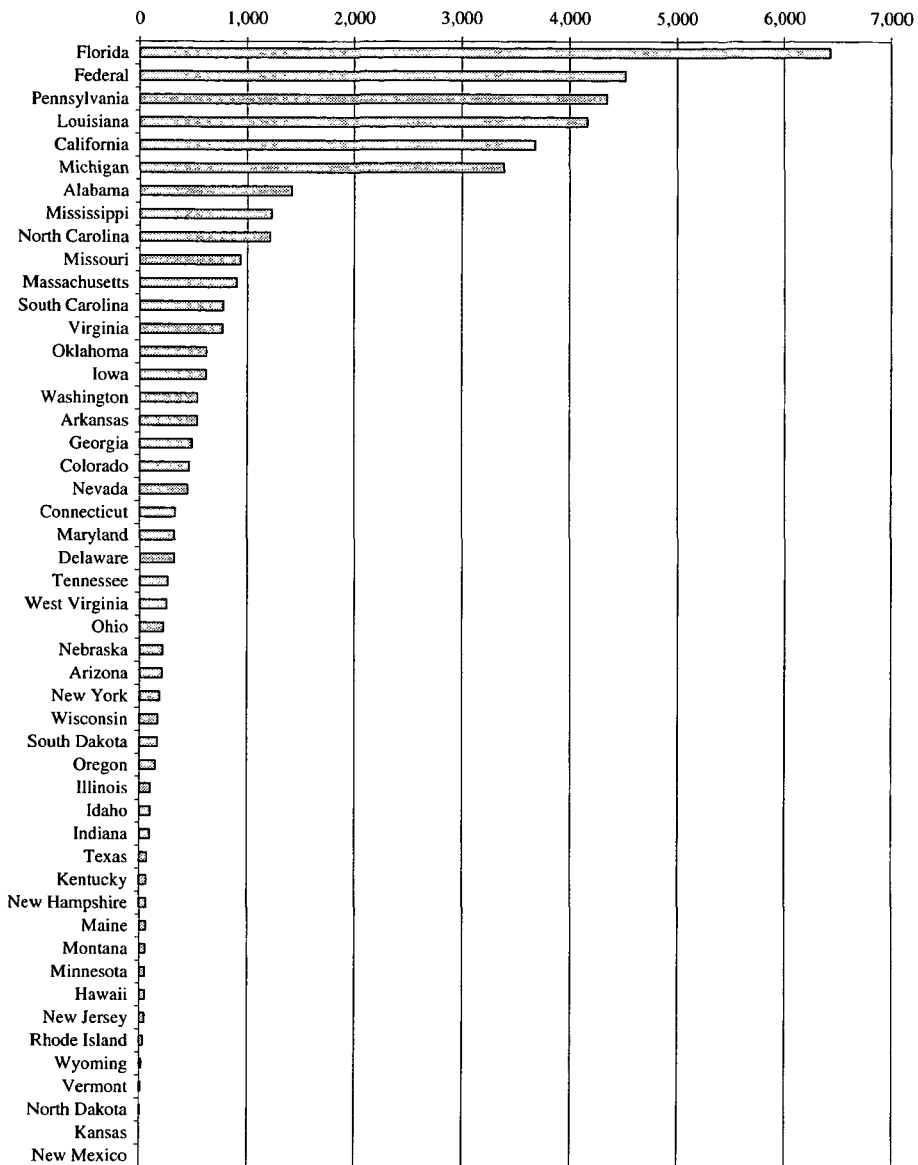
16. See <http://sentencingproject.org/map/map.cfm> (last visited Dec. 17, 2012) (noting state totals for juveniles serving life without the possibility of parole).

17. See Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 66, 67 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

18. *Compare Number of Prisoners on Death Row*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/content/glance/tables/drracetab.cfm> (last visited Nov. 25, 2012) (stating that there were 3,210 individuals on death row in 2008), with Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010), available at http://sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf (stating that there were 41,095 individuals serving LWOP sentences in 2008).

19. See generally Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194–1206 (2005).

FIGURE 3. STATE AND FEDERAL LWOP POPULATIONS IN 2008/2009



Source: ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 8-9 (2009).

nate, long sentences.²⁰

Prominent among these tough-on-crime sentencing policies are three-strikes laws, one of the drivers of LWOP. Three-strikes laws have been promoted as providing confidence that upon a defendant's third conviction he or she will be given an extremely long prison sentence—preferably one that locks him or her away for life. Between 1993 and 1995, twenty-four states and the federal government enacted three-strikes laws.²¹ While most of the life sentences resulting from three-strikes laws allow for the possibility of parole, thirteen states and the federal government have three-strikes laws that mandate LWOP for certain crimes.²²

