

No Way Out?

Life Sentences and the Politics of Penal Reform

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The Great Recession has raised expectations that the United States will begin to empty its jails and prisons because it can no longer afford to keep so many people behind bars.¹ As Attorney General Eric Holder told the American Bar Association in August 2009, the country's extraordinary incarceration rate is "unsustainable economically."² The economic crisis has sparked a major rethinking of U.S. penal policies that may eventually result in significant cuts in the country's incarceration rate, which for years has been the highest in the world. Enthusiasm for the "war on drugs" appears to be waning at the federal and state levels. States have enacted a slew of penal reforms aimed at shrinking their prison populations, including expanding the use of alternative sentences and drug courts, loosening restrictions on parole eligibility, and reducing revocations of parole and probation for minor infractions.³ Dozens of states have cut their corrections budgets the past few years, and many have proposed closing penal facilities to save money.⁴ In 2009, the total state-prison population in the country dipped for the first time since 1972.⁵

Although the economic crisis has been a catalyst to reexamine many penal policies, the political obstacles to seriously reconsidering the widespread use of life sentences in the United States remain formidable. The United States continues to be deeply attached to condemning huge numbers of offenders to the "other death penalty" despite mounting evidence that lengthy sentences have minimal impact on reducing the crime rate and enhancing public safety. Moreover, some of the recent successes of penal reformers seeking to soften the hard edge of the U.S. carceral state, including opponents of capital punishment and foes of the war on drugs, may be coming at the cost of reinforcing the country's strong attachment to the widespread use of life sentences and life sentences without the possibility of parole (LWOP).

Life sentences have become so commonplace that about 1 out of 11 people imprisoned in the United States is serving one.⁶ Nearly one-third of these life-sentenced offenders have been sentenced to LWOP.⁷ The total life-sentenced population in the United States is about 141,000 people—or about twice the size of the *entire* incarcerated population in Japan. Indeed, the United States locks up people for life at a rate of about 50 per 100,000 people, which is comparable to the incarceration rate for *all* prisoners in Sweden and other Scandinavian countries, including pretrial detainees.⁸ These figures on life sentences do not fully capture the extraordinary number of people who will spend all or much of their lives in U.S. prisons, as Jessica S. Henry elaborates in her chapter in this book. They do not include the “virtual lifers”—people serving so-called basketball sentences that exceed a natural life span and who will likely die in prison long before reaching their parole-eligibility or release dates.⁹ Moreover, defendants serving life sentences have much in common with defendants sentenced to capital punishment. They are disproportionately poor, African American, and Hispanic and are often bereft of adequate legal representation. The conditions of confinement for prisoners serving life sentences in the United States and elsewhere “are often far worse than those for the rest of the prison population and more likely to fall below international human rights standards.”¹⁰

The explosion in the number of lifers in the United States since the 1970s is a dramatic change in U.S. penal policy. For much of the last century, life in prison “never really meant life in prison” thanks to critical penal reforms during the Progressive era.¹¹ These reforms were rooted in growing enthusiasm for early release as halfway houses, work-release programs, and parole programs proliferated. In 1913, a “life” sentence in the federal system was officially defined as 15 years.¹² Many states had comparable rules.¹³ Until the early 1970s, even in a hard-line state such as Louisiana, which today has the country’s highest incarceration rate, a life sentence typically meant 10 years and 6 months. For almost five decades, the 10/6 law, enacted in 1926, governed life sentences in Louisiana. Lifers were routinely released in Louisiana after serving about a decade if they had good conduct records and the warden’s support. The years that inmates spent in Louisiana’s infamous Angola prison were oftentimes brutal and dehumanizing, but they nearly always had an end date. Almost overnight that changed. In 1973, lawmakers in Louisiana raised the minimum to be considered for clemency to 20 years. Three years later they raised it to 40 years. And in 1979 they mandated that all life sentences meant life without the possibility of parole.¹⁴ In 1970, just 143 people

were serving LWOP sentences in Louisiana. By 2009, it had mushroomed to 4,270—or to about 11 percent of the state’s entire prison population.¹⁵

The political and legal obstacles to reducing the life-sentenced population in the United States are formidable. In the 2010 *Graham vs. Florida* decision, the Supreme Court ruled that sentencing juveniles convicted of nonhomicidal crimes to life imprisonment without the possibility of parole was unconstitutional. That decision bolstered faith in focusing on the courts to reduce the lifer population. However, this faith in legal strategies may be unwarranted. In the absence of a wider political push to challenge life sentences, the courts can be counted on at best to chip away at the life-sentenced population without making a major dent in it. Relatively speaking, the political and legislative arenas—not the courts—may be more promising forums to challenge life sentences. That said, the obstacles to convincing governors, legislators, prosecutors, parole and pardon boards, and the general public to seriously rethink the country’s excessive reliance on extraordinarily long sentences are considerable.

This chapter identifies some of the key hurdles and assesses emerging legal and political strategies to reduce the number of lifers and to challenge excessive sentences more broadly. It begins by highlighting why an assault on life sentences waged primarily through the courts is not likely to reduce the lifer population significantly. The second section examines how concerns about recidivism and public safety tower over all discussions of penal reform, often to the detriment of lifers. It also discusses how the war on the war on drugs influences penal policy more generally. In particular, it may be constricting political opportunities to reduce the broader lifer population.

The third section examines how the vast heterogeneity of the life-sentenced population, as measured by offense, is an impediment to developing effective political and legal strategies to challenge the widespread use of the “other death penalty.” It focuses on the political and legal challenges posed by four categories of lifers: those convicted of felony murder, juvenile lifers, California’s three-strikers, and the “worst of the worst,” who have been convicted of particularly brutal or heinous crimes. The fourth section analyzes why executive clemency, which used to be an important release valve for lifers, has atrophied in the United States and the obstacles to resuscitating what once was an integral feature of the criminal justice system.

The final section analyzes the long shadow that capital punishment continues to cast over penal policy in general and life sentences in particular. It assesses the degree to which the abolitionist movement has contributed to the proliferation of life sentences. It also identifies some key lessons that

opponents of life sentences should draw from the setbacks and victories of the abolitionist movement.

I. No Judicial Promised Land

The public has been largely indifferent to the proliferation of life sentences and of disproportionate and arbitrary punishments in the United States. Likewise, the political process has failed to engage in a serious debate about these issues. For these reasons, the courts appear to some observers to be the most promising arena to check the “excessive punishments that emerge from a democratic process that fails to give noncapital sentencing rational consideration.”¹⁶ This confidence in the judiciary’s greater potential to lead the way in curtailing extreme sentences in the United States is unwarranted. Moreover, an excessive focus on judicial strategies may come at the cost of developing successful complementary political and legislative strategies to shrink the lifer population.

The Supreme Court has a “highly unsatisfactory and disappointing” record when it comes to defining and limiting disproportionate sentences.¹⁷ Generally, the Supreme Court has been extremely supportive of life sentences. In *Schick v. Reed* (1974), it dismissed any notion that LWOP was unconstitutional.¹⁸ In *Harmelin v. Michigan* (1991), it ruled that LWOP sentences do not require the same “super due process” procedures mandated in capital punishment cases.¹⁹ Thus, LWOP has become cheaper and easier to mete out than a death sentence.²⁰ Few LWOP prisoners “have any reasonable chance of getting their sentences overturned or reduced.”²¹ Offenders sentenced to life often have fewer legal resources to challenge their sentences because they are not entitled to the automatic appeals process available to prisoners on death row. Moreover, most postconviction offices and organizations focus almost exclusively on capital cases.

A life sentence has become an acceptable punishment not only for murder but also for a wide variety of other crimes, some of them quite trivial, as evidenced by the popularity of draconian versions of three-strikes legislation. In *Lockyer v. Andrade* (2003), the U.S. Supreme Court affirmed two 25-years-to-life sentences for a California man whose third strike was the theft of \$153 worth of videotapes intended as Christmas gifts for his nieces. In *Ewing v. California* (2003), it sanctioned a 25-years-to-life sentence under California’s three-strikes law for the theft of three golf clubs. In rendering these decisions, the Supreme Court affirmed that proportionality is a valid constitutional principle but then rejected strong proportionality limits. Its

jurisprudence with respect to noncapital sentences has been a “meaningless muddle”²² in which “no clear definition of proportionality can be found.”²³ The Supreme Court has consistently given legislators and judges wide berth to impose whatever punishments they see fit—short of death—without significant judicial oversight.

The Supreme Court’s persistent reluctance—or hostility—to meaningfully defining and imposing real proportionality limits on noncapital cases stands in sharp contrast to its behavior in other areas of law. With respect to fines, forfeitures, and punitive damages, it has shown itself to be willing and able to set limits and define excessiveness. Concerns about federalism, separation of powers, and judicial restraint have not prevented the Court from imposing meaningful “constitutional proportionality limits in many other areas of law,” unlike in the case of noncapital sentences.²⁴ This suggests that the Supreme Court lacks the will—not the capability—to take up the task of reviewing noncapital sentences and to devise a meaningful definition of proportionality that limits excessive sentences.

Capital punishment is one area of criminal law where the Supreme Court has sought to define a robust oversight process and curb excessive punishment.²⁵ The Court requires states to have clear guidelines for the imposition of a capital sentence so that it is not imposed capriciously and arbitrarily. It has banned mandatory death sentences and insisted that capital defendants have the opportunity to present all kinds of mitigating evidence in the sentencing phase of their trial. It has sought to make the punishment fit the crime in capital cases, thus forbidding the execution of people convicted of rape and greatly restricting the use of the death penalty in felony murder cases.²⁶

By contrast, life sentences are imposed today in a manner that is similar in some ways to how death sentences were imposed in the pre-*Furman* and pre-*Gregg* eras, before the Supreme Court nationalized capital punishment and began to regulate it through its new death-is-different doctrine. This has prompted some observers to argue, notably Bowers in his contribution to this volume, that pushing the courts to extend the death-is-different doctrine to lifers may be the most fruitful way to curtail use of this extreme sentence. The *Graham* decision, which was a rare instance when the Court stepped in to regulate a noncapital sentence and borrowed from the death-is-different canon to do so, has reinforced this view. However, it is doubtful that legal strategies derived from death penalty jurisprudence will significantly stem the flow of life sentences in the United States.

First, as Rachel E. Barkow argues in her contribution to this volume, the Supreme Court has been scrupulous about keeping its death penalty juris-

prudence from bleeding into other areas of criminal justice by repeating the truism that death is different.²⁷ Second, one thing supporters and opponents of the death penalty agree on is that the Supreme Court's regulation of capital punishment has not been a success. As Supreme Court Justice Harry Blackmun declared in 1994, a decade and a half after he voted in favor of reinstating the death penalty in the *Gregg* decision, "[T]he death penalty experiment has failed."²⁸ Today, the death penalty is "overlaid by a web of rules and procedures that is more complex than that of any other area of criminal law."²⁹ Yet opponents of the death penalty complain that capital defendants are regularly denied due process and that capital punishment continues to be imposed in a capricious, arbitrary, and discriminatory fashion.³⁰ Stephen Bright, a leading capital defense attorney, sardonically titled one of his articles "Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer."³¹ Meanwhile, supporters of capital punishment lament the lengthy, often unending, legal appeals process in death penalty cases that in their view denies victims' families the closure that a timely execution reportedly brings.

Compared to the "virtually nonexistent"³² oversight of noncapital cases, the death penalty review process may look robust. However, on its own, the body of rules and principles that has developed over the past four decades to govern capital punishment "is notoriously hard to decipher" and oftentimes "confused and contradictory."³³ Moreover, around 1983 the Supreme Court began dismantling or weakening some of the legal protections it had erected for capital defendants over the previous decade. The U.S. Congress subsequently joined the Court in this shift toward "deregulating death."³⁴

It would be a mistake to view the *Graham* decision as a major departure from these general trends or to interpret it as a signal that the judiciary is the Promised Land to roll back life sentences in the United States. In *Graham*, as in the *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005) decisions, which respectively banned the execution of the mentally retarded and juvenile offenders, the Court emphasized that it was dealing with an extremely rare sentencing practice. It noted that perhaps as few as 129 men and women currently were serving LWOP sentences for nonhomicidal crimes committed when they were juveniles.³⁵ The Court pointed to the rare use of this sentence as one piece of evidence that these particular LWOP sentences were at odds with "evolving standards of decency," a key pillar of its death penalty jurisprudence, and thus were cruel, unusual, and unconstitutional. To gauge "evolving standards of decency," it weighed not just how many states had this sentence on the books but also how few actually imposed it. The Court also

noted that international opinion and practice were arrayed against LWOP sentences for juvenile offenders, as were some key professional associations.

Even though the Court borrowed from the capital punishment canon to invalidate LWOP for these particular juvenile offenders, “evolving standards of decency” does not look like a promising avenue to mount a broader legal challenge to LWOP or other life sentences. It is hard to make the case that the American public has become disenchanted with LWOP or life sentences more generally for most adult offenders. Prior to the 1970s, LWOP was virtually nonexistent. Today 49 states have some form of LWOP on the books, up from 16 in the mid-1990s.³⁶ In six states—Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota—all life sentences mean life without the possibility of parole. The same is true for life sentences in the federal system, which ended parole eligibility for life-sentenced prisoners in 1987. This was a sharp reversal. A decade earlier, parole eligibility for federal lifers had been reduced to 10 years.³⁷ Over the past three decades, the U.S. incarceration rate has quadrupled. “However, the LWOP population in the United States has increased at an even greater rate than the overall prison population,” according to Appleton and Grøver. “The ratio of the LWOP population to the U.S. prison population has increased to such an extent that it is currently a 100 times greater than it was 30 years ago.”³⁸ Public opinion polls show growing and strong support for LWOP as an alternative to the death penalty.³⁹ Although international practice and opinion are decidedly against LWOP and the widespread use of other kinds of life sentences, international sentiment has been at best a second-tier consideration for the Court in gauging “evolving standards of decency.” In short, LWOP and other life sentences are a widely used but unremarkable part of the sentencing toolkit in the United States. One would be hard-pressed to argue that they violate the “evolving standards of decency” as defined by the capital punishment legal canon.

In *Graham*, the Supreme Court identified the “denial of hope” as another reason to declare that these specific juvenile LWOP sentences were unconstitutional. The Court favorably quoted a lower court decision to overturn an LWOP sentence for a juvenile offender. That sentence was unacceptable because it “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”⁴⁰ However, “denial of hope” does not look like a fruitful opening to challenge life sentences more broadly. Lifers exhibit a wide range of behaviors and coping strategies, much as one would find among the terminally ill or chronically disabled at various stages of their diagnoses and ill-

nesses.⁴¹ Anyone who has spent some time with lifers—especially lifers who have been incarcerated for a decade or more—cannot fail to be impressed with how hopeful many of them appear to be. Many lifers doggedly seek purpose in their lives despite what may appear to many outsiders to be bleak living conditions and bleak life prospects.