In 1994, Georgia passed a “two-strike” law that requires, upon conviction of the first strike, that individuals convicted of kidnapping, armed robbery, rape, aggravated sodomy, aggravated sexual battery, and aggravated child molestation are sentenced to a minimum of ten years without parole.²³ A second strike results in life without parole.²⁴ The mandatory sentence for all homicide convictions is death, life imprisonment, or LWOP; however, even those sentenced to life imprisonment must serve a minimum of thirty years before becoming eligible for parole.²⁵ Within the first few years, fifty-seven people were sentenced to LWOP under the new law.²⁶ As of August 2012, 737 Georgia prisoners were serving LWOP, a 270% increase from its population of 199 LWOP prisoners in August 2000.²⁷ And despite the intended purpose of the law, LWOP sentences have not been reserved for the worst of the worst. Only a slight majority (58.93% as of October 2012) of life-sentenced Georgia inmates with no chance for parole has been convicted of

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

21. JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, U.S. DEP'T OF JUSTICE, “THREE STRIKES AND YOU'RE OUT”: A REVIEW OF STATE LEGISLATION 1 (1997), available at <https://www.ncjrs.gov/pdffiles/165369.pdf>.

22. See Charles J. Ogletree, Jr. & Austin Sarat, *Introduction to LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?*, *supra* note 17, at 1, 4–5 tbl.I.1 (listing jurisdictions with three-strikes laws requiring mandatory LWOP).

23. See Sentence Reform Act of 1994, no. 1265, 1994 Ga. Laws 1959 (codified as amended in scattered sections of titles 16, 17, & 42 of GA. CODE ANN.).

24. See *id.* (codified at GA. CODE ANN. § 17-10-7 (Supp. 2012)).

25. See GA. CODE ANN. § 16-5-1(d) (2011); GA. CODE ANN. § 17-10-6.1(a), (c)(1) (Supp. 2012).

26. Walter J. Dickey & Pam Hollenhorst, “Three-Strikes” Laws: Five Years Later, CORRECTIONS MGMT. Q., Summer 1999, at 1, 2.

27. Compare GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE: ACTIVE LIFE WITHOUT PAROLE 5 (2012), available at http://www.dcor.state.ga.us/Research/Monthly/Profile_life_wo_parole_2012_07.pdf, with GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE: ACTIVE PRISONERS SERVING LIFE WITHOUT PAROLE EXCLUDING JAIL 2 (2000), available at http://www.dcor.state.ga.us/Research/Monthly/Profile_life_wo_parole_2000_08.pdf.

homicide.²⁸

LWOP can be a powerful tool to motivate defendants to plead guilty in exchange for having their lives spared by the state. Knowing this, prosecutors have been known to charge a defendant with capital murder in the hopes that he or she will plead guilty and accept a reduced, LWOP sentence.²⁹ This practice has been approved by the Supreme Court,³⁰ though the moral and ethical appropriateness of it is questionable,³¹ and it has eased the ways in which defendants receive an LWOP sentence.

B. *Repeal of the Death Penalty*

The rapid rise in LWOP sentences can partly be attributed to a desire for a reliable, terminal punishment to replace the death penalty after it was declared unconstitutional in 1972.³² Alabama, Illinois, and Louisiana all adopted LWOP statutes in direct response to the *Furman* decision.³³ Although life sentences were certainly available in many states before *Furman*, they usually had the option of parole.³⁴ More recent LWOP statutes, though they may not be in direct response to *Furman*, have been successful at enacting LWOP partly because of the promise of irrevocability that the sentence offers. Numerous state examples demonstrate this point.

In 2004, Kansas Governor Sebelius publicly supported LWOP and signed it into law to show her opposition to the death penalty,³⁵ even

28. See GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE: ACTIVE LIFE WITHOUT PAROLE 69 (2012), available at http://www.dcor.state.ga.us/Research/Monthly/Profile_life_wo_parole_2012_09.pdf.

29. See Julian H. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 559 (1990).

30. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (“[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.”); see also generally *United States v. Goodwin*, 457 U.S. 368, 382 (1982) (“A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution.”).

31. See Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 3 & n.13 (1982).

32. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam); see also *id.* at 356 (Marshall, J., concurring).

33. Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 175–76 (2008) [hereinafter Steiker & Steiker, *Opening a Window*].

34. Marie Gattschalk, *No Way Out? Life Sentences and the Politics of Penal Reform*, LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 227–281 (C. Ogletree & A. Sarat eds. New York University Press) (2010).

35. See Chris Moon, *Sebelius Open to Death Bill Debate*, TOPEKA CAPITAL-J., Dec. 24, 2004, at B1.

though Kansas has not had an execution since 1965 and has only nine death row inmates.³⁶ Texas policymakers resisted enacting an LWOP statute for many years because of the state's devotion to the death penalty, but it finally passed LWOP legislation after the death penalty was abolished for juveniles in 2005.³⁷ And New Mexico's abolition of the death penalty would not have been possible had the state not endorsed LWOP in exchange.³⁸ In fact, in twenty of the thirty-four death-penalty states, LWOP is now the required alternative if a prosecutor fails to obtain a death sentence.³⁹ LWOP is not only used for capital murder either. Many state legislatures have expanded the range of LWOP-eligible offenses to include a broad array of noncapital crimes as well, such as armed burglary and various drug offenses.⁴⁰ Today about 10% of LWOP inmates have been convicted of nonviolent crimes.⁴¹

C. Public Mistrust

Confidence in the criminal justice system drops and concerns are raised about judicial or correctional leniency when paroled offenders commit a new offense. The idea of eliminating the death penalty is more palatable to a fearful public if the sentence that replaces it is equally permanent, guaranteeing that the prisoner will never be released. When the public struggles to believe that lengthy sentences will be carried out in their entirety, it will prefer lifelong, determinate sentencing structures, despite evidence that lengthy prison sentences are not associated with less crime or enhanced public safety.⁴²

Public outrage ensued after outgoing Mississippi Governor Barbour released 198 prisoners in early 2012, four of which had been convicted of murder.⁴³ Three of the murders occurred nearly twenty years ago and

36. *Capital Punishment*, KAN. DEPARTMENT CORRECTIONS (2011), <http://www.doc.ks.gov/news-room/frequently-asked-questions/capital-punishment>.

37. Act of June 17, 2005, 2005 Tex. Gen. Laws 2705 (codified at TEX. GOV'T CODE ANN. § 508.145 (West 2012)).

38. Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 17, at 190, 208.

39. Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 17, at 25, 32, 55 n.58.

40. *See, e.g.*, S.C. CODE ANN. § 17-25-45 (2003).

41. Mauer, M., King, R., and Young M. (2004) *The Meaning of 'Life': Long Prison Sentences in Context*. Washington, DC: The Sentencing Project. Page 13, Table 5.

42. Todd R. Clear, *The Impact of Incarceration on Public Safety*, 74 SOC. RES. 613, 620–26 (2007); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 22–31, 38 (2011); *see also* Marie Gottschalk, *No Way Out? Life Sentences and the Politics of Penal Reform*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 17, at 227, 235.

43. Campbell Robertson & Stephanie Saul, *List of Pardons Included Many Tied to Power*, N.Y. TIMES, Jan. 28, 2012, at A1.

the fourth occurred more than a decade ago.⁴⁴ While the Mississippi Supreme Court upheld Barbour's decision,⁴⁵ it was not without political backlash: Incoming Governor Phil Bryant abruptly ended the decades-old practice of allowing prison "trusties" to work in the governor's mansion.⁴⁶ In addition, attempts were quickly made to limit the governor's pardoning power through legislation or a change to the constitution.⁴⁷

Fear of judicial leniency makes the public leery of sentences that allow for even the remote possibility of release; however, as Justice Kennedy noted in *Graham v. Florida*, a parole-eligible life sentence does not give someone the *right* to be released, it just gives a person the opportunity for sentence review at some reasonable point during their sentence.⁴⁸

D. Promotion of LWOP as a Replacement for the Death Penalty

Executions have declined by over 50% in the past decade in large part due to successes in legislation, litigation, and public education that have narrowed or eliminated the death penalty in certain states or in certain instances (e.g., the mentally handicapped, juveniles).⁴⁹ The steadily falling homicide rate has also contributed to the decline in executions. Without these successes, consideration of the appropriateness of LWOP would not be possible. Death penalty abolitionist work opens the door to a broader review of all extreme sentences, starting with LWOP. Just as the death penalty movement has leaned on LWOP to advance its reforms, so too has the LWOP abolition movement benefitted from the growing prominence of death penalty discussions in order to gain momentum in its own reforms.

At the same time, the steady rise in LWOP sentences may be due to the promotion of LWOP as a replacement for the death penalty.⁵⁰ Even

44. Holbrook Mohr, *Outgoing Mississippi Governor Pardons 4 Convicted Killers*, TELEGRAPH-HERALD (Dubuque, Iowa), Jan. 10, 2012, at C5.

45. *In re Hooker*, 87 So. 3d 401, 414 (Miss. 2012).

46. *Governor's Mansion Trusties Booted in Mississippi*, DISPATCH (Columbus, Miss.), Jan. 21, 2012, <http://www.cdispatch.com/news/article.asp?aid=15213>.

47. Bobby Harrison, *Outcry Aside, No Pardon Changes This Year*, N.E. MISS. DAILY J., Apr. 3, 2012, http://djournal.com/printer_friendly/18087442.

48. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

49. In the last five years alone, Connecticut, New York, Illinois, New Jersey, and New Mexico have eliminated the death penalty. In 2005, the U.S. Supreme Court ruled that it is unconstitutional to sentence juveniles to death. *Roper v. Simmons*, 543 U.S. 551, 575 (2005). In 2002, the U.S. Supreme Court ruled that it is unconstitutional to sentence mentally retarded individuals to death. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In 2008, the Supreme Court ruled that it is unconstitutional to apply the death penalty in instances where a death did not occur. *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008).

50. See Gottschalk, *supra* note 42, at 259; Steiker & Steiker, *Opening a Window*, *supra* note 33, at 176.

though clear evidence is not yet available about whether the expansion of LWOP sentences is empirically attributable to the decline in death sentences, promotion of LWOP as a humane, reasonable alternative to the death penalty desensitizes society to the fact that this, too, is a death sentence. Instead of being portrayed as such, LWOP is often portrayed as a lucky break for defendants (e.g., defendants are tempted by prosecutors and defense attorneys alike to plead guilty and serve LWOP rather than risk a death sentence).

III. WHAT'S WRONG WITH LWOP?

There are at least three serious issues with parole-ineligible life sentences. These problems include an absence of heightened review of LWOP sentences, the mandatory application of LWOP, and the extreme racial disparity in the LWOP population.

A. *Lack of Heightened Review*

Death penalty cases are reviewed with a high degree of scrutiny because of the irrevocable nature of executions.⁵¹ In fact, several layers of review separate the imposition of death sentences from that of all lesser sentences.⁵² For instance, capital defendants generally have the right to state-appointed counsel for post-conviction litigation, but non-capital defendants do not.⁵³ And, while ineffective assistance of counsel still occurs in death penalty cases some of the time, particularly for low-income defendants, these claims are carefully reviewed.⁵⁴

For life without parole cases, the court procedures are far more limited; appeals by the highest state court are not guaranteed as they are with death penalty cases, and the mandatory nature of LWOP sentences allows important features of a case or defendant to be overlooked.⁵⁵ For juveniles, it is not uncommon for a defendant's attorney to be trying his or her first homicide case, as trial attorneys often cut their teeth in juvenile cases.

Those facing LWOP sentences do not benefit from the same level of procedural protections during the original trial or during the appeals process, despite the similarities they share with death sentences.⁵⁶ And though state and federal post-conviction habeas restrictions differ from

51. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion).

52. *Barkow*, *supra* note 38, at 206.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

state to state, appeals are frequently time-barred.⁵⁷ Yet there is virtually no limit to the appeals process where the penalty is death, resulting in offenders remaining in prison an average of about fifteen years before facing execution.⁵⁸ Of the roughly 3,300 prisoners currently on death row, nearly all will die of natural causes or suicide, the same cause of death for the roughly 41,000 individuals who comprise the LWOP population.⁵⁹

The means by which a defendant can be sentenced to death are much more limited than those for an LWOP defendant. First, depending on the jurisdiction, both judges and juries can deliver LWOP sentences, but death sentences are usually the sole decision of juries.⁶⁰ In addition, most states and the federal government require the jury to unanimously agree that a defendant should be sentenced to death, but this is not the case with LWOP. Unanimous jury decisions are not required for LWOP, and judges often make the sentencing decision. “[S]cholars estimate the reversal rate for noncapital cases to be 10–20%, far below the capital reversal rate of roughly 68%.”⁶¹

Another concern is the limited amount of information that juries are entitled to receive about sentencing options in death penalty cases. *Simmons v. South Carolina* determined that when a prosecutor who wishes to raise the issue of future dangerousness as justification for sentencing the defendant to death, he or she must disclose LWOP as an alternative if it is an option in the state.⁶² However, it is not a requirement to disclose any other sentencing options that might be available.

The lack of heightened review in cases leading to LWOP sentences brings an increased likelihood that innocent individuals will be punished. Just as placing an innocent person on death row is morally unacceptable, so too is the wrongful imprisonment of someone for the rest of his or her life. For both, it means a period of irreversible years spent in prison. Since 1973, there have been 141 exonerated death row prisoners;

57. See, e.g., *Merritt v. Blaine*, 326 F.3d 157, 159, 170 (3d Cir. 2003) (holding that equitable tolling of one-year statute of limitations on federal habeas petition, due to petitioner’s belief that he had properly filed for state habeas relief, was not warranted for LWOP sentence).

58. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2010 – STATISTICAL TABLES 12 tbl.8 (Jill Thomas ed., 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp10st.pdf> (noting that in 2010 the average time elapsed between sentencing and execution for all inmates was 178 months, or almost fifteen years).

59. See *Gottschalk*, *supra* note 42, at 267; *Nellis & King*, *supra* note 8, at 3.

60. A judge’s authority to sentence a defendant to death is only available through judicial overrides of jury recommendations, which are allowable in only Delaware, Alabama, and Florida. In Florida and Delaware they are rarely used and their relatively common use in Alabama is an anomaly. See also Raoul G. Cantero & Robert M. Kline, *Death Is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4 (2009).