New research is substantiating this view. Until the 1980s, most studies appeared to support the claim that “long-term incarceration inevitably leads to a systematic physical, emotional and mental deterioration.”⁴² More recent research suggests that “lifers have survived the considerable adversity of confinement through an ‘optimistic sense of personal efficacy,’” by compiling trouble-free disciplinary records, and by strictly adhering to daily routines defined by a range of activities, including educational programs, volunteer work, religious studies, mentoring, and physical fitness.⁴³ These are “fruits of hope” that are “crucial to their psychological survival.”⁴⁴ Confined for the long haul, many lifers come “grudgingly to accept the prison as their involuntary home for life and fellow lifers as something akin to an adopted family.”⁴⁵ This helps explain why lifers are “the stabilizing force for prison management and for creating a more livable atmosphere,” according to one lifer.⁴⁶

This is not to deny or minimize the severe psychological distress that often comes with a life sentence. Life sentences are like a death in slow motion for many prisoners, causing great mental and sometimes great physical distress, as Sharon Dolovich elaborates in her chapter in this book. As Lewis E. Lawes, warden of New York’s Sing Sing prison in the 1920s and 1930s, once said, “Death fades into insignificance when compared with life imprisonment. To spend each night in jail, day after day, year after year, gazing at the bars and longing for freedom, is indeed expiation.”⁴⁷ A survey of offenders on death row in Tennessee found that half of them perceived LWOP to be a harsher punishment than execution.⁴⁸

In short, the courts have been persistently reluctant to engage in a serious review of noncapital sentences. The hostility of the political process to rethinking lengthy sentences is matched in some ways by the courts. Notably, in the immediate wake of *Graham*, not a single former juvenile sentenced to LWOP in Florida has found much relief in the courts. The handful who thus far have returned to the trial courts for resentencing received de facto life sentences of 50, 65, and even 90 years.⁴⁹ Although *Graham* certainly provides a legal opening, it is likely to be a very limited opening. This does not mean opponents of the proliferation of life sentences should give up on the courts. Rather judicial efforts need to be pursued in tandem with political and legislative strategies and with a clear understanding of their limitations.

The political and legislative obstacles to rethinking the widespread use of life sentences are almost as daunting as the judicial ones. The remainder of this chapter examines some of the key impediments to developing effective political and legislative strategies to end the country's excessive reliance on extraordinarily long sentences.

II. Lengthy Sentences, Recidivism, Public Safety, and the War on Drugs

The U.S. commitment to life sentences remains deep despite a formidable consensus among experts on sentencing and crime that imprisonment and lengthy sentences do not necessarily deter offenders and would-be offenders from committing crimes. State-of-the-art research in criminology is substantiating Italian philosopher Cesare Beccaria's provocative claim in the 18th century that the certainty of punishment is a far greater deterrent to crime than the severity of punishment.⁵⁰ The most persuasive studies "suggest that increases in the severity of punishment have at best only a modest deterrent effect."⁵¹ All things being equal, the recidivism rate for people sentenced to prison, regardless of sentence length, is higher than for those who receive alternative sanctions.⁵² It also appears that increasing sentence lengths considerably does not deter crime. For example, sentencing enhancements for offenders who use a gun when committing a crime apparently have not reduced the use of guns.⁵³

The deterrent and incapacitative effects of lengthy sentences are so modest for several reasons. Although we still need to know much more about what determines criminal decision-making, we do know that offenders tend to be present oriented. Thus, lengthening the sentence from, say, 15 years for a certain offense to life in prison is unlikely to have much of an effect on whether someone commits that crime or not. Moreover, the evidence that people age out of crime is compelling. Researchers have persistently found that age is one of the most important predictors of criminality. Criminal activity tends to peak in late adolescence or early adulthood and then declines as a person ages.⁵⁴ Finally, many lifers are first-time offenders convicted of homicide. The phrase "one, then done" is commonly used to sum up their criminal proclivities.

Older inmates who have served lengthy sentences are much less likely to return to prison due to the commission of a serious crime than are younger inmates who have served shorter sentences. The recidivism rate for lifers is much lower by far than for other offenders. People released from a life sen-

tence were less than one-third as likely to be rearrested as all released prisoners, according to an analysis by The Sentencing Project.⁵⁵ Two-thirds of all people released in 1994 were rearrested, compared with one in five people who were released from a life sentence.⁵⁶ Only seven of the 285 lifers in Pennsylvania who were released on parole between 1933 and 2005 after their sentences were commuted were recommitted to prison for a new crime. Of the nearly 100 commuted lifers who were ages 50 and above when they were released, only one was sent back to prison for a new crime.⁵⁷ According to a 2011 study by the New York State parole board, of the 368 people convicted of murder who were granted parole in New York between 1999 and 2003, just “six, or 1.6 percent, were returned to prison within three years for a new felony conviction—none of them a violent offense.”⁵⁸ These findings are consistent with other studies documenting the relatively low recidivism rate of people convicted of murder and of people on death row.⁵⁹ For example, Hugo Adam Bedau found that less than 1 percent of released murderers were returned to prison for committing a subsequent homicide.⁶⁰

These research findings on recidivism and public safety have not spurred a rethinking of penal policy for longtime or serious offenders. Faced with severe budget shortfalls, many states have begun talking about how to reduce their prison populations. But their attention has been focused primarily on how to shorten the prison stays of nonviolent offenders and how to keep them out of prison altogether. Policymakers and public officials generally are not pushing to revitalize the parole and commutation processes so that even people who committed serious crimes and/or received lengthy sentences get a chance to prove they are rehabilitated and should be released. Nor have they pushed for abolishing life in prison without the possibility of parole and for making all life sentences parole eligible. Although several states have enacted new measures intended to expand the use of geriatric or compassionate release for elderly or gravely ill inmates, few inmates are actually being released under these new provisions.⁶¹

Life sentences and decades-long sentences contribute little to enhancing public safety and are socially and economically very costly, but rethinking their widespread use is not high up on the penal reform agenda for several reasons. One reason has to do with how the political mobilization against the war on drugs has developed. The battle against the war on drugs has been premised in part on lightening up on drug offenders and other nonviolent offenders while getting tough with the “really bad guys.” This quid pro quo has reinforced the misleading belief that there are two very distinct and immutable categories of offenders, the violent ones and the nonviolent ones,

which has been to the detriment of lifers. This helps obscure the fact that the United States, relatively speaking, is already quite punitive toward violent offenders and property offenders and has been so for a long time now.⁶² It also fuels the misperception that the war on drugs has been the primary engine of mass incarceration in the United States and that ending it would significantly reduce the country's prison population while leaving the "really bad guys" in prison where they belong.⁶³

A decade ago, Franklin Zimring argued that the era of mass incarceration that began in the 1970s was not a unitary phenomenon and could be broken down into three distinct periods driven by different engines of growth.⁶⁴ From 1973 to the mid-1980s, the main engine was a general rise in committing more marginal felons to prison, with few discernible patterns by type of crime or type of offender.⁶⁵ The 1985–92 period was the heyday of the war on drugs, when "the growth of drug commitments and drug sentences far outpaced the rate of growth of other offense commitments."⁶⁶ Zimring tentatively suggested (because of insufficient evidence at the time) that longer sentences for a range of offenses propelled the prison population upward in the third period, which began in the early 1990s. The intensely punitive political climate at the time fostered penal innovations such as "three strikes and you're out," truth in sentencing, and the growing use of life sentences.

New research by William Sabol, the chief statistician for the U.S. Bureau of Justice Statistics, more precisely identifies what has been driving up the prison population since crime rates began dropping in the early 1990s. All the attention that opponents of the war on drugs, most notably the Drug Policy Alliance, have brought to bear on the excesses of the war on drugs have fueled the public perception that the country's hard-line drug policies have been the primary engine of prison growth. Sabol's findings challenge this widespread belief. He calculates that the contribution of violent offenders to the prison population dwarfs the contribution of drug offenders. Drug offenses accounted for 16 percent of the total increase in the state prison population from 1994 to 2000 and slowed to just 7 percent from 2000 to 2006.⁶⁷ Overall, drug offenders were responsible for 13 percent of the growth in the state prison population from 1994 to 2006.⁶⁸ By contrast, in the face of plummeting violent crime rates, defendants convicted of violent crimes accounted for almost two-thirds of the overall growth in state prisoners from 1994 to 2006. The lion's share of the Drug Policy Alliance's efforts has been focused on reforming the nation's marijuana laws. But cannabis offenders, who account for one million arrests annually, comprise only 30,000 of the 2.3 million people in U.S. jails and prison today—or about 1.5 percent.⁶⁹ These

figures indicate that ending the war on drugs—one of the top priorities for many penal reformers—will not necessarily end mass incarceration in the United States because drug offenders have not been the primary driver of recent growth.

Opposition to the war on drugs has dominated the penal reform movement, overshadowing the plight of the “really bad guys” left behind. On a number of occasions lawmakers have enacted comprehensive penal reform packages that reduce the penalties and/or provide alternatives to incarceration for drug possession and other nonviolent crimes while simultaneously ratcheting up the punishments for other crimes. For example, in 2010, South Carolina legislators approved a number of laudable sentencing reforms with bipartisan support. These reforms included equalizing the penalties for possession of crack and powdered cocaine, authorizing greater use of alternatives to incarceration for people convicted of nontrafficking drug offenses, and reducing the maximum penalty for burglary. But South Carolina lawmakers also added two dozen offenses to the “violent crime” list and expanded the opportunities to impose LWOP sentences.⁷⁰

The past few years, maverick district attorneys launched into office in major urban areas with the backing of broad penal reform coalitions have served as important beachheads to engineer wider statewide shifts in penal policy. However, most of their focus has been on the shortcomings of the war on drugs. The plight of people serving lengthy sentences for serious or violent crimes has not been part of their reform agenda.

New York State is a good case in point. The Empire State has garnered enormous attention recently for its success in reducing its prison population by 20 percent between 1999 and 2009.⁷¹ Drug offenders have constituted a much higher proportion of New York’s prison population than the national average thanks to the draconian Rockefeller drug laws.⁷² The decades-long “Drop the Rock” campaign centered on exposing the racial disparities in imprisonment created by enforcement of the Rockefeller drug laws. The upset victory of David Soales in Albany’s 2004 district attorney contest was a “watershed event” in the fight to repeal the Rockefeller drug laws.⁷³ Drug policy reform was the central plank of his campaign, which drew support from both urban areas and affluent suburbs. The Pataki administration’s partial rollback of the Rockefeller laws in 2003–5, the consequence of an immediate budget crisis and the “Drop the Rock” campaign, and David Patterson’s assumption of the governorship after Eliot Spitzer resigned in disgrace in 2008 paved the way in April 2009 for the evisceration of what remained of the Rockefeller drug laws. The New York legislature enacted the 2009 reform

package in the face of strong opposition from the New York State association of district attorneys, which criticized it as “a serious threat to public safety in our state.”⁷⁴

The extent of the rollback in the war on drugs in New York State is exceptional. In other ways, however, New York is a very typical state when it comes to penal issues. Like public officials elsewhere, its legislators have been reluctant to support proposals to decrease the time served by people convicted of violent offenses. In enacting the 2009 reform package, they rejected a recommendation from the New York State Commission on Sentencing Reform to extend “merit time” to a very limited pool of people convicted of violent offenses, making them eligible to have a few months at most shaved off their sentences.⁷⁵ Many of these offenders have served decades in the system, have stellar behavior records, and have earned college degrees and/or other markers of rehabilitation.

Notably, two of the rare victories in recent efforts to curtail the use of life sentences for adult offenders have involved drug crimes. In 1998, Michigan reformed its notorious “650-lifer” law. Enacted in 1973, it mandated LWOP for all drug offenders caught with more than 650 grams of heroin or cocaine. Under the new law, the mandatory sentence was reduced to 20 years to life. The law was made retroactive, thus permitting the 220 people then serving 650-lifer sentences to be considered for parole.⁷⁶ As part of a package of penal reforms enacted in 2001, the Louisiana legislature reduced the penalty for distribution of heroin from life imprisonment to 5 to 50 years and for distribution of cocaine from a life term to 10 to 30 years. Members of Louisiana’s black caucus sponsored the legislation, which was not retroactive. In 2003, the legislature agreed to permit lifers convicted of nonviolent crimes to be considered for parole eligibility.⁷⁷

The political strategy to draw a firm line between nonviolent drug offenders and violent offenders contributes to the further demonization of “serious” or “violent” offenders in the public imagination and in policy debates. It reinforces the misleading view that there are two clear-cut, largely immutable, categories of offenders who are defined most meaningfully by the seriousness of the offense that sent them away. However, on closer examination, these fixed categories—the nonviolent drug offender on one hand and the serious violent offender on the other—are more porous.

Certainly many drug offenders are in prison because their primary criminal activities were possession of and/or trafficking in illegal drugs. However, police, prosecutors, and some scholars claim that the drug charge often serves as a surrogate for a violent crime. The difficulties that the police

and prosecutors face in trying to prosecute violent felonies in many poor inner-city neighborhoods—due to no-snitchin’ norms, the vulnerability of eyewitnesses, and constitutional protections imposed in the 1960s that make it harder to extract confessions—help explain why, according to Stuntz and others. Another factor is the fall in the clearance rates for violent felonies due to the changing nature of violent crimes, notably a rise in the proportion of stranger killings and robbery-murders and a relative decline in friend-and-family murders, which are easier to solve. “For all these reasons, the substitution of drug prosecutions for violent cases was natural,” explains Stuntz.⁷⁸

Just as all drug convictions may not necessarily be what they first appear, on closer inspection, all “violent” offenders are not necessarily what they seem. Many of the people sent to prison for violent offenses are not necessarily violent offenders years later. But the widespread perception is that they still are despite stellar prison conduct records; ample evidence of rehabilitation through education, volunteering, and other programs; and the mounting research about deterrence and aging out of crime. Marc Mauer’s claim a decade ago that “[p]ublic policy has all but obliterated the distinction between a violent *offender* and a violent *offense*, with Charles Manson emblematic of the former and a battered wife who attacks her abuser the latter” remains true today.⁷⁹ Witness the uproar after the North Carolina Supreme Court declined in October 2009 to review a 2008 decision by the appellate court that a life sentence is to be considered 80 years under the state’s statutes. After the ruling, the state’s Department of Corrections announced its intention to release dozens of lifers who were eligible for early release thanks to the good-time and merit-time credits they had accumulated.⁸⁰ Governor Beverly Perdue stepped in to stop the release amid numerous reports in the media that many “rapists and murderers” were about to go free.⁸¹ This brouhaha spurred a spate of news stories that featured outraged victims and their families and that recounted the gruesome details of crimes committed decades earlier.⁸² In August 2010, the North Carolina Supreme Court reversed course, ruling that these inmates sentenced to life in the 1970s were not eligible for parole.⁸³

III. The Pizza Thief and the “Worst of the Worst”

The life-sentenced population includes not only drug offenders but also middle-aged serial killers, getaway drivers in convenience store robberies gone awry, aging political radicals from the 1960s and 1970s, women who killed their abusive partners, three-strikers serving 25 years to life for trivial infrac-

tions such as stealing two pieces of pizza, and people who killed their teenage girlfriends decades ago in a fit of jealous rage. Many of the people serving life sentences today were the main perpetrators of a violent crime such as homicide, but a great number of them were sent away for life for far less serious infractions. A central question facing any penal reform movement concerned about the lifer issue is whether to concentrate on challenging the fundamental legitimacy of all life sentences not subject to a meaningful parole review process or to concentrate on a subset of lifers who appear less culpable and more likely to garner public sympathy.