61. *Henry*, *supra* note 17, at 77.

62. *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) (plurality opinion).

the exact number of exonerated individuals serving LWOP is not known but is presumed to be lower.⁶³ One such case is that of the West Memphis Three, which received prominent national attention by investigative journalists and Hollywood celebrities, ultimately pressuring the state enough to revisit the case. Eventually, the two LWOP sentences and one death sentence were successfully challenged, and the three men were released after serving sixteen years in prison for crimes they did not commit.⁶⁴

With few exceptions the weight of the discussion around innocence claims is focused on death sentences,⁶⁵ despite the strong probability that some prisoners serving life sentences are also innocent. Moreover, the death penalty is frequently used to leverage a guilty plea in exchange for a reduced sentence of LWOP.⁶⁶ There is some evidence that defendants sometimes plead guilty to avoid more severe sanctions even though they are actually innocent.⁶⁷

Perhaps one reason the practice of trading death for the rest of one's life behind bars is morally accepted is that the public believes that it is relatively simple to have a case reopened if new evidence of innocence emerges. In a 2010 national public opinion poll, respondents were asked to provide their level of agreement (on a scale of 0-10) with the following statement: "*With a sentence of life without parole, if new evidence of innocence emerges, the case can be reopened.*"⁶⁸ Sixty-six percent of respondents gave this a "10" and an additional fourteen percent gave it an "8" or "9," meaning that the vast majority of respondents thought this was an option for life sentences.⁶⁹ Yet, in reality this is not the case. Most states have time limits in which claims of innocence must be filed, ranging from just twenty-one days to three years.⁷⁰ And it is more difficult to have an LWOP case examined because of the perception advanced that less is at stake compared to a death sentence. Over the past three decades, the opportunities for post-conviction appeals

63. *Innocence and the Death Penalty*, DEATH PENALTY INFO. CENTER (Oct. 1, 2012), <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

64. CNN Wire Staff, *Freed 'West Memphis Three' Enjoy Family, Food, Technology*, CNN.COM (Aug. 20, 2011), <http://www.cnn.com/2011/CRIME/08/20/arkansas.child.killings/index.html>.

65. See Steiker & Steiker, *Opening a Window*, *supra* note 33, at 155, 159.

66. See Susan Ehrhard-Dietzel, *The Use of Life and Death as Tools in Plea Bargaining*, 37 CRIM. JUST. REV. 89, 90-91 (2012).

67. *Id.* at 90; ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 18 (2012), available at http://www.sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

68. DEATH PENALTY INFO. CENTER, FINAL WEIGHTED TOPLINES 5 (2010), available at <http://www.deathpenaltyinfo.org/documents/topline.DPIC.DPNDP.pdf>.

69. *Id.*

70. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1671-72 (2008).

have been drastically reduced.⁷¹

North Carolina's Racial Justice Act illustrates the subordinate position that LWOP holds in terms of protections against miscarriages of justice. Under the Act, a death row inmate can challenge his or her sentence on the grounds that race played a significant role in arriving at the sentence.⁷² Yet if the appeal is won and the case is determined to have been racially biased, the remedy is an LWOP sentence. Missouri and Pennsylvania introduced similar legislation in 2012.⁷³ Lawmakers seem to have come to the conclusion that it is somehow less unjust to administer an LWOP sentence than a death sentence when race was established to have played an important role.

In general, the public is less concerned about innocent people being sentenced to life without parole than being sentenced to death. In the same survey referenced above, respondents were asked to report how convincing they found the following statement:

The death penalty risks executing the innocent. Many innocent people have been sent to our nation's death rows before new evidence freed them and some innocent people may have been executed. It is unacceptable to execute innocent people, and in a system run by human beings that's inevitable. Executing innocent people is a risk we can completely avoid by using sentences of life with no possibility of parole.⁷⁴

Seventy-one percent of respondents found this statement to be very or somewhat convincing,⁷⁵ suggesting that the public is not nearly as concerned about individuals serving lifelong prison sentences, even if they are innocent, because the wrongful execution of them has been spared.

One might think that clemency is an option for relief from an LWOP sentence, but governors nationwide have denied virtually all clemency requests over the past three decades.⁷⁶ Petitioners must depend on a shift in the political landscape in order to hope for relief through clemency. One's readiness for release should be a decision that is determined by a professional panel equipped to review the prisoner's original sentence and his or her rehabilitation since arriving at prison.

Some states have eased the ways in which inmates can be released from long sentences, but in reality these early release valves are rarely

71. Molly M. Gill, *Clemency for Lifers: The Only Road Out is the Road Not Taken*, 23 *FED. SENT'G REP.* 21, 21 (2010).

72. N.C. GEN. STAT. § 15A-2010 (2011).

73. H.B. 1625, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H.B. 2256, 2012 Gen. Assemb., 2012 Sess. (Pa. 2012).

74. DEATH PENALTY INFO. CENTER, *supra* note 63, at 14.

75. *Id.*

76. Gill, *supra* note 71, at 21, 23.

used.⁷⁷ In Wisconsin, for instance, the Governor expanded a program in 2009 that permits LWOP inmates to petition for release on the basis of age and infirmity, but few inmates were released under this program and the program was later amended and restricted.⁷⁸ Virginia and several other states have a mechanism in place for geriatric release, but this too is rarely utilized.⁷⁹

B. *Mandatory Sentences*

By 1963, all states had abolished the mandatory imposition of the death penalty.⁸⁰ Analyses of executions before and after mandatory death sentences were permitted show a marked decline in the use of the death penalty when discretion is allowed.⁸¹ In at least twenty-nine jurisdictions, life without parole is mandatorily applied in some circumstances.⁸² The consequence of this is that decisions are not the product of reasoned deliberations.⁸³

The issue of mandatory LWOP sentences, at least for some, received national attention in June 2012 because of the U.S. Supreme Court decision in *Miller v. Alabama*. *Miller* held that individuals who are under the age of eighteen at the time of their crime cannot mandatorily be sentenced to life in prison without the possibility of parole.⁸⁴ In this particular case, Mr. Miller was fourteen at the time he committed homicide.⁸⁵ Similar to other recent rulings on juveniles, the Court maintained that juveniles' actions do not necessarily predict who they will become once they mature into adulthood.⁸⁶ Mandatory sentences preclude the possibility of a second look and were therefore determined to be unconstitutional for individuals under eighteen.

Judges are often frustrated with mandatory sentences such as LWOP. In one review of federal judicial opinions on sentencing, repeated concerns were voiced about extremely long sentences for non-

77. See Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED SENT'G REP. 1, 3 (2010).

78. Nicole M. Murphy, Note, *Dying to be Free: An Analysis of Wisconsin's Restructured Compassionate Release Statute*, 95 MARQ. L. REV. 1679, 1703, 1708, 1722 (2012); O'Hear, *supra* note 77, at 3.

79. See, e.g., N.M. STAT. ANN. § 31-21-25.1 (2010); N.C. GEN. STAT. §§ 15A-1369-1369.5 (2011); VA. CODE ANN § 53.1-40.01 (2009).

80. See *Woodson v. North Carolina*, 428 U.S. 280, 291-92 (1976) (plurality opinion).

81. WILLIAM J. BOWERS ET AL., *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA*, 1864-1982, at 87-89 (1984).

82. See *Miller v. Alabama*, 132 S. Ct. 2455, 2471 & n.9 (2012).

83. See Bowers, *supra* note 39, at 49.

84. *Miller*, 132 S. Ct. at 2475.

85. *Id.* at 2462.

86. See *id.* at 2463-65, 2468-69 (citing *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)).

violent and first time offenders.⁸⁷ According to one judge, sentences that held nonviolent offenders past the age of sixty were “pointless.”⁸⁸ “Moreover, if there is no likelihood of release before death or old age, some judges [a]re troubled that these defendants w[ill] have no hope, and therefore, little incentive to be ‘model prisoners.’”⁸⁹ Judges have also noted that giving a thirty-year sentence “when fifteen would accomplish the same goal” is fiscally irresponsible.⁹⁰

Federal judges have expressed much frustration in their limited discretion at the sentencing stage when a mandatory life sentence is the only option.⁹¹ Individuals who pose no threat of physical harm and have been convicted of nonviolent offenses are nevertheless subjected to mandatory LWOP sentences under harsh federal sentencing structures.⁹² Recollecting one such case, a federal judge remarked in an interview that had he not been forced to issue an LWOP sentence, he would have opted for a term of ten to twelve years.⁹³

C. Racial Disparity

Racial disparity is a widely documented problem in death sentences; multiple studies confirm that race plays a fundamental role in sanctions imposed within the criminal justice system.⁹⁴ The race of the victim appears to play a particularly important role in whether the death penalty is sought.⁹⁵

Any sentence that is more likely to be imposed because of one’s racial or ethnic background, all other factors being equal, is inappropriate. Just as it is wrong to administer a death sentence when it is discovered that the trial phase was influenced by race, it is also wrong to

87. David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guideline Era*, 79 U. COLO. L. REV. 1, 47–50 (2008).

88. *Id.* at 48.

89. *Id.*

90. *Id.* at 49.

91. *See, e.g., id.* (“On the other hand, Judge Longstaff stated, ‘The mandatory life sentence as applied to you is not just, it’s an unfair sentence, and I find it very distasteful to have to impose it’”).