In the 1980s and 1990s, the penal reform movement among lifers at Louisiana's Angola prison splintered and floundered over this very issue. Divisive battles among the various lifers at Angola and their allies on the outside "crippl[ed] any chance for a united front in the quest for penal reform."⁸⁴ Old-timers sentenced during the more permissive 10/6 regime were at odds with more recent lifers sentenced under the tougher new statutes.⁸⁵ Angola's Lifers Association excluded "practical lifers," even though "there is little difference between a man with a life sentence and one doing 299 years without parole."⁸⁶ Lifers who were first-time offenders wearied of the all-or-nothing push for parole eligibility for all lifers and attempted to form their own organization. They believed legislators would be more receptive to consider parole eligibility for them than for repeat offenders. Their movement quickly gained momentum "despite the objection of organized penal reform groups who stood fast to the ideal that no matter what the offender status a life sentence was one in the same for all."⁸⁷ Norris Henderson, a leader of Angola's lifers who became a penal reformer on the outside, said, "Now that I'm in the free world and talk to different people and we talk about lifers, they want to know what group of lifers. Those serving first degree murder or second degree murder? The repeat offenders or the first offenders?" He continued, "While I think the life sentence is in itself the problem, I also believe we have to go for the low-hanging fruit. We've now done that with the drug lifers, so the next thing might be to see how many 10/6 lifers are here and work on them. Then how many 20-year lifers and work on them."⁸⁸

The enormous heterogeneity of the life-sentenced population presents an enormous political challenge. It renders political and legal arguments based on going after the "low-hanging fruit" by emphasizing degrees of culpability and relative fairness extremely attractive. However, such strategies could be costly over the long term. They potentially sow divisions among lifers and also among their advocates on the outside. Moreover, they also threaten to undermine more universalistic arguments about redemption, rehabilitation,

mercy, and aging out of crime that would encompass a broader swath of the life-sentenced population. Narrowly tailored arguments may win the release of individual lifers or certain categories of lifers but may worsen the odds of other lifers left behind. Four categories of lifers sharply illustrate this point: offenders convicted of felony murder, juveniles sentenced to life without the possibility of parole (JLWOP), people sent away for life for trivial offenses under California's "three-strikes" law, which is the toughest in the country, and, finally, the "worst of the worst," convicted of particularly brutal, offensive, or noteworthy crimes.

Felony Murder. The United States is exceptional not only for its widespread use of life sentences but also for the persistence of the felony murder rule, which has its origins in English common law. The British Parliament abolished felony murder in 1957, and other common law countries, except the United States, followed suit. There are many variants of the felony murder doctrine, which generally refers to an unintended killing during a felony and/or an accomplice's role in a murder. An accomplice can be considered as liable as the triggerman for any murder committed during the commission of another felony such as burglary or robbery. And the definition of accomplice can be quite capacious. Lending your car to a friend who ends up using it to commit a murder can send you away for life in some states.⁸⁹ Prosecutions for felony murder have been relatively common in the more than 30 states that allow them.⁹⁰

Political and legal strategies highlighting the lesser culpability of people convicted of felony murder and the gross disproportionality of their sentences can end up pitting one group of lifers and their advocates against another. One lifer appears more deserving of release by highlighting how less deserving other lifers are. This may win the eventual release of that offender who had only minimal involvement in a particular crime but perhaps at the cost of bolstering the view that the main perpetrators—or the "really bad guys"—got what they deserved and should be forever defined by the crime they committed. As such, arguments about rehabilitation, redemption, mercy, and aging out of crime are pushed even further to the wayside.

Juvenile Lifers. The plight of juvenile lifers sentenced to life without the possibility of parole is another good case in point. Approximately 2,500 people are currently serving LWOP sentences for offenses committed when they were juveniles. This sentencing practice violates the 1989 United Nations Convention on the Rights of the Child and other international human rights agreements and norms.⁹¹ The United States is the only country "in the world today that continues to sentence child offenders to LWOP terms."⁹² In 2007,

the United Nations General Assembly passed a resolution by a 183-to-1 vote urging member states to outlaw JLWOP as soon as possible. The United States was the only dissenting vote.⁹³ Many youths sentenced to LWOP are incarcerated in adult facilities while they are still juveniles. Youths as young as 14 years of age who are convicted of murder in Michigan are automatically sent to adult prisons.⁹⁴ Despite efforts to segregate these juveniles from the adult population, often in supermax-type conditions until they turn 18, many youths in adult prison are still subject to physical and other abuses, including rape, by adult inmates.⁹⁵

States are beginning to rethink JLWOP. In recent years, legislation that would eliminate or restrict the use of JLWOP has been introduced in at least nine states.⁹⁶ In 2006, Colorado banned JLWOP, and Texas followed suit three years later. Montana recently changed its laws to hold out the possibility of parole for some juvenile lifers.⁹⁷ After a lengthy, emotional debate in August 2010, the California State Assembly defeated a proposal that would have allowed juvenile lifers to petition for sentence modification. The California State Senate had approved a more liberal version of the proposal by a wide margin.⁹⁸ Developments at the federal level have been mixed. In 2009, legislation was introduced to abolish JLWOP at the federal and state levels through the use of financial incentives.⁹⁹ However, leading conservatives on the Senate Judiciary Committee have been pushing legislation to make it easier to prosecute juvenile defendants as adults.¹⁰⁰

As discussed earlier, *Graham v. Florida* and *Roper v. Simmons* have been major catalysts for the reconsideration of JLWOP sentences. These two cases rested on persuasive new research in brain science and psychology about adolescent brain development, most notably that the prefrontal cortex of the brain, which regulates impulse control, is not fully developed in teenagers. Opponents of executing juveniles and of condemning them to life in prison argue that children and teenagers should not be considered fully culpable for the crimes they commit, however heinous or violent, because their brains are not fully developed until they are in their 20s. As a consequence, they have greater trouble controlling their impulses and resisting peer pressure.

Political and legal strategies rooted in arguments about the underdevelopment of teenage brains have proven to be an extremely promising avenue to end or at least limit the use of JLWOP sentences. However, these strategies could be costly over the long term for those offenders who were sent away for life for crimes they committed as adults and thus who presumably had fully developed brains. Stressing that teenagers are not fully culpable reinforces in a backhanded way the idea that adults who commit serious

crimes should have known better and thus are fully culpable. The brain-scan approach to criminal justice bolsters narrow biologically deterministic arguments about why people commit crimes, arguments that are enjoying a renaissance in criminology and in public debates about crime and punishment to a degree not seen since the heyday of the eugenics movement a century ago. This approach reinforces the popular view that people who commit serious crimes are biologically incapable of fundamentally changing.

Pennsylvania has about 450 juvenile lifers, or one-fifth of the country's total, which is more than any other jurisdiction in the world.¹⁰¹ Under Pennsylvania law, mandatory life is the only sentence available to adults and youths convicted of first- or second-degree murder, and there is no minimum age for which a juvenile can be tried as an adult.¹⁰² The recent case of Jordan Brown, initially charged as an adult in early 2010 for killing his father's pregnant girlfriend when he was 11 years old, put an unflattering national spotlight on JLWOP in Pennsylvania.¹⁰³ In keeping with national trends, Pennsylvania's juvenile lifer population is disproportionately African American. A black juvenile in Pennsylvania is 1.48 times more likely to receive an LWOP sentence than a white juvenile is.¹⁰⁴ Pennsylvania has been persistently unwilling to commute the sentences of juvenile lifers who have served decades behind bars, even in instances when members of the homicide victim's family have called for mercy and release.¹⁰⁵ A newly formed statewide coalition is currently engaged in an uphill battle to get Pennsylvania legislators to reconsider the state's widespread use of JLWOP sentences. At a legislative hearing in August 2010, JLWOP opponents focused extensively on the adolescent brain development argument. As Robert G. Schwartz, executive director of the Juvenile Law Center testified, "Kids are different."¹⁰⁶

The relative culpability of juveniles convicted of felony murder was also a central issue at the hearing. One of the main witnesses testifying in favor of the legislation was Anita Colón, a charismatic, articulate woman whose brother, Robert Holbrook, is serving a life sentence in Pennsylvania for a felony murder conviction when he was 16. Decades ago, her brother was the lookout in a drug deal gone awry that resulted in the death of a young woman. In her testimony, Colón underscored that almost 60 percent of Pennsylvania's juvenile lifers were first-time offenders who had never been convicted of a previous crime and that about a third of them were sent away for life for a felony murder conviction.¹⁰⁷ This is slightly above the national average of about 25 percent.¹⁰⁸ She and other supporters of the legislation stressed that rehabilitation and treatment have a greater impact on juveniles than they do on adults and thus juveniles are not "beyond redemption." Members of the

House Judiciary Committee focused much of their attention in their comments and questions on the relative fairness of felony murder for juvenile lifers rather than on alternative arguments raised by Colón and other witnesses about redemption, aging out of crime, and the huge economic cost of incarcerating so many youths until the end of their days.

In opposing the legislation, the Pennsylvania District Attorneys Association (PDAA) commended the House Judiciary Committee's recent efforts to reduce the state's prison population by focusing on diversionary and other programs directed at people convicted of less violent offenses. "That is the cohort group our collective attention should be focused on—not on letting murderers out early," the association declared in its written testimony. The association also emphasized that the state's Board of Pardons provides adequate means for offenders to prove "they are rehabilitated and seek release through the commutation process."¹⁰⁹

The PDAA and other opponents framed the proposed legislation as a violation of the rights of victims and of Pennsylvania's commitment to truth in sentencing. "It would be devastating and unfair to change the rules long after families of murder victims who were told that the person who murdered their child, spouse, parent or other family members would spend the rest of his or her life behind bars," the PDAA argued.¹¹⁰ Representatives of victims' organizations and other opponents of the legislation echoed this view and devoted much of their testimony to recounting gruesome details of crimes committed by juvenile lifers.¹¹¹ Charles D. Stimson of the Heritage Foundation used the term "juvenile killers" half a dozen times in his brief testimony opposing the bill.¹¹² However, Julia Hall, representing the Pennsylvania Prison Society, questioned, among other things, the primacy that victims and their families have had in debates over JLWOP. "A serious question arises about whether personal grief is an appropriate basis for public policy and legislation," she testified.¹¹³

The debate over JLWOP illustrates how the death penalty continues to cast a long shadow over the broader politics of punishment and penal reform. As *Roper v. Simmons* wound its way through the courts, organizations representing the victims of juvenile offenders generally did not mobilize in support of executing juvenile offenders. Assurances that juveniles who were spared the death penalty would spend all their remaining days behind bars were an important reason why. At the Pennsylvania hearing, representatives of victims' organizations portrayed ending JLWOP retroactively and making juvenile lifers eligible for parole consideration as a betrayal. They contended that many victims' families agreed not to push for the death penalty because

of assurances from prosecutors that the perpetrator would be locked up for life, thus sparing the family the seemingly endless appeals process of capital punishment cases. At the Pennsylvania hearing on JLWOP legislation, Bobbi Jamriska, a prominent spokesperson for the National Organization of Victims of “Juvenile Lifers” (NOVJL), charged that ending JLWOP in Pennsylvania would be tantamount to “torturing” victims whose loved ones were murdered, forcing them “to relive the trauma over and over” again with each parole hearing.¹¹⁴

Striking Out in the Golden State. California has been teetering at the brink of fiscal Armageddon for several years now and is contending with a federal court order to release tens of thousands of prisoners to relieve overcrowded, unconstitutional prison conditions or else to build more prisons to house them. Nonetheless, the state’s commitment to incarcerating people for lengthy or life sentences at an average cost of nearly \$50,000 per year has not diminished. California has the largest state prison system and also the highest number of life-sentenced prisoners—about 34,000, or about one-quarter of the nation’s total.¹¹⁵ This is more than triple the number in 1992, before the state enacted the country’s toughest three-strikes legislation.¹¹⁶ About one in five prisoners in California is serving a life sentence, or about double the national average.¹¹⁷

California’s life-sentenced population is exceptional not only for its sheer size but also for its extreme heterogeneity as measured by sentencing offense. The three-strikes law in California, which has become a towering symbol of the state’s commitment to crime victims and of its uncompromising stance toward offenders, poses a huge hurdle to devising effective political and legislative strategies to dismantle the “other death penalty” in the Golden State.

California’s 1994 three-strikes law doubles the minimum sentence for anyone convicted of a felony who has one prior serious or violent felony. For those with two or more prior serious or violent strikes, a third conviction for *any* felony generally means a minimum sentence of 25 years to life if a prosecutor chooses to invoke the three-strikes law. Unlike three-strikes statutes in many other states and the federal system, in California the third strike need not be for a serious or violent offense. Moreover, California has an extremely permissive definition of what constitutes a felony, and prosecutors have enormous leeway to upgrade misdemeanors to felonies. As a consequence, the state’s prison population includes a considerable number of people convicted under the three-strikes law who are serving lengthy sentences for trivial infractions such as petty theft, minor drug possession, or minor drug sales. In one of the most infamous cases, Jerry Dewayne Williams received a

25-years-to-life sentence for stealing pizza from some children.¹¹⁸ In another, a defendant was sentenced to life for stealing a dollar in change from the coin box of a parked car.¹¹⁹

The proportion of three-strikers in California's prisons increased dramatically between 1994 and 2001, going from about 2.5 percent to about 25 percent, where it has stabilized.¹²⁰ The readiness of California's district attorneys to invoke their three-strikes prerogative varies enormously around the state and even between seemingly like cases in a single county.¹²¹ Offenders sentenced under the state's three-strikes law receive on average sentences that are nine years longer than they would have received otherwise.¹²² A recent study by the state's auditor estimated that the 43,500 inmates currently serving time under California's three-strikes law will cost the state approximately \$19 billion in additional costs.¹²³ More than half of the people convicted under three strikes are imprisoned for a felony that is not considered violent or serious, at an additional cost of \$7.5 billion.¹²⁴ A significant number of them are not necessarily habitual offenders.¹²⁵ Rather, prosecutors chose to invoke three strikes in instances of multiple serious or violent offenses committed on a single day, often in a single incident. For example, an armed robbery committed by a first-time offender could, through creative prosecutorial accounting, be considered three strikes that warrant a sentence of 25 years to life.

The last major attempt to reform the state's three-strikes law went down to a resounding defeat in 2004. Proposition 66 would have required that all strikes under the revised law be for serious or violent offenses. Offenders serving 25-years-to-life sentences for nonviolent or trivial infractions would be eligible for resentencing. Proposition 66 also included provisions that would have made it more difficult to invoke the draconian three-strike penalties in instances of multiple infractions stemming from a single criminal incident such as an armed robbery.

Just two weeks before the 2004 election, polls showed that two-thirds of likely voters supported Proposition 66. However, the ballot initiative was defeated 53 percent to 47 percent on Election Day after the political establishment in California, including then governor Arnold Schwarzenegger and former and current governor Jerry Brown, rallied against the measure in the final days before the election. They joined a well-funded campaign against Proposition 66 spearheaded by conservative victims' groups allied with the California Correctional Peace Officers Association (CCPOA), arguably the most powerful union in the state and unquestionably the country's savviest prison guards' union. A fund developed by Schwarzenegger to pay for

ballot initiatives contributed over \$2 million to defeat the measure, while the CCPOA spent more than three-quarters of a million dollars to kill it.¹²⁶ The well-funded eleventh-hour blitz of television and radio commercials employed “harrowing music and images of reviled criminal types like sex offenders and career criminals” to communicate “a simple yet powerful message; the initiative would lead to chaos and destroy communities and families.”¹²⁷ The notorious “He Raped Me” commercial featured a white middle-aged rape victim and concluded with the warning, “Proposition 66 creates a loophole that will release 26,000 dangerous felons.”¹²⁸

California’s three-strikes case raises a broader question about how best to challenge mass imprisonment in the United States. Should penal reformers concentrate on high-profile campaigns, such as undoing three strikes at the ballot box, that may go down to defeat but may help to build the foundation for a more durable political movement to challenge the carceral state? Or should they concentrate on below-the-radar efforts that attract less public attention and controversy? For example, some lawyers and law students in the state have started mobilizing to exploit a 1998 ruling by the California Supreme Court that permits trial judges, in considering a bid for leniency in a three-strikes case, to weigh whether mitigating factors such as a defendant’s “background, character and prospects” place him or her outside the “spirit” of three strikes.¹²⁹ The Stanford Three Strikes Project has litigated various aspects of the administration of California’s three-strikes law in both state and federal court.¹³⁰ Defense attorney Michael Romano, who helped found the Stanford clinic, argues that legal clinics should concentrate their efforts on gaining the release of sympathetic three-strikers “who haven’t done terrible things, who haven’t actually hurt anyone.”¹³¹ On the positive side, these below-the-radar efforts have resulted in the release of a handful of three-strikers. But given the huge size of the three-striker and life-sentenced population, it is hard to see how these below-the-radar efforts will significantly reduce the number of lifers in California.

The case of California is a stark reminder that political and institutional logic can matter as much as or more than economic logic in determining the future course of penal policy. Another ballot initiative to challenge three strikes may be in the offing. In some respects, the prospects for revising three strikes should be more promising now for several reasons. First, as mentioned earlier, California has been teetering on the brink of fiscal and social disaster for several years. Commentators have even begun to refer to it as a “failed state,” a term usually associated with countries such as Congo or Afghanistan. Over the past three decades, California has gone from spend-

ing five dollars on higher education for every dollar spent on corrections “to a virtual dead-heat on spending.”¹³² In 2007–8, the annual expenditures for the California Department of Corrections and Rehabilitation topped \$10 billion, or about 10 percent of the state’s General Fund, compared to just 2 percent in 1982.¹³³ The state’s ballooning budget deficits and deep cuts in spending on education and other key services are drawing increased attention to the state’s costly prison system.

Moreover, despite all the billions spent each year on the prison system, the federal judiciary put California’s prison system under federal receivership in 2006 because of extreme overcrowding and failure to provide adequate medical care to all prisoners. In August 2009, a panel of three federal judges ordered the corrections department to devise a plan that would reduce the state’s prison population by more than 40,000, or to about 138 percent of capacity (compared to 200 percent in recent years). In May 2011, the U.S. Supreme Court upheld that decision by a 5–4 vote. Finally, the political establishment’s support of three strikes is not as steadfast as it once was. Steven Cooley, the 2010 Republican candidate for attorney general in California, became an outspoken opponent of three strikes as district attorney of Los Angeles, earning him the umbrage of the California District Attorneys Association. Kamala Harris, who triumphed over Cooley in a tight race, brought forward relatively few three-strikes cases when she was San Francisco’s district attorney.

Despite these developments, a major overhaul of three strikes in California via the ballot box remains a tough sell. When Arnold Schwarzenegger was governor, he and the state’s corrections department vigorously fought the federal court order and any population caps or court-ordered early release of prisoners. They charged that the federal judges exceeded their authority under the federal Prison Litigation Reform Act. As discussed earlier, the CCPOA and its allies have been steadfast in their opposition to revising three strikes, even in the case of the pizza thief, the petty drug dealer, and other minor offenders. The prison guards provided a key campaign endorsement to Jerry Brown, the state’s new governor, who has assiduously cultivated the union over the years.

California’s recent record on crime-related ballot initiatives and the enormous controversy surrounding recent legislative proposals to reduce the number of nonviolent offenders in its prisons indicate that the state is not likely to begin a serious discussion about the huge and growing lifer population. Despite the state’s growing fiscal crisis, in November 2008, voters narrowly approved Proposition 9, which toughens up requirements for granting

parole and calls for amending the state's constitution to give crime victims unprecedented influence on criminal cases.¹³⁴ Voters soundly rejected Proposition 5, a ballot initiative that would have expanded alternative sentences for nonviolent drug offenders and saved billions of dollars.¹³⁵ Schwarzenegger and four former governors opposed the measure, including Jerry Brown, who was then attorney general.¹³⁶

A legislative proposal in 2009 to release some nonviolent offenders in response to the federal lawsuit created a political firestorm. A watered-down compromise was nearly scuttled in the eleventh hour in the state assembly after the sensational story of Phillip Garrido became front-page news worldwide in summer 2009. Garrido was accused of kidnapping an 11-year-old girl and confining her to an undiscovered backyard encampment for nearly two decades while he was on parole for rape and kidnapping offenses dating back to 1976. The significantly weaker assembly bill eventually passed in late August without a vote to spare. The measure unleashed over-the-top rhetoric. One Republican assemblyman warned, "We might as well set off a nuclear bomb in California with what we are doing with this bill."¹³⁷ Law enforcement groups, led by the CCPOA, successfully pressed Democrats to strip the bill of provisions to reduce sentences for some nonviolent offenders and to establish a commission to revise sentencing guidelines.¹³⁸ The final bill projected to reduce the prison population by 16,000 inmates, far fewer than originally proposed.¹³⁹ In a similar vein, the case of John Wesley Ewell, charged in late 2010 with murdering four people in home-invasion robberies, has clearly set back the cause of three-strikes reform. Ewell was a "multiple felon who campaigned against California's three-strikes law and was free after managing four times to escape its harsh sentencing guidelines."¹⁴⁰

In short, the political establishment's commitment to three strikes is almost theological in California. In the past, any time this faith appeared to be wavering, victims' groups working closely with the CCPOA have had the money and organizational resources to bring them back into the fold. Any future ballot initiative to reform three strikes may provide yet another occasion to demonstrate that California's prisons are full of the "worst of the worst" who should not be released for a very long time—if ever.

The "Worst of the Worst." What to do about "the worst of the worst" lurks in the background of any discussion of life sentences. Just reciting the names Charles Manson, Jeffrey Dahmer, and Ted Bundy is enough to abort any serious discussion about developing political and legislative strategies to challenge the fundamental legitimacy of *all* LWOP sentences and of *all* life sentences that are not subject to meaningful parole reviews. The two key issues

here are retribution and risk. Some people mistakenly interpret calls to abolish all LWOP sentences and to entitle all prisoners to a parole eligibility hearing after a certain number of years as an assault on the whole idea of retribution, which has been a guiding principle, if not the preeminent philosophy, of the criminal justice system in the United States for decades. In affirming retribution as a legitimate reason to punish, Justice Anthony Kennedy wrote in the *Graham* decision, “Society is entitled to impose severe sanctions, . . . to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offenders.”¹⁴¹

The retribution issue is a familiar one from debates over capital punishment. As demonstrated most starkly with the death penalty, what constitutes an acceptable punishment is culturally, politically, and socially constructed and thus varies enormously over time. Centuries ago, a mere execution was not enough to express society’s reprobation. The condemned often were publicly tortured and mutilated, and then their bodies were dissected for good measure and left on public display. By contrast, the maximum sentence available today to the International Criminal Court, which tries the gravest of crimes, including war crimes, crimes against humanity, and genocide, is a life sentence reviewable every 25 years.¹⁴² Under California law, Charles Manson has been getting a parole eligibility hearing every two years for decades, as has Sirhan Sirhan, the assailant of Senator Robert F. Kennedy. This is hardly a sign that California, whose prison population has increased more than 800 percent since Manson and Sirhan were incarcerated and which today operates the second-largest penal system in the country after the federal government, has somehow forsaken retribution.¹⁴³ As Dan Markel argues, retributive justice, properly understood, “hinges on modesty and dignity in modes of punishment” and is at odds with “the apparently ineluctable slide towards ever-harsher punishments in the name of justice.”¹⁴⁴

Unlike in the United States, a number of European countries make explicit the relative weights of retribution and risk in meting out life sentences. England and Wales, for example, have adopted a two-part process in which the court sets a minimum term for the purposes of deterrence and retribution. “However, once that period has been served, the release of the offender must be considered by a judicial body that meets the requirements of due process similar to those of a full trial but considers only the danger that the offender may still present to the public,” according to Appleton and Grøver.¹⁴⁵ In Germany, all life-sentenced prisoners are constitutionally entitled to be considered for release after 15 years. If someone does not pose a continued major threat to public safety and was not convicted of crimes involving “exceptional gravity

of guilt,” he or she is generally released after serving 15 years. Crimes involving “exceptional gravity of guilt” include multiple homicides and instances of particularly cruel, brutal, reckless, or antisocial acts. “In practice, most prisoners whose guilt is so exceptionally grave will serve 18 or 20 years,” according to Frieder Dünkel and Ineke Pruin.¹⁴⁶ As of 2007, Germany had about 2,000 prisoners serving life sentences, or about the same number as the state of Mississippi, whose total population is barely 4 percent of Germany’s population.¹⁴⁷

One of the country’s premier penal reform groups appears to have made an important shift in its stance on the abolition of LWOP. The Sentencing Project is the author of two pathbreaking reports on life sentences, in 2004 and 2009, that were invaluable in drawing public, journalistic, and scholarly attention to this invisible issue. In the earlier report, the Sentencing Project called for abolishing LWOP “in all but exceptional cases.”¹⁴⁸ In the follow-up report, it recommended eliminating *all* sentences of life without the possibility of parole.¹⁴⁹ Explaining the organization’s current stance on LWOP, Marc Mauer, the executive director, said, “The argument on LWOP is very similar to that on the death penalty. Both on moral and practical terms the death penalty is cruel and ineffective and so should be eliminated, rather than each of us individually trying to determine who is actually ‘the worst.’” Mauer went on to say, “Similarly for LWOP, there’s no strong public safety argument supporting the policy since its elimination only opens up a possibility for release, and certainly no guarantee.”¹⁵⁰

To sum up, the “worst of the worst” will always present a daunting challenge to penal policy. For ages, this issue dominated discussions of capital punishment. In deciding on how best to challenge the widespread use of LWOP and whether to declare all LWOP sentences unacceptable, penal reformers certainly need to consider the realities of the broader political environment. But as Hugo Adam Bedau, a prominent death penalty abolitionist who did not endorse LWOP as an alternative to capital punishment, eloquently reminds us, “[I]t is not the task of penal reform—or of the movement against the death penalty—to present to the public whatever it will accept. The task, rather, is to argue for a punitive policy that is humane, feasible, and effective, whatever the crime and whoever the offender, and regardless of the current climate of public opinion.”¹⁵¹

IV. Executive Clemency, Risk, and the Waning of Mercy

Governors and other public officials today remain deeply opposed to releasing serious and long-time offenders, no matter how many decades they have served behind bars, no matter the pile of evidence showing that they have

turned their lives around, and no matter the compelling research findings about deterrence and aging out of crime. For example, in 2008 Governor Schwarzenegger and prosecutors in California vehemently opposed the compassionate release of Susan Atkins, a former follower of Charles Manson who was convicted in the infamous 1969 Tate-LaBianca murders. Atkins, who was paralyzed and dying of brain cancer, had become a model prisoner in her four decades behind bars.¹⁵² Explaining why he refused to commute Atkins when she was gravely ill, Schwarzenegger said, “[T]hose kinds of crimes are just so unbelievable that I’m not for compassionate release.”¹⁵³ For Schwarzenegger and many other politicians, the retributive endpoint for certain crimes is infinity.

Over the past four decades or so, retribution has become a central feature of U.S. penal policy, supplanting rehabilitation and even public safety as the chief aim. As a consequence, mercy, forgiveness, and redemption, which have been central considerations in religious, philosophical, and political debates about punishment for centuries—indeed millennia—have been sidelined. This is starkly evident not only in the sharp drop in the use of executive clemency today but also in the marked change in how public officials justify the few pardons and commutations that they do grant.

Pardons and commutations were vital features of the U.S. criminal justice system throughout the 19th century and much of the 20th century.¹⁵⁴ Presidents and governors regularly invoked their powers of executive clemency to reduce prison sentences, to remit fines, and to spare the lives of prisoners on death row. Despite the widespread view that pardons and commutations were antidemocratic and sources of corruption, executive clemency was a key mechanism to manage the prison population, to correct miscarriages of justice, to restore the rights of former offenders, and to make far-reaching public statements about the criminal justice system.¹⁵⁵

Presidents and governors continued to wield their powers of executive clemency even in the face of public uproars over particular pardons or commutations. On Christmas Day in 1912, Governor George Donaghey of Arkansas, a fierce opponent of convict leasing, “pardoned 360 state prisoners in one fell swoop,” in a gesture that made national headlines.¹⁵⁶ For years, a coalition of cotton planters, coal operators, corrupt judges, and anxious taxpayers had stymied his attempts to end the brutal system of convict leasing in Arkansas, which Donaghey considered a legalized system of murder in which the punishment so poorly fit the crime. In the 1930s at the height of Jim Crow era, Governor Mike Conner traveled to Parchman Farm to investigate the “forgotten men” of Mississippi’s infamous penal farm. He “offered

a personal hearing to any convict who had served a sentence of at least ten years.” At his “mercy courts,” Conner freed dozens of black prisoners in the face of charges that he was granting “amnesty for ancient coons.” The governor was particularly affected by the sight of black children wearing prison stripes at Parchman, where one out of five inmates was under 20 years of age. He sent a number of these children home after giving them a lecture about honesty.¹⁵⁷

Compare that with the modern-day commutation record of Pennsylvania, one of six states where life means life and where the lifer population has increased elevenfold since the early 1970s.¹⁵⁸ Between 1967 and 1994, Pennsylvania’s governors and pardon board commuted the life sentences of nearly 400 inmates. Since then, only six commutations have been granted. Democrat Ed Rendell commuted only five life sentences during his two terms. Three of those were announced just weeks before he left office in early 2011.¹⁵⁹ By contrast, Democrat Milton Shapp commuted 251 during his eight years in office (1971–79), and Republican Raymond Shafer (1967–71) commuted 95 during his single term.¹⁶⁰ Pennsylvania’s state officials vigorously battled a lawsuit filed on behalf of inmates sentenced prior to 1997, when the commutation rules changed significantly. Under the old rules, a commutation recommendation was forwarded to the governor if a majority of the pardon board supported it. The new rules, enacted in the wake of a high-profile double murder committed by a man whose sentence had been commuted, require a unanimous decision from the board, which includes the attorney general and a representative of victims’ groups. That lawsuit dragged on for more than a decade—or almost as long as a typical lifer spent in prison in Pennsylvania in the 1970s before being released—and was eventually decided in the state’s favor.¹⁶¹

In the first half of the 20th century, Woodrow Wilson, Franklin D. Roosevelt, and Harry Truman issued hundreds and in some cases thousands of pardons and commutations during their terms. The number of presidential pardons began to ebb during the Eisenhower years and severely dropped off with President George H. W. Bush and his successors.¹⁶² Since at least the mid-1990s, the federal Bureau of Prisons has declined to take a position on the merits of clemency applications. It has abdicated its historical role in assisting the pardon attorney of the U.S. Department of Justice in identifying appropriate cases to recommend to the White House for early release.¹⁶³ As one commentator quipped, since becoming president, Barack Obama “has issued more pardons to Thanksgiving turkeys than to ex-offenders.”¹⁶⁴

Since the ascendancy of law-and-order politics in the 1970s, executive clemency has atrophied across the country. A survey of all commutations in noncapital cases between 1995 and 2003 found that most states averaged fewer than 100 commutations during these eight years; 34 states, including Texas, California, Ohio, and Pennsylvania, which have some of the largest prison populations, granted 20 or fewer commutations during this time.¹⁶⁵ The American Bar Association's Justice Kennedy Commission "reviewed the state of pardoning in the United States and found that in most jurisdictions the pardon power is rarely utilized to reduce sentences or promote reentry of individuals to the community."¹⁶⁶ The Kennedy Commission wisely recommended that states and the federal government revitalize the clemency process. It urged them "to establish standards and provide an accessible process by which prisoners may request a reduction of sentence in exceptional circumstances," including but not limited to "old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering." The commission also called for ensuring that procedures are in place to aid prisoners who are unable to advocate for themselves to seek clemency.¹⁶⁷

Standardizing procedures for seeking clemency and providing prisoners with more assistance to navigate the clemency process are noble goals. But they will not on their own revitalize the use of clemency and significantly reduce the lifer population. Public officials need once again to be willing to assume the political risks that come with releasing offenders early. In the past, governors and presidents were willing to weather charges of being antidemocratic or corrupt when they invoked their clemency powers. Now that crime has become such a persistent political trip wire in the United States, they need to steel themselves—and prepare the public—for the rare but inevitable instance when a released prisoner goes on to commit a front-page crime.

Although the recidivism rate for older inmates who have served lengthy sentences is comparatively lower, it is not—and will never be—zero. Despite all the attention focused these days on developing better risk-assessment tools, we will never be able to predict with complete certainty who will commit a serious crime if released and who will not. Lifers are not likely to kill or assault in prison or after release. However, some will. Of the 558 inmates (excluding those in Illinois) on death row awaiting execution whose sentences were commuted as a result of the 1972 *Furman* decision, six went on to commit murder in prison over the next decade and a half.¹⁶⁸ The 239 *Furman*-era capital offenders released on parole to the community, who as a group were more than 40 years old when they were released, committed 12 new violent offenses. Notably, one killed again and two raped again.¹⁶⁹ Those

who went on to commit additional violent acts apparently were indistinguishable from those who did not in terms of their previous offense characteristics, race, age, and prior criminal history.¹⁷⁰ A more recent survey of the 322 former death-row inmates released on parole from the “class of ’72,” who had served about 18 years on average, found that five went on to kill again. Of the 164 who were not released, 9 committed homicide while in prison and 10 reportedly killed themselves.¹⁷¹

If public officials are going to revitalize executive clemency and parole, they need to reconcile themselves to “the fact that release procedures, like all other human practices, are not infallible.”¹⁷² They need to improve their rehabilitation programs and risk-assessment tools, but they also must do more to educate the public that inmates who are released after serving lengthy terms are unlikely to commit violent offenses—but they are not risk free.

Governors willing to assume that risk remain the exception today. Before she left office in 2011, Governor Janet Granholm of Michigan had commuted more sentences than had all her three predecessors combined. Nearly all of these commutations came after she ran for reelection in 2006, and the overwhelming majority involved drug offenders or seriously ill inmates.¹⁷³ During Arkansas governor Mike Huckabee’s first six years in office, he granted 30 percent more clemencies than had the previous three governors combined.¹⁷⁴ His commutation and pardon record came under national scrutiny and spurred a spate of political obituaries for Huckabee after a man he had granted clemency in 2000 later killed four police officers in Tacoma, Washington, in 2009. After a released parolee shot and killed a Massachusetts police officer in December 2010, Democratic governor Patrick Duval sought to replace much of the parole board with law enforcement appointees and introduced legislation that would further restrict parole eligibility for lifers in the Bay State.¹⁷⁵ Notably, since returning to the governor’s mansion in 2011, Jerry Brown of California has been paroling a much higher proportion of lifers than his predecessors did.¹⁷⁶

Some public officials have expressed interest in releasing infirm elderly inmates who do not pose a threat to society. One of the major obstacles is that older prisoners are more likely to have been incarcerated for a serious violent offense. A 2006 report on North Carolina prisoners found that almost 60 percent of inmates ages 50 and above were serving time for violent or sex crimes. More than half of them were serving a sentence of life or 10 years to life.¹⁷⁷ By late 2009, 15 states and the District of Columbia had established provisions for geriatric release.¹⁷⁸ However, these jurisdictions rarely released elderly inmates due to political considerations, fears of public

opposition, the narrow criteria for eligibility, Byzantine procedures that discourage inmates from applying for release, and the complicated and lengthy referral and review process that often drags on right up until the time an inmate dies in prison. Some of these jurisdictions have yet to release a single elderly inmate using the new geriatric early-release provisions.¹⁷⁹

Released long-time offenders do not pose a widespread public threat. But they do pose a significant risk to political careers. Changes in the institutional structure of parole and pardon boards could provide public officials with some important political insulation from potentially controversial release decisions. States almost always staff these boards with political appointees, who are extremely vulnerable to the wrath of public opinion. Four decades ago, the President's Commission on Law Enforcement and the Administration of Justice recommended that the boards be composed of psychologists, social workers, corrections officials, and other professionals with specialized training and expertise to evaluate offenders' suitability for release. That recommendation remains largely unrealized today. In nearly every state, governors appoint all members of the parole board.¹⁸⁰ Two-thirds of the states have no professional qualifications for parole board membership. A notable exception is Ohio, where all parole board members "are appointed by the director of the state department of corrections, serve in civil service positions, and must have an extensive background in criminal justice."¹⁸¹

As U.S. Senator James Webb (D-VA) said at a recent conference on prisoner reentry sponsored by the Hamilton Project, "The question is about political fear. And I think it invades the political process."¹⁸² Politicians and public officials can help neutralize that fear by educating the public about the nuances of deterrence, the limited utility of lengthy sentences for fighting crime, the phenomenon of aging out of crime, and the strengths and limits of risk-assessment tools. However, they cannot guarantee that releasing offenders will be risk free. As Glenn Martin of the Fortune Society said at the Hamilton Project conference, "[W]e need to increase our appetite for risk. . . . [W]e have to at least accept the fact that some people are going to fail and some people are going to fail pretty significantly."¹⁸³

The public's and politicians' low appetite for risk is not the only obstacle to expanding the use of executive clemency and rethinking the widespread practice of condemning so many people to the "other death penalty." As Austin Sarat, Daniel Kobil, Elizabeth Rapaport, and others have noted, the retributive theory of clemency has been ascendant for some time now.¹⁸⁴ There is a widespread belief that clemency should only be used to remedy "miscarriages of justice," as U.S. Supreme Court Justice William Rehnquist

famously argued.¹⁸⁵ Governors are largely unwilling to treat mercy as a permissible reason for granting clemency. Commutations and pardons are most commonly justified as a means to rectify some shortcoming of the judicial process: the offender is innocent or has a credible claim of innocence; he or she did not receive a fair trial; the sentence is disproportionately severe compared to what other participants in the crime received.¹⁸⁶ These “anti-mercy conceptions of clemency”¹⁸⁷ wholly reject redemption, forgiveness, reconciliation, and mercy as legitimate claims for clemency, greatly narrowing the pool of prisoners who might petition for a pardon or commutation. But they do more than that.

The impact of executive clemency extends far beyond all the individuals lucky enough—or not—to receive a pardon or commutation. Executive clemency is an important vehicle to make a statement about the criminal justice system and, more broadly, about what kind of society we want. As such, it shapes the wider political environment in which issues of crime and punishment are debated and criminal justice policy is forged. Governor Donaghey’s wholesale pardon a century ago was intended as a searing denunciation of Alabama’s system of convict leasing. Woodrow Wilson was an ardent supporter of temperance but opposed the Volstead Act, which imposed Prohibition. As president, he pardoned hundreds of alcohol-related offenders.¹⁸⁸ His pardons were widely understood at the time as an indictment of Prohibition. Governors Lee Cruce of Oklahoma (1911–15), Winthrop Rockefeller of Arkansas (1966–70), and Toney Anaya of New Mexico (1982–86) issued mass commutations to empty their death rows and justified their actions with calls for mercy for the condemned.¹⁸⁹ By contrast, of the four dozen people sentenced to death between 1976 and 2003 who were spared by acts of executive clemency, “only four were based on what could arguably be characterized as merciful reasons.”¹⁹⁰ When Governor George Ryan pardoned four inmates on death row in Illinois and commuted the sentences of 167 others in 2003, he rejected “mercy and compassion as legitimate responses to criminals.”¹⁹¹ He said his actions were warranted because of problems in the way capital punishment was administered, not because of the fundamental immorality of the death penalty. At the time, Ryan went out of his way to reaffirm his law-and-order credentials and to herald life in prison without the possibility of parole as a fate perhaps worse than death.¹⁹²

U.S. Supreme Court Justice Anthony Kennedy lamented in a 2003 speech to the American Bar Association, “The pardon process, of late, seems to have been drained of its moral force.”¹⁹³ As a consequence, many crimes remain eternally unforgivable and unforgettable. Their perpetrators are forever

defined by the crime they were convicted of, despite all the evidence piling up over the decades that they are not the same person who committed that crime and that they do not pose a major threat to public safety.

V. Capital Punishment and the “Other Death Penalty”

The death penalty abolition movement and the tenacity of capital punishment in the United States pose two important challenges to reducing the lifer population. Thanks in part to the innocence movement, with its dramatic focus on people wrongly condemned to death, capital punishment is declining in the United States.¹⁹⁴ The number of people executed each year has fallen by about half since the late 1990s. Opinion polls show that support for capital punishment is waning. It now stands at about two-thirds, down from a high point of 86 percent in 1995, according to Gallup polls.¹⁹⁵ The innocence frame, with its related arguments about fairness, has supplanted constitutionality and morality as the dominant frame.

The anti-death-penalty movement’s “obsessive focus” on the innocent, estimated to constitute anywhere from 1 percent to a third of the death-row population, has overshadowed the wider question of what constitutes justice for the guilty housed on death row and for the growing number of lifers who will likely die in prison or spend most of their lives there.¹⁹⁶ The number of people sentenced to death and executed has fallen sharply but at the cost of a huge spike in “death by incarceration.”

Over the years, a number of leading abolitionists have ardently supported LWOP. They have uncritically accepted LWOP as a viable alternative to the death penalty and thus have helped to legitimize the wider use of a sentence that has many features in common with capital punishment. These abolitionists have helped normalize a sanction that, like the death penalty, is way out of line with human rights and sentencing norms in other developed countries. Many European countries do not permit LWOP, and those that do use it sparingly. In much of western Europe, a “life” sentence typically amounts to a dozen or so years, as it once did in practice in many U.S. states.¹⁹⁷ That said, the number of life sentences appears to have increased in the wake of the abolition of capital punishment in many countries.¹⁹⁸

One has to be careful here about how much blame to apportion to death penalty abolitionists for the proliferation of life sentences in the United States, however.¹⁹⁹ Neither opponents nor supporters of capital punishment could have predicted the fierce conservative backlash after

the 1972 *Furman* decision and how it would spur the push for more punitive penal policies. For various reasons, the abolitionist movement of the late 20th century got channeled through the courts. A string of victories in the courts beginning in the 1960s reinforced this bias toward viewing the judiciary as the most promising venue to abolish capital punishment.²⁰⁰ In the mid-1960s an elite-led anti-death-penalty movement began to take shape in the United States. At the time, the leading public-interest groups opposed to capital punishment made a key decision to launch an all-out assault on the death penalty through the courts by challenging its fundamental constitutionality rather than by attempting to abolish it through legislative means. As a consequence, the main arena to battle capital punishment shifted from state legislatures to the courts. Accustomed to fighting and winning in the courts and bereft of the necessary resources to wage a wider political and legislative campaign, abolitionists concentrated their efforts and resources on the legal arena. As a consequence, they were unprepared for the virulent political and legislative backlash in the 1970s as many states moved quickly to refashion their death penalty statutes to meet the constitutional objections that the Supreme Court had raised in the *Furman* decision.

At the time, the abolitionist movement was not really a movement at all but rather a consortium of elite public-interest lawyers. They could not have done much to stem the punitive stampede in the immediate wake of *Furman* as states rewrote their death penalty statutes and began to rethink life sentences. Moreover, executive clemency still appeared to be a viable mechanism to secure the release of many lifers. Thus, abolitionists at that time could endorse LWOP or a life sentence as an alternative to capital punishment, figuring that most lifers—even those serving LWOP sentences—would be released after a decade or two at the most.²⁰¹ Indeed, there was an expectation at the time that as states returned to determinate sentencing systems, the importance of executive clemency as a release mechanism was likely to grow.²⁰²

No comprehensive account exists to my knowledge that compares and contrasts when, why, and how individual states came to enact LWOP statutes. Seven states already had LWOP statutes on the books or in practice prior to the *Furman* decision. Some of these statutes dated back to the 19th century.²⁰³ Although the growing punitive climate generally explains why states enacted LWOP or tougher life statutes in the aftermath of *Furman*, the timing and triggering events appear to have varied enormously. Some states embraced LWOP as an immediate response to sentencing dilemmas

created by *Furman*.²⁰⁴ The public's growing frustration with what it perceived to be a "revolving door" of justice facilitated by permissive and incompetent parole boards appears to have been the catalyst elsewhere.²⁰⁵ In other states, a particularly heinous crime set off the political stampede for LWOP.²⁰⁶ As Mona Lynch explains, "the direct catalysts for mass incarceration generally are located in regional, state, and local conditions—historical and contemporary—whereas their proliferation is enhanced by more macro-level factors."²⁰⁷

Abolitionists likely played an important role in establishing the legitimacy of LWOP in the 1970s, 1980s, and 1990s but were probably quite incidental in most cases to the final legislative outcome. Some abolitionists ardently opposed promoting LWOP as an alternative to the death penalty. Hugo Adam Bedau, for example, declared, "The death penalty is not the only outrageous form of punishment active in our society, even if it is the worst."²⁰⁸ But a number of prominent abolitionists have promoted LWOP as an equally tough—or even tougher—retributive moral sanction.²⁰⁹ As such, we have had "a strange pairing of death penalty abolitionists" joining together with penal hard-liners to promote LWOP statutes.²¹⁰ In the early 1990s, Governor Mario Cuomo of New York called for wider use of LWOP and offered to sign away his clemency powers so as to neutralize public opposition to his strident anti-death-penalty stance.²¹¹ Sister Helen Prejean of *Dead Man Walking* fame also promoted LWOP to undermine public support for the death penalty. Steven Brill, the founder of the *American Lawyer*, denounced the death penalty as "immoral and never acceptable" but called for imposing LWOP in all instances of premeditated murder and murder "committed during and in the furtherance of another crime." He faulted liberals for being "insanely permissive about murderers."²¹²

Leading abolitionist organizations took ambivalent position stances. The director of the ACLU's National Capital Punishment Project declared in 1990 that his organization would "acquiesce, but not support" LWOP if it were offered as a substitute for the death penalty.²¹³ The head of the ACLU's southeastern regional office characterized LWOP sentences as too harsh and inflexible but nonetheless endorsed them as "a wrong step in the right direction."²¹⁴ In the early 1990s, a spokesman for the National Coalition to Abolish the Death Penalty (NCADP) refused to denounce LWOP sentences, declaring instead that the organization did not endorse particular alternatives to execution.²¹⁵

Capital defense attorneys have been vested in retaining LWOP. Evidence suggests that the availability of parole in capital cases is often a key factor

for jurors, who must decide whether to impose the death penalty or a life sentence. In those death penalty states where LWOP is an alternative option, capital defense attorneys, in making their pitch for life over death, emphasize that the defendant will never be getting out of prison and that a life sentence that stretches out for decades is actually more punitive than condemning someone to death. LWOP statutes appear to have played only a minor role in the recent drop in the number of executions in the United States.²¹⁶ But they have contributed to a doubling or even tripling of the sentence lengths for offenders who never would have been sentenced to death in the first place or even been eligible for the death penalty.²¹⁷ Lifers today serve on average 29 years in prison, up from about 21 years in 1991.²¹⁸

Prosecutors in capital punishment states have been some of the fiercest opponents of LWOP statutes. In states where parole is a possibility—however remote—for life-sentenced offenders, prosecutors often focus their closing arguments on warnings about the future threat the defendant poses if released on parole one day. They ask jurors, “Do you really want this man back on the streets?”²¹⁹ This widespread prosecutorial strategy spurs jurors to choose death over life.²²⁰ The *Simmons v. South Carolina* decision reinforced prosecutors’ opposition to LWOP. That 1994 Supreme Court decision requires prosecutors who raise the issue of the future dangerousness of a capital defendant in their closing arguments to inform the jury if the LWOP alternative exists in a state. But jurors do not have to be informed about other parole conditions.²²¹ This explains why prosecutors in Texas steadfastly opposed creating an LWOP provision in the Lone Star State.²²² They preferred to maintain the state’s “capital life” statute, which renders prisoners eligible for parole but only after 40 years. Thanks to *Simmons v. South Carolina*, Texas prosecutors were not required to inform capital juries about the existence of this de facto life sentence.²²³ Only after the Supreme Court ruled in *Roper v. Simmons* that the execution of people who committed their crimes as juveniles was unconstitutional did Texas prosecutors soften their opposition to an LWOP bill that had stalled in the state legislature. This paved the way for its quick passage in spring 2005. Texas prosecutors acted out of a fear that juvenile offenders might become eligible for parole in the aftermath of the *Roper* decision.²²⁴ This legislation opened the floodgates for what people in Texas began calling “life row.” In a pattern familiar in other states, the list of qualifying crimes for LWOP expanded in Texas.²²⁵

The exploding lifer population and our growing understanding of the similarities between how life sentences and death sentences are imposed and on whom have not prompted a fundamental rethinking of the connections

between death penalty abolitionism and penal policy more broadly. The abolitionist movement still operates quite independently of the growing movement against mass incarceration. Typical of many mainstream abolitionist organizations, Amnesty International remains notably agnostic on the question of alternatives to the death penalty, except in the case of JLWOP, which it forcefully opposes.²²⁶ In 2002, Amnesty International rejected a recommendation by its own internal review committee to “initiate a thorough discussion of alternatives to the death penalty,” even though its unwillingness to recommend or oppose substitute punishments might be undermining “the credibility of its overall argument for abolition.”²²⁷ As for the NCADP, on its current list of “Ten Reasons Why Capital Punishment Is Flawed Public Policy,” number 10 is “Life without parole is a sensible alternative to the death penalty.”²²⁸

Attorney Barry Scheck, one of the leading figures in the innocence movement today, continues to strongly defend LWOP as an alternative to capital punishment.²²⁹ Scheck and other foes of capital punishment who testified before the New Jersey Death Penalty Study Commission in 2006 generally did not raise any concerns about the state’s growing lifer population as they promoted LWOP as an alternative to the death penalty. In their testimony, they emphasized “evolving standards of decency,” the growing number of exonerated prisoners released from death row, public opinion data showing growing support for LWOP among New Jerseyans, and the huge economic burden of capital punishment in the Garden State.²³⁰ Echoing Sister Helen Prejean’s position, a local chapter of the New Jersey ACLU declared in its written testimony to the panel that the death penalty is “the single most serious violation of civil liberties in our nation.”²³¹ At the time, New Jersey had only nine prisoners on death row and had not executed anyone since 1963. But its lifer population numbered about 1,000.²³² A 2007 analysis by the *Newark Star-Ledger* of murder cases since 1982, when capital punishment was reinstated in New Jersey, found that about 100 people who were convicted of murder would have been punished more harshly under the LWOP bill proposed by the state’s Death Penalty Commission.²³³

The Other Death Penalty Project, a new group composed exclusively of prisoners, has called on death penalty abolitionist groups to stop promoting LWOP as a “supposedly humane alternative to lethal injection.” The group rejects the proposition that LWOP “is a necessary first step toward ultimate abolition of the death penalty.”²³⁴ Kenneth E. Hartman, a founder of the group, is serving an LWOP sentence in California for killing a man in a fistfight more than three decades ago when he was 19 years old. Hartman

describes a life sentence as an “execution in the form of a long, deliberate stoning that goes on for as long as I draw breath.”²³⁵ In 2004, the Campaign to End the Death Penalty passed a resolution opposing LWOP. At its 2008 convention, it reaffirmed that LWOP is not a “humane or just alternative to the death penalty.”²³⁶ However, the campaign’s website does not prominently feature its opposition to LWOP.

The abolitionist experience is relevant to the debate over life sentences in another respect. Those who are opposed to the proliferation of life sentences should be wary of making some of the same missteps that death penalty abolitionists made in the 1960s and 1970s by focusing primarily on judicial strategies and largely ignoring the legislative or political arenas. An exclusive focus on judicial strategies is potentially costly in several respects. It forces an issue to be framed within the constraints of prior legal texts, rules, and decisions. As a consequence, arguments and evidence that may be compelling in the political sphere fall to the wayside because the courts have been unreceptive to them. The most notable relevant example here is how the Supreme Court has dealt with the issue of race in the context of the death penalty.

Some of the most striking victories for civil rights groups from the 1920s to 1960s involved southern criminal cases marred by Jim Crow.²³⁷ But in the landmark capital punishment cases since then, the Supreme Court has been persistently unreceptive to arguments fashioned on how capital punishment is imposed in a racially discriminatory manner. In 1963, Supreme Court Justice Arthur Goldberg made his highly calculated dissent to the denial of certiorari in *Rudolph v. Alabama*, an obscure interracial rape case, that appeared to open the way for a broader constitutional challenge to the death penalty. In his dissent, Goldberg did not cite racial discrimination “as relevant and, apparently, worthy of argument,” even though Rudolph was black and 9 out of 10 men executed for this crime since 1930 had been black.²³⁸ The racially discriminatory nature of capital punishment was not a central issue in the landmark *Furman* decision that suspended capital punishment in the United States. Four years later, when the Court revisited the issue of the constitutionality of the death penalty, it carefully chose the five cases that became collectively known as *Gregg*. Most of the lead defendants in those five cases, including Troy Leon Gregg, were white, thus “taking race, for the moment, off the table,” David Oshinsky explains.²³⁹ When the Supreme Court struck down capital punishment in instances of rape in the 1977 *Coker* decision, it cited proportionality concerns, not the racially discriminatory manner in which capital rape laws were imposed. Notably, the Court chose the case of Erlich Coker, a white male, to test the constitutionality of capital rape laws,

which have been used overwhelmingly to punish black—not white—men. In the *McCleskey v. Kemp* (1987) decision, indifference and hostility characterized the majority’s reaction to compelling statistical evidence that people convicted of murdering a white person in Georgia are 11 times more likely to be sentenced to death than those convicted of killing a black person. Extensive evidence about the history of racial discrimination in the imposition of the death penalty did not sway the majority’s decision.²⁴⁰ Racial considerations apparently were irrelevant in the recent *Graham* decision, even though Terrance Graham is African American, as is Joe Sullivan, another juvenile offender in Florida who had a companion case with Graham, and even though juvenile lifers are disproportionately African American.

Given the Court’s persistent indifference and/or hostility to claims about racial discrimination in the administration of criminal justice, it is not surprising that legal strategies to challenge life sentences do not stress the racial aspects of this punishment.²⁴¹ But the fact that the life-sentenced population is disproportionately African American is an important political issue.²⁴² African Americans are considerably more likely to receive third-strike sentences in California, even after controlling for legally relevant variables.²⁴³ Nationally, nearly half of all lifers are black.²⁴⁴ This is considerably higher than the proportion of blacks in the general prison population, which is about 38 percent. The issue of racial disparities is even more pronounced in the case of LWOP sentences. Blacks constitute 56 percent of the LWOP population.²⁴⁵ Nearly half of all juveniles sentenced to life—and about 56 percent of the juveniles serving LWOP sentences—are African American.²⁴⁶ In many states, the racial disparity in juvenile life sentences is “quite severe.”²⁴⁷ In short, a primary or exclusive focus on judicial strategies forces the white-washing of the problem of LWOP and life sentences.

Conclusion

Keeping so many older prisoners incarcerated does not significantly reduce the crime rate and is extremely expensive. It vacuums up dollars that might be better spent on something else. The population of imprisoned elderly adults is growing rapidly. Between 1999 and 2007, the number of people ages 55 or older in state and federal prisons grew by nearly 77 percent, and those ages 45 to 54 grew by almost 68 percent.²⁴⁸ Because of elderly inmates’ greater need for expensive health-care services, prisons spend two to three times more to incarcerate an elderly inmate than a younger one, or on average about \$70,000 a year.²⁴⁹ These elderly inmates, like nearly all inmates, do

not qualify for Medicare, Medicaid, or Social Security benefits, so states must assume the entire burden of their medical and other costs. Although the current economic distress provides an important political opening to rethink these and other penal expenses, we should not assume that the crushing economic burden of the penal system will single-handedly unhinge the carceral state.

Mounting fiscal pressures will not be enough on their own to spur communities, states, and the federal government to make deep and lasting cuts in their prison and jail populations. It was mistakenly assumed four decades ago that shared disillusionment on the right and the left with indeterminate sentences and prison rehabilitation programs would shrink the inmate population. Instead, it exploded. The race to incarcerate began in the 1970s at a time when states faced dire financial straits. It persisted over the next four decades despite wide fluctuations in the crime rate, public opinion, and the economy. If history is any guide, rising public anxiety in the face of persistent economic distress and growing economic inequalities might, in fact, spur more punitiveness.²⁵⁰

In short, the current economic crisis presents an opportunity to redirect U.S. penal policy that opponents of the prison boom should exploit. However, framing this issue as primarily an economic one will not sustain the political momentum needed over the long haul to drastically reduce the prison population and to bring about the end of LWOP and the release of sizable numbers of lifers. Economic justifications also ignore the fact that a successful decarceration will cost money. The people reentering society after prison need significant educational, vocational, housing, medical, and economic support. We need to make considerable reinvestments in reentry to ensure that the communities these people are returning to are not further destabilized by waves of former prisoners whose time inside has greatly impaired their economic, educational, and social opportunities.

Reentry—that is, providing offenders with educational programs, substance-abuse treatment, job skills, and other services to help them make a successful transition back to society upon release—has caught the imagination of penal reformers, policymakers, and public officials spanning the political spectrum. But as reentry has skyrocketed to the top of the penal reform agenda, lifers are facing the prospect of a further deterioration in their conditions of confinement. Despite all the recent talk about reentry, money for treatment, programs, and services for all offenders is shockingly limited and continuing to shrink.²⁵¹ In an age of tightening budgets and a fixation on reentry, lifers are increasingly being denied programs and activi-

ties that might make their prison days without end more bearable.²⁵² As one lifer in California lamented, “The thinking goes that since we will never get out of prison there is no point in expending scarce resources on dead men walking.”²⁵³

In California and elsewhere, the prospects are bleak that the plight of lifers will become a leading issue on the penal reform agenda anytime soon. This political quiescence in the face of exponential growth in the lifer population is particularly striking given the intense legal and political mobilization against capital punishment in recent years. There are currently about 3,300 inmates on death row in the United States. Nearly all of them will die in prison of natural causes or suicide—not lethal injection. Compare that with the estimated 141,000 people now serving life sentences in the United States. The reinstatement and transformation of capital punishment have been central legal and political issues for going on four decades now. Meanwhile the United States has been nonchalantly condemning tens of thousands of people to the “other death penalty” with barely a legal or political whimper.

NOTES

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1. Pew Center on the States, “One in 31: The Long Reach of American Corrections” (Washington, DC: Pew Center on the States, 2009), 2; Sara Robinson, “Five Big Ideas We Should Be Talking About,” OurFuture.org, Feb. 4, 2009, <http://www.ourfuture.org/blog-entry/2009020604/five-big-ideas-we-should-be-talking-about> (accessed Mar. 24, 2009); Newt Gingrich and Pat Nolan, “Prison Reform: A Smart Way for States to Save Money and Lives,” *Washington Post*, Jan. 7, 2011.

2. Abdon Pallasch, “Prisons Not the Answer to Crime Problems: Attorney General,” *Chicago Sun-Times*, Aug. 3, 2009.

3. Ryan S. King, “The State of Sentencing 2008: Developments in Policy and Practice” (Washington, DC: Sentencing Project, 2009).

4. Nicole D. Porter, “The State of Sentencing 2010: Developments in Policy and Practice” (Washington, DC: Sentencing Project, Feb. 2011); David M. Reutter, “Economic Crisis Prompts Prison Closures Nationwide, but Savings (and Reforms) Are Elusive,” *Prison Legal News* 20.4 (2010): 1, 3–10; John Gramlich, “At Least 26 States Spend Less on Prisons,” *Stateline.org*, Aug. 11, 2009 (updated Aug. 14, 2009), <http://www.stateline.org/live/details/story?contentId=418338> (accessed Oct. 16, 2009).

5. Pew Center on the States, “Prison Count 2010” (Washington, DC: Pew Center on the States, Mar. 2010).

6. Ashley Nellis and Ryan S. King, “No Exit: The Expanding Use of Life Sentences in America” (Washington, DC: Sentencing Project, July 2009), 2.
7. *Ibid.*, 2–3.
8. Michael Tonry, *Punishing Race: A Continuing American Dilemma* (New York: Oxford University Press, 2011), 36.
9. A 2000 study estimated that about one of every four adult prisoners was serving a sentence of 20 years or more. C. G. Camp and G. M. Camp, *The 2000 Corrections Yearbook: Adult Corrections* (Middletown, CT: Criminal Justice Institute, 2000), 54, cited in Marc Mauer, Ryan S. King, and Malcolm C. Young, “The Meaning of ‘Life’: Long Prison Sentences in Context” (Washington, DC: Sentencing Project, May 2004), 11.
10. Penal Reform International, “Alternatives to the Death Penalty: The Problems with Life Imprisonment,” *Penal Briefing* 1 (2007), <http://www.penalreform.org/publications/penal-reform-briefing-no1-alternatives-death-penalty-o> (accessed May 25, 2011), 1, 6.
11. “A Matter of Life and Death: The Effect of Life-without-Parole Statutes on Capital Punishment,” *Harvard Law Review* 119 (2006), 1839.
12. Peter B. Hoffman, “History of the Federal Parole System, Part 1 (1910–1972),” *Federal Probation* 61 (1997), 24, cited in “A Matter of Life and Death,” *Harvard Law Review*, 184on. 16.
13. In the early 1950s, the average life sentence was 10 years in Kentucky, 11 years in Texas, and 14 years in North Carolina. Giovanni I. Giardini and Richard G. Farrow, “The Paroling of Capital Offenders,” *Annals of the American Academy of Political and Social Science* 284 (1952), 93.
14. Lane Nelson, “A History of Penal Reform in Angola, Part I: The Immovable Object,” *Angolite*, Sept.–Oct. 2009, 17.
15. John Corley, “A Matter of Life,” *Angolite*, Sept.–Oct. 2009, 29.
16. Rachel E. Barkow, “The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity,” *Michigan Law Review* 107 (May 2009), 1167.
17. Youngjae Lee, “The Constitutional Right against Excessive Punishment,” *Virginia Law Review* 91.3 (May 2005): 681. See also Barkow, “The Court of Life and Death.”
18. Julian H. Wright, Jr., “Life-without-Parole: An Alternative to Death or Not Much of a Life at All?,” *Vanderbilt Law Review* 43 (March 1990): 535–37.
19. J. Mark Lane, “‘Is There Life without Parole?’: A Capital Defendant’s Right to a Meaningful Alternative Sentence,” *Loyola (Los Angeles) Law Review* 26 (1992–93): 351–53.
20. Robert M. Bohm, “The Economic Costs of Capital Punishment: Past, Present, and Future,” in James R. Acker, Robert M. Bohm, and Charles S. Lanier, eds., *America’s Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, 2nd ed. (Durham, NC: Carolina Academic Press, 2003), 591–92. In Texas, each death penalty case costs taxpayers on average \$2.3 million, about three times the lifetime cost of imprisoning someone at the highest level of security. Richard C. Dieter, “Millions Misspent: What Politicians Don’t Say about the High Costs of the Death Penalty,” in Hugo Adam Bedau, ed., *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1997), 402.
21. “A Matter of Life and Death,” 1853.
22. Lee, “The Constitutional Right against Excessive Punishment,” 681.
23. Richard S. Frase, “Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: ‘Proportionality’ Relative to What?,” *Minnesota Law Review* 89 (Feb. 2005),

574. See also Catherine Appleton and Bent Grøver, “The Pros and Cons of Life without Parole,” *British Journal of Criminology* 47 (2007): 599.

24. Frase, “Excessive Prison Sentences,” 629. See also Barkow, “The Court of Life and Death,” 1184.

25. Barkow, “The Court of Life and Death,” 1145.

26. For an excellent critical overview of the Court’s “death-is-different canon,” see Barkow, “The Court of Life and Death.” See also Barkow’s “Life without Parole and the Hope for Real Sentencing Reform,” chap. 6 in this volume, as well as Henry, “Death-in-Prison Sentences,” and Josh Bowers, “Mandatory Life and the Death of Equitable Discretion,” chap. 1 in this volume.

27. See Barkow, “Life without Parole,” this volume.

28. *Callins v. Collins* 510 U.S. 1141, at 1145 (1994), as quoted in David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (Cambridge: Belknap Press of Harvard University Press, 2010), 266.

29. Garland, *Peculiar Institution*, 43.

30. See, for example, Stephen B. Bright, “Discrimination, Death, and Denial: Race and the Death Penalty,” in David R. Dow and Mark Dow, eds., *Machinery of Death: The Reality of America’s Death Penalty Regime* (New York: Routledge, 2002): 45–78.

31. *Yale Law Journal* 103.7 (1994): 1835–83.

32. Barkow, “The Court of Life and Death,” 1145.

33. Garland, *Peculiar Institution*, 258.

34. Robert Weisberg, “Deregulating Death,” *Supreme Court Review* (1983): 305–95. See also John Paul Stevens, “On the Death Sentence,” *New York Review of Books*, Dec. 23, 2010, 14.

35. *Graham v. Florida*, 569 U.S. (2010), slip opinion, 2.

36. Bohm, “The Economic Costs of Capital Punishment,” 591; and Nellis and King, “No Exit.”

37. Peter B. Hoffman, “History of the Federal Parole System,” 49, 51, cited in “A Matter of Life and Death,” *Harvard Law Review*, 1839n. 8.

38. Appleton and Grøver, “The Pros and Cons of Life without Parole,” 599–600.

39. Phoebe C. Ellsworth and Samuel R. Gross, “Hardening of the Attitudes: Americans’ Views of the Death Penalty,” in Stuart A. Scheingold, ed., *Politics, Crime Control and Culture* (Aldershot, UK: Ashgate, Dartmouth, 1997): 209–47; William J. Bowers, Margaret Vandiver, and Patricia H. Dugan, “A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer,” in Scheingold, *Politics, Crime Control and Culture*; Richard C. Dieter, “Sentencing for Life: Americans Embrace Alternatives to the Death Penalty,” in Robert M. Bohm, ed., *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1998): 116–34; and Frank R. Baumgartner, Suzanna L. De Boef, and Amber E. Boydston, *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge: Cambridge University Press, 2008), 173–74.

40. *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989), as quoted in *Graham*, 569 U.S., slip opinion, 19.

41. See Timothy J. Flanagan, ed., *Long-Term Imprisonment: Policy, Science, and Correctional Practice* (Thousand Oaks, CA: Sage, 1995).

42. Robert Johnson and Ania Dobrzanska, “Mature Coping among Life-Sentenced Inmates: An Exploratory Study of Adjustment Dynamics,” *Corrections Compendium*, Nov.–Dec. 2005, 37n. 4.

43. *Ibid.*, 37.
44. *Ibid.*
45. *Ibid.*, 8.
46. As quoted in *ibid.*, 36.
47. Lewis E. Lawes, "Why I Changed My Mind," in Philip E. Mackey, ed., *Voices against Death: American Opposition to Capital Punishment, 1787–1975* (New York: Burt Franklin, 1976), 194.
48. Julian H. Wright, Jr., "Life without Parole: The View from Death Row," *Criminal Law Bulletin* 27 (1991), 348.
49. Lloyd Dunkelberger, "Juvenile Offenders Still Get Near-Life Terms," *Herald-Tribune*, Nov. 21, 2010, <http://www.heraldtribune.com/article/20101121/ARTICLE/11211086> (accessed Mar. 28, 2011).
50. See the contributions to the special issue on imprisonment and crime in *Criminology & Public Policy* 10.1 (Feb. 2011).
51. Steven N. Durlauf and Daniel S. Nagin, "Imprisonment and Crime: Can Both Be Reduced?," *Criminology & Public Policy* 10.1 (Feb. 2011): 13–54.
52. Daniel S. Nagin, Francis T. Cullen, and Cheryl Lero Jonson, "Imprisonment and Reoffending," in Michael Tonry, ed., *Crime and Justice: A Review of Research* 38 (Chicago: University of Chicago Press, 2009): 115–200.
53. There is one important caveat here. Although gun-use laws have increased the length of sentences on the books, they appear not to have increased the actual lengths of the sentences meted out. Durlauf and Nagin, "Imprisonment and Crime," 28.
54. John H. Laub and Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (Cambridge: Harvard University Press, 2003).
55. Mauer, King, and Young, "The Meaning of 'Life,'" 24.
56. *Ibid.*
57. Advisory Committee on Geriatric and Seriously Ill Inmates, "Report of the Advisory Committee on Geriatric and Seriously Ill Inmates" (Harrisburg, PA: Joint State Government Commission, General Assembly of the Commonwealth of Pennsylvania, 2005), 77.
58. "Low Recidivism Rate Reported for Paroled NY Murderers," *Crime Report*, Jan. 7, 2011, <http://www.thecrimereport.org/archive/low-recidivism-rate-reported-for-paroled-ny-murderers/> (accessed Mar. 28, 2011).
59. For a summary of these research findings, see James W. Marquart and Jonathan R. Sorensen, "A National Study of the *Furman*-Committed Inmates: Assessing the Threat to Society from Capital Offenders," *Loyola of Los Angeles Law Review* 23 (1989): 9–10. See also *Prison Statistics for England and Wales 1999* (London: Home Office, 2000), 100n. 43, cited in Andrew Coyle, "Replacing the Death Penalty: The Vexed Issue of Alternative Sanctions," in Peter Hodgkinson and William A. Schabas, eds., *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004), 107; and Mark D. Cunningham, Thomas J. Reidy, and Jon R. Sorensen, "Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri," *Behavioral Sciences and the Law* 23 (2005): 307–20.
60. Hugo Adam Bedau, "Recidivism, Parole, and Deterrence," in Hugo Adam Bedau, ed., *The Death Penalty in America*, 3rd ed. (New York: Oxford University Press, 1982), 179, as cited in Marquart and Sorensen, "A National Study of the *Furman*-Committed Inmates," 24.

61. Vera Institute of Justice, “It’s about Time: Aging Prisoners, Increasing Costs, and Geriatric Release” (New York: Vera Institute of Justice, 2010).

62. The typical prison sentence for robbery in the United States is 97 months, of which the typical time served is 60 months (including the pretrial time spent in jail), at a cost of approximately \$113,000. The median loss associated with a robbery reported to the police is \$100. James Austin, “Reducing America’s Correctional Populations: A Strategic Plan,” *Justice Research and Policy* 12.1 (2010), 21. A Bureau of Justice Statistics study of comparative sentencing found that people in the United States sentenced to prison for burglary generally served much longer sentences than those sentenced for the same crime in several European countries. See David P. Farrington, Patrick A. Langan, and Michael Tonry, eds., “Cross-National Studies in Crime and Justice” (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sept. 2004), x.

63. For a recent analysis of mass incarceration that puts much of the blame on the war on drugs, see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

64. Franklin E. Zimring, “Imprisonment Rates and the New Politics of Criminal Punishment,” *Punishment & Society* 3.1 (2001): 161–66.

65. Franklin E. Zimring and Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (New York: Oxford University Press, 1995), chap. 5.

66. Zimring, “Imprisonment Rates,” 162.

67. Calculated from William J. Sabol, “Implications of Criminal Justice System Adaptation for Prison Population Growth and Corrections Policy,” paper presented at “Symposium on Crime and Justice: The Past and Future of Empirical Sentencing Research,” SUNY at Albany, Sept. 23–24, 2010, table 1.

68. Calculated from *ibid.*

69. Mark Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment* (Princeton: Princeton University Press, 2009), 15.

70. Porter, “The State of Sentencing 2010,” 5.

71. Judith Greene and Marc Mauer, “Downscaling Prisons: Lessons from Four States” (Washington, DC: Sentencing Project, 2010); and Bert Useem, “Right-Sizing Corrections in New York,” *Justice Research and Policy* 12.1 (2010): 89–112.

72. David F. Weiman and Christopher Weiss, “The Origins of Mass Incarceration in New York State: The Rockefeller Drug Laws and the Local War on Drugs,” in Steven Raphael and Michael A. Stoll, eds., *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom* (New York: Russell Sage Foundation, 2009): 73–116.

73. Greene and Mauer, “Downscaling Prisons,” 22.

74. Nicholas Confessore, “Litmus Test in Primaries: Overhauled Drug Laws,” *New York Times*, June 20, 2010.

75. New York State Commission on Sentencing Reform, “The Future of Sentencing in New York State: Recommendations for Reform,” Jan. 30, 2009, 163–66.

76. Michigan Families Against Mandatory Minimums, “Michigan Enacts Reform of ‘650-Lifer’ Law,” *News Briefs*, July–Aug. 1998, <http://www.ndsn.org/julaug98/sent.html> (accessed Jan. 26, 2011).

77. Drug Policy Alliance, “Louisiana Passes Sweeping Drug Law Reform,” press release, June 18, 2001, http://www.drugpolicy.org/news/pressroom/pressrelease/pr_june18_01.cfm

(accessed Jan. 26, 2011); and Larry Sharp, "Coming Full Circle," *Angolite*, Sept.–Oct. 2009, 25.

78. William Stuntz, "Unequal Justice," *Harvard Law Review* 121.8 (June 2010), 2022. See also Tracey L. Meares, Neal Katyal, and Dan M. Kahan, "Updating the Study of Punishment," *Stanford Law Review* 56.5 (2004): 1178.

79. Marc Mauer, "The Causes and Consequences of Prison Growth in the United States," *Punishment & Society* 3.1 (2001), 17. Italics in the original.

80. David M. Reutter, "Political Uproar Follows NC Court Ruling That Life Sentence Is 80 Years," *Prison Legal News*, May 2010, 34–35.

81. Associated Press, "Rapists and Murderers Going Free under Old Law," MSNBC.com, Oct. 16, 2009, <http://www.msnbc.msn.com/id/33340592/> (accessed Sept. 24, 2010).

82. WSOCTV, "Victims, Families Outraged by N.C. Inmates' Release," Oct. 20, 2009, <http://www.wsocvtv.com/news/21350656/detail.html> (accessed Sept. 24, 2010).

83. Mandy Locke, "Ruling Affirms 1970s Life Sentences," *Charlotte Observer*, Aug. 27, 2010, <http://www.charlotteobserver.com/2010/08/27/1647108/nc-supreme-court-life-sentences.html> (accessed Sept. 24, 2010).

84. Nelson, "A History of Penal Reform in Angola, Part 1," 19.

85. Lifers also divided over whether to keep their distance from the controversies surrounding the "Angola 3," the former Black Panthers kept for decades in solitary confinement at Angola. Lane Nelson, "A History of Penal Reform in Angola, Part 2: The Immovable Object," *Angolite*, Nov.–Dec. 2009, 32.

86. *Ibid.*, 28.

87. *Ibid.*, 33.

88. *Ibid.*

89. Adam Liptak, "Serving Life for Providing Car to Killers," *New York Times*, Dec. 4, 2007.

90. *Ibid.*

91. Nellis and King, "No Exit," 42; Human Rights Watch and Amnesty International, "The Rest of Their Lives: Life without Parole for Child Offenders in the United States" (New York: Human Rights Watch and Amnesty International, 2005), 5; Michelle Leighton and Connie de la Vega, "Sentencing Our Children to Die in Prison: Global Law and Practice," *University of San Francisco Law Review* 42 (Spring 2008): 990–92.

92. Leighton and de la Vega, "Sentencing Our Children to Die in Prison," 985.

93. *Ibid.*, 989n. 19.

94. American Civil Liberties Union of Michigan, "Second Chances: Juveniles Serving Life without Parole in Michigan's Prisons," 2004, in letter from United States and International Human Rights Organizations to the Committee on the Elimination of Racial Discrimination, June 4, 2009, 3.

95. Equal Justice Initiative, "Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison" (Montgomery, AL: Equal Justice Initiative, Nov. 2007), 14–15. On any given day, as many as 7,500 youths are incarcerated in adult prisons and jails in the United States. Campaign for Youth Justice, "National Statistics," <http://www.campaignforyouthjustice.org/national-statistics.html> (accessed May 25, 2011).

96. Porter, "The State of Sentencing 2010," 22.

97. Vince Beiser, "Kids Locked Up for Life," *Atlantic*, Nov. 2009; Teresa Baldas, "More States Rethinking Life Sentences for Teens," *National Law Journal*, Mar. 15, 2010.

98. “Assembly Rejects Bill to Aid Juvenile Lifers,” *Capitol Alert*, Aug. 25, 2010, <http://blogs.sacbee.com/capitolalert/latest/2010/08/> (accessed Jan. 27, 2011); Leland Yee, “California Assembly Failed Our Kids,” press release, Aug. 30, 2010, http://disto8.casen.govoffice.com/index.asp?Type=B_PR&SEC=%7BEFA496BC-EDC8-4E38-9CC7-68D37AC03DFF%7D&DE=%7BC4416778-A9D3-4257-8659-28FC2F0767E5%7D (accessed Nov. 20, 2010).

99. Sentencing Project, “Juvenile Life without Parole,” 2010, 2, http://www.sentencingproject.org/doc/publications/publications/jj_jlwopfactsheetJuly2010.pdf (accessed Jan. 31, 2011).

100. “Under current federal transfer law, an adult court judge determines on a case-by-case basis whether it is ‘in the interest of justice’ to charge a youth in adult court.” However, under amendments pushed by Senator Jeff Sessions (R-AL) and Senator Jon Kyl (R-AZ), prosecutors, instead of judges, would decide whether to prosecute youth as adults for certain federal crimes. “JJDP A Passes through Senate Judiciary Committee,” *Campaign for Youth Justice Newsletter*, Jan. 2010, <http://www.campaignforyouthjustice.org/documents/Jan.2010cfjnewsletter.pdf> (accessed Jan. 31, 2011), 4.

101. Bradley Bridge, Defender Association of Philadelphia, testimony before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010, 1.

102. *Ibid.*, 4.

103. Andrea Canning and Maggie Burbank, “Jordan Brown Murder Case Takes Emotional Toll,” ABC News/Nightline, Apr. 28, 2010, <http://abcnews.go.com/Nightline/jordan-brown-murder-case-12-year-adult/story?id=10288704> (accessed Nov. 4, 2010). In August 2011, the case was moved to juvenile court after a Superior Court overturned the initial decision to try him as an adult. CBS Pittsburgh, “Jordan Brown Case Moves to Juvenile Court,” Aug. 23, 2011, <http://pittsburgh.cbslocal.com/2011/08/23/jordan-brown-case-moves-to-juvenile-court/> (accessed Sept. 26, 2011).

104. In Pennsylvania, the JLWOP population is about 67 percent African American, 20 percent white, and 10 percent Hispanic. The lifer population as a whole in Pennsylvania is 63 percent African American. Nellis and King, “No Exit,” 22, table 8, and 16, table 5.

105. Adam Liptak, “To More Inmates, Life Term Means Dying behind Bars,” *New York Times*, Oct. 2, 2005.

106. Robert G. Schwartz, Juvenile Law Center, testimony before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010, 10.

107. Anita Colón, Pennsylvania Coalition for the Fair Sentencing of Youth, testimony before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010.

108. Marc Mauer, The Sentencing Project, executive director, letter to Reps. John Conyers, Jr., and Lamar Smith, May 7, 2009.

109. Pennsylvania District Attorneys Association, testimony before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010, 3-4.

110. *Ibid.*, 3.

111. See the testimony by Dawn Romig, Larry Markel, Carol Schouwe, and Alyce C. Thompson before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010.

112. Charles D. Stimson, Heritage Foundation, testimony before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010.

113. Julia Hall, chair, Pennsylvania Prison Society Subcommittee on Juvenile Lifers, testimony before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010, 2.

114. Bobbi Jamriska, National Organization of Victims of “Juvenile Lifers,” testimony before the Pennsylvania House Judiciary Committee Hearing on HB 1999, Aug. 4, 2010, n.p.
115. Solomon Moore, “Number of Life Terms Hits Record,” *New York Times*, July 22, 2009.
116. *Ibid.*
117. *Ibid.*
118. Jack Leonard, “‘Pizza Thief’ Walks the Line,” *L.A. Times*, Feb. 10, 2010, <http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10> (accessed Nov. 22, 2010).
119. Emily Bazelon, “Arguing Three Strikes,” *New York Times Magazine*, May 21, 2010.
120. Stanford Three Strikes Project, “Overview,” <http://www.law.stanford.edu/program/clinics/threestrikesproject/> (accessed Mar. 30, 2011).
121. Samara Marion, “Justice by Geography? A Study of San Diego County’s Three Strikes Sentencing Practices from July–Dec. 1996,” *Stanford Law and Policy Review* 11.1 (1999–2000): 29–57; and Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You’re Out in California* (New York: Oxford University Press, 2001).
122. California State Auditor, “California Department of Corrections and Rehabilitation: Inmates Sentenced under the Three Strikes Law and a Small Number of Inmates Receiving Specialty Health Care Represent Significant Costs,” report 2009.107.2 (Sacramento: California State Auditor, Bureau of State Audits, May 2010), 1.
123. California State Auditor, “California Department of Corrections and Rehabilitation: It Fails to Track and Use Data That Would Allow It to More Effectively Monitor and Manage Its Operations,” report 2009.107.1 (Sacramento: California State Auditor, Bureau of State Audits, Sept. 2009), 2.
124. California State Auditor, report 2009.107.2, 2.
125. California State Auditor, report 2009.107.2, 23, table 2.
126. This account of the defeat of Proposition 66 is largely based on Joshua Page, *The Toughest Beat: Politics, Punishment, and the Prison Officers Union in California* (New York: Oxford University Press, 2011), 121–32.
127. Joshua Page, “Fear of Change: Prisoner Officer Unions and the Perpetuation of the Penal Status Quo,” *Criminology & Public Policy* 10.3 (August 2011), 747.
128. *Ibid.*, 748.
129. *People v. Williams*, 17 Cal. 4th 148, 161 (1998), as quoted in Rebecca Gross, “The ‘Spirit’ of Three Strikes Law: From the *Romero* Myth to the Hopeful Implications of *Andrade*,” *Golden Gate University Law Review* 32.2 (2002), 179.
130. Among other claims, the Stanford Project has successfully argued that its clients were denied effective legal representation and that their sentences constitute cruel and unusual punishment. Stanford Three Strikes Project, “Three Strikes Basics,” <http://www.law.stanford.edu/program/clinics/threestrikesproject/> (accessed Mar. 30, 2011).
131. Bazelon, “Arguing Three Strikes.”
132. Sasha Abramsky, “The War against the ‘War on Drugs,’” *Nation*, June 17, 2009.
133. California State Auditor, report 2009-107.1, 7; and Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007), 8.
134. “Billionaire-Funded California Initiative Triples Lifer Parole Denial Intervals, Imposes Restrictions on Parole Violators,” *Prison Legal News*, May 2009, 12–13.

135. Legislative Analyst's Office, "Proposition 5: Nonviolent Drug Offenses, Sentencing, Parole, and Rehabilitation Initiative Statute" (Sacramento, CA: Legislative Analyst's Office, Sept. 28, 2008).
136. In a thoroughly mixed result, voters also overwhelmingly rejected Proposition 6, which would have increased spending on law enforcement, ratcheted up the penalties for "gang-related" activities, and toughened up the criminal justice system in dozens of other ways. "Fiscal Disaster in California," editorial, *New York Times*, Oct. 10, 2008, A32.
137. Michael Rothfeld, "After Delay, Assembly to Take Up Prison Measure," *L.A. Times*, Sept. 1, 2009, <http://articles.latimes.com/2009/sep/01/local/me-prisons1> (accessed Jan. 31, 2011).
138. Solomon Moore, "California State Assembly Approves Prison Legislation," *New York Times*, Sept. 1, 2009; Page, *The Toughest Beat*.
139. Solomon Moore, "California Passes Bill Addressing Prisons," *New York Times*, Sept. 13, 2009.
140. Rebecca Cathcart, "3-Strikes Challenger Is Charged with 4 Murders," *New York Times*, Dec. 1, 2010.
141. *Graham*, 569 U.S., slip opinion, 20.
142. Appleton and Grover, "The Pros and Cons of Life without Parole," 608.
143. In 1972, California's state prison population was 19,773. As of June 30, 2009, it was 168,000. Rosemary Gartner, Anthony Doob, and Franklin E. Zimring, "The Past as Prologue? Decarceration in California Then and Now," *Criminology & Public Policy* 10.2 (2011): 291–325; and California State Auditor, report 2009-107.1, 7.
144. Dan Markel, "State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty," *Harvard Civil Rights–Civil Liberties Law Review* 40 (2005), 407.
145. Appleton and Grover, "The Pros and Cons of Life without Parole," 606.
146. Frieder Dünkler and Ineke Pruin, "Germany," in Nicola Padfield, Dirk van Zyl Smit, and Frieder Dünkler, eds., *Release from Prison: European Policy and Practice* (Portland, OR: Willan, 2010), 193–94.
147. Dünkler and Pruin, "Germany," 193.
148. Mauer, King, and Young, "The Meaning of 'Life,'" 32.
149. Nellis and King, "No Exit," 41.
150. Personal e-mail communication to author, Jan. 26, 2011.
151. Hugo Adam Bedau, "Imprisonment vs. Death: Does Avoiding Schwarzschild's Paradox Lead to Sheff's Dilemma?," *Albany Law Review* 54 (1989–90): 495.
152. One prosecutor who did support her release was Vincent Bugliosi, who prosecuted Atkins and other members of the Manson Family. He said he supported her release, if only to save the state the extraordinary cost of her health care. "Ailing Manson Follower Denied Release from Prison," CNN, July 15, 2008, http://articles.cnn.com/2008-07-15/justice/release.denied_1_charles-manson-follower-compassionate-release-terminally-ill-inmates/2?_s=sPM:CRIME (accessed Oct. 4, 2010).
153. *Ibid.*
154. James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (New York: Oxford University Press, 2003).
155. *Ibid.*; Christen Jensen, *The Pardoning Power in the American States* (Chicago: University of Chicago Press, 1922).

156. David M. Oshinsky, *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996), 67–69.
157. *Ibid.*, 196–200.
158. In 1971, Pennsylvania’s lifer population was 390; 20 years later, it had increased over 500 percent to 2,139. In 2008, it was 4,349. Mark Rowan and Brian S. Kane, “Life Means Life, Maybe? An Analysis of Pennsylvania’s Policy toward Lifers,” *Duquesne Law Review* 30 (1992): 662; and Nellis and King, “No Exit,” 9, table 2.
159. Robert Moran, “Rendell to Commute Life Sentences for Three,” *Philadelphia Inquirer*, Dec. 30, 2010, http://articles.philly.com/2010-12-30/news/26356500_1_pardons-board-rendell-clemency (accessed Jan. 27, 2011).
160. Advisory Committee on Geriatric and Seriously Ill Inmates, “Report of the Advisory Committee on Geriatric and Seriously Ill Inmates,” 78.
161. Michael Rubinkam, “Pa. Lifers Seeking Clemency in Wake of U.S. Ruling,” Associated Press, Sept. 3, 2009.
162. P. S. Ruckman, “Executive Clemency in the United States: Origins, Development, and Analysis (1900–93),” *Presidential Studies Quarterly* 27 (1997): 261, table 1.
163. Smart on Crime Coalition, “Smart on Crime: Recommendations for the Administration and Congress” (Washington, DC: Constitution Project, 2011), 175.
164. “Public Tired of Willie Horton? Whither 21st Century Clemency?,” *Grits for Breakfast* (blog), Jan. 10, 2010, <http://gritsforbreakfast.blogspot.com/2010/01/public-tired-of-willie-horton-whither.html> (accessed Apr. 17, 2010). Technically, that is no longer true. At the end of Obama’s second year in office, he finally got around to issuing his first pardons. The nine pardons were characterized as “stingy” and “lackluster.” Six of them “were for offenses so minor that they did not warrant time behind bars; six offenses were committed three decades ago.” Editorial, “Mr. Obama’s Lackluster Pardons,” *Washington Post*, Dec. 30, 2010.
165. Stu Whitney, “Prison Time Cuts Lead U.S.,” *Sioux Falls–Argus Leader*, Jun. 29, 2003, cited in Daniel T. Kobil, “Should Mercy Have a Place in Clemency Decisions?,” in Austin Sarat and Nasser Hussain, eds., *Forgiveness, Mercy, and Clemency* (Stanford: Stanford University Press, 2007), 37n. 11.
166. American Bar Association, Justice Kennedy Commission, “Reports with Recommendations to the ABA House of Delegates” (Chicago: ABA, Aug. 2004), 67.
167. *Ibid.*, 64.
168. Marquart and Sorensen, “A National Study of the *Furman*-Commuted Inmates,” 21.
169. *Ibid.*, 23, 26.
170. *Ibid.*, 22, 28.
171. Joan M. Cheever, *Back from the Dead: One Woman’s Search for the Men Who Walked Off Death Row* (New York: Wiley, 2006), 4, 36, and 206.
172. Bedau, “Recidivism, Parole, and Deterrence,” 175–80, as quoted in Marquart and Sorensen, “A National Study of the *Furman*-Commuted Inmates,” 25.
173. Bob Brenzing, “179 Commutations and Counting: Granholm Exits as Most Merciful Michigan Governor in Decades,” *Detroit Free Press*, Dec. 20, 2010 http://www.wzzm13.com/news/news_story.aspx?storyid=145281 (accessed Jan. 27, 2011).
174. “By the Numbers: Huckabee’s Clemency Record,” KFSM News, July 28, 2004, cited in Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution* (Princeton: Princeton University Press, 2005), 33.

175. Michael Levenson, "Patrick Names Four Nominees for State Parole Board," *Boston Globe*, Mar. 4, 2011; Ben Storrow, "Legislators See Merit in Reforming Parole Laws," *Daily Hampshire Gazette*, Feb. 16, 2011, <http://www.gazettenet.com/2011/02/16/legislators-see-merit-reforming-parole-laws?SESSfo5297705985580b55f7534e48eb6854=gsearch> (accessed Mar. 28, 2011).

176. Bob Egelko, "Brown Paroles More Lifers Than Did Predecessors," SFGate.com, April 29, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/04/28/MNUA1J991B.DTL> (accessed May 9, 2011).

177. Charlotte A. Price, "Aging Inmate Population Study," North Carolina Department of Correction, Division of Prisons, May 2006.

178. Vera Institute of Justice, "It's about Time," 2.

179. *Ibid.*

180. Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press), 191.

181. *Ibid.*

182. Hamilton Project, "From Prison to Work: Overcoming Barriers to Reentry" (Washington DC: Brookings Institution, Dec. 5, 2008), 15, http://www.brookings.edu/~media/Files/events/2008/1205_prison/20081205_prison_to_work.pdf (accessed Oct. 8, 2010).

183. *Ibid.*, 31.

184. Sarat, *Mercy on Trial*; Kobil, "Should Mercy Have a Place in Clemency Decisions?"; and Elizabeth Rapaport, "Retribution and Redemption in the Operation of Executive Clemency," *Chicago-Kent Law Review* 74.4 (2000): 1501-35.

185. *Herrera v. Collins*, 506 U.S. 390, 412 (1993), quoted in Sarat, *Mercy on Trial*, 107.

186. Kobil, "Should Mercy Have a Place in Clemency Decisions?," 37.

187. Sarat, *Mercy on Trial*, 139.

188. P. S. Ruckman, "The Pardoning Power: The *Other* Civics Lesson" (paper presented at the annual meeting of the Southern Political Science Association, Atlanta, Georgia, Nov. 7-10, 2001), 8.

189. Sarat, *Mercy on Trial*, 37-66.

190. Kobil, "Should Mercy Have a Place in Clemency Decisions?," 37.

191. Sarat, *Mercy on Trial*, 28.

192. *Ibid.*, 10.

193. Anthony M. Kennedy, "Speech at the American Bar Association Annual Meeting," American Bar Association, press release, Aug. 9, 2003, <http://www.abanet.org/leadership/initiative/kennedyspeech.pdf> (accessed Jan. 31, 2010), 