92. *Id.* at 49–50.

93. *Id.*

94. *See generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); DAVID COLE, NO EQUAL JUSTICE—RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE (2006).

95. BOWERS ET AL., *supra* note 81, at 224–32; David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 709–10 (1983); David C. Baldus & George Woodworth, Race of Victim and Race of Defendant Disparities in the Administration of Maryland’s Capital Charging and Sentencing System (1978–99): Preliminary Finding 2 (Feb. 15, 2001) (unpublished manuscript) (on file with the Maryland State Law Library).

sentence someone to life in prison for this reason. Yet we see this playing out in states around the country.

Of the 41,095 people serving LWOP sentences (as of 2008), 48.3% are African-American.⁹⁶ While data on the race of the victims for all people serving life without parole sentences has not been gathered, an analysis of data on juvenile life without parole (“JLWOP”) shows that the proportion of African-Americans serving JLWOP sentences for killing a white person (43.4%) is nearly twice the rate at which African-American juveniles overall have been arrested for taking a white person’s life (23.2%).⁹⁷ Perhaps other factors, such as a prior record, account for this large-scale disparity, but until we can be absolutely certain that these other factors provide a full explanation, it is inappropriate to permit criminal sentencing that produces racial disparity.⁹⁸

IV. LWOP AS AN INAPPROPRIATE ALTERNATIVE TO THE DEATH PENALTY

The reasons why American society will eventually decide to eliminate the death penalty as a punishment are as important as the outcome—maybe more so. Subsequent sentencing reform efforts are more difficult when LWOP is promoted as an alternative only to be opposed later. As advocates work to eliminate the death penalty, they may harm later efforts if LWOP is dismissed as unworthy of similar ethical concerns.

This is apparent in the juvenile arena, where the potential pitfalls of this approach were observed during the oral arguments in *Miller*, the Supreme Court case considering LWOP for juveniles. At oral argument, Justice Ginsburg pointed out that LWOP was a sufficiently severe sanction that could be a constitutional alternative to the death penalty for juveniles:

[B]ut in *Roper*, the Court also made the point—when it ruled out the death penalty, it said, “To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction.”

So, the Court in *Roper* seemed to be anticipating this case and suggesting that—that it was all right, it was constitutional.⁹⁹

96. NELLIS & KING, *supra* note 8, at 11.

97. NELLIS, *supra* note 67, at 3.

98. *Id.* at 15.

99. Transcript of Oral Argument at 4, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-9646.pdf (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

Pitting these two sentences against one another makes later reform efforts more difficult.

The Supreme Court typically avoids regulating the constitutionality of sentences other than the death penalty.¹⁰⁰ *Graham v. Florida*,¹⁰¹ which acknowledged the appropriateness of an Eighth Amendment analysis for a noncapital, non-homicide crime, is a significant departure from the Supreme Court's precedent for narrowing the scope of its Eighth Amendment considerations to the death penalty.¹⁰² Before *Graham*, the Court had largely limited its rulings on cruel and unusual punishments to death-eligible cases.¹⁰³ In *Graham*, Justice Kennedy wrote that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences" because both "alter[] the offender's life by a forfeiture that is irrevocable."¹⁰⁴

The death penalty is a small fraction of our complete crime policy structure, yet it stands as a symbol both domestically and internationally that America continues to be tough on crime. At a 2011 GOP debate, Texas Governor Rick Perry announced with pride that his state's execution of 234 people demonstrated "the ultimate justice."¹⁰⁵

V. SUGGESTIONS FOR REFORM

A. *Seek Nuanced Assessments of Death Penalty Alternatives*

Despite sizable declines in support over the years, the majority of the public still favors the death penalty. In a 2010 Gallup Poll, 64% of respondents said that they supported the death penalty for persons convicted of murder and 29% opposed it; the percentage in favor of the death penalty wavered only slightly between 2002 and 2010.¹⁰⁶ Yet, when surveys provide alternatives to the death penalty, support for the death penalty drops considerably.¹⁰⁷

100. Steiker & Steiker, *Opening a Window*, *supra* note 33, at 159.

101. 130 S. Ct. 2011 (2010).

102. *See generally* Steiker & Steiker, *Opening a Window*, *supra* note 33, at 177–90 (discussing the Supreme Court's application of the Eighth Amendment's Cruel and Unusual Punishments Clause).

103. *Id.* at 178. 184 *But see* *Ewing v. California*, 538 U.S. 11 (2003); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Solem v. Helm*, 463 U.S. 277 (1983).

104. *Graham*, 130 S. Ct. at 2027.

105. *POLITICO-NBC News Republican Debate* (NBC television broadcast Sept. 7, 2011); *The Republican Debate at the Reagan Library*, N.Y. TIMES, Sept. 7, 2011, http://www.nytimes.com/2011/09/08/us/politics/08republican-debate-text.html?pagewanted=all&_r=0 (transcript of the full debate).

106. Frank Newport, *In U.S., 64% Support Death Penalty in Cases of Murder*, GALLUP (Nov. 8, 2010), <http://www.gallup.com/poll/144284/support-death-penalty-cases-murder.aspx>.

107. *See infra* Table 1. Death Penalty Information Center (2012). *Facts about the Death Penalty*. Washington, DC: Death Penalty Information Center. Available online: <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

It is misleading to measure public opinion based on a limited range of sentencing options when, in actuality, there are additional sanctions that both support prison reform and protect public safety. It is essential to explore public support for all sentencing alternatives to the death penalty, not only life without parole.

Promotion of LWOP in exchange for fewer death sentences legitimizes LWOP even though it, too, is rife with problems of its own.

B. *Look to Other Countries for Guidance*

Many countries exist without the death penalty or LWOP and are able to maintain public safety.¹⁰⁸ These countries do not experience major crime spikes.¹⁰⁹ According to a 2005 United Nations report, seven countries reported having a mandatory life sentence for murder; however, all of them reported mechanisms for releasing prisoners after a certain period of time.¹¹⁰ In 2005, the United Kingdom had only twenty-two prisoners serving LWOP sentences.¹¹¹ Most European countries do not have parole-ineligible life sentences.¹¹² In these countries, it is recognized that no one should be declared beyond reform or redemption without first attempting to rehabilitate them.¹¹³ A comprehensive review after some term of years is considered appropriate because of the emphasis on human rights and human dignity.¹¹⁴ Perhaps we can learn from these countries how to develop a continuum of sanctions that encourages individual reform and protects the public at the same time.

C. *Oppose LWOP Except in Death-Eligible Cases*

The esteemed American Law Institute notes in its Model Penal Code that LWOP is only an appropriate sentence in cases where the defendant would otherwise receive the death penalty.¹¹⁵ The advocacy for LWOP as an alternative to the death penalty should not endorse LWOP as an acceptable sentence on its own, leading to a further upward creeping of LWOP sentences.

108. See Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 601, 606 (2007).

109. Richard Berk, *New Claims about Executions and General Deterrence: Déjà vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303 (2005).

110. Appleton & Grøver, *supra* note 108, at 601–02.

111. *Id.* at 603.

112. See *id.* at 601, 610.

113. See *id.* at 609–10.

114. Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT'G REP. 39, 46 (2010).

115. MODEL PENAL CODE: SENTENCING at 21 (Discussion Draft No. 3, 2010) (“[LWOP] is disapproved in theory, but reluctantly accepted when it is the only alternative to a death sentence.”).

Perhaps the wholesale elimination of LWOP as a sentence is unlikely in the near future, limited largely by continued loyalty to the retributive goal of punishment. Judicial or legislative bodies could decide to narrow the scope of allowable scenarios that could result in an LWOP sentence, excluding the mentally handicapped and those convicted of felony murder from LWOP eligibility, for instance. These exemptions were successfully made for the death penalty in *Enmund v. Florida*¹¹⁶ and *Atkins v. Virginia*.¹¹⁷ *Graham* and *Miller* are significant victories in excepting juveniles from tough sanctions, but the progress need not be limited to juveniles. These two recent cases suggest the Court's potential willingness to draw additional categorical distinctions in limiting LWOP sentences.

VI. CONCLUSION

Life without parole is effectively a death sentence; to consider it as anything less severe is a mistake. Even though one's death may not occur for a few decades or more does not mean that the government has not decided how and where the individual will die. When looked at from this view, LWOP is not so different from the death penalty. Moreover, in both an execution and a life sentence without the possibility of parole, there is no hope for redemption or reform, despite the reality that many people turn away from their criminal pasts and go on to lead law-abiding lives where they could contribute in a positive way to society. Neither of these two sentences allow for this possibility, however. Both the death penalty and LWOP are terminal sentences and guarantee that the prisoner will die in prison.

Death penalty abolitionists are in a difficult position. Victories in eliminating the sentence have only been successful in recent years despite efforts that span the last several decades. Advocates to eliminate LWOP can sympathize with the challenges inherent in this effort and know that most abolitionists privately consider LWOP to be an excessive punishment as well. Yet everyone agrees that if forced to choose between a death sentence and LWOP, life without parole is the preferred sentence.

Ultimately, however, neither sentence is appropriate in a corrections system that has the ability to reform lives as ours does. Our society demands fair and just sentences that keep the public safe, apply a reasonable amount of punishment, and attempt to reform the offender so that he or she can be safely returned to the community. Neither the death penalty nor LWOP accomplish these goals.

116. 458 U.S. 782 (1982).

117. 536 U.S. 304 (2002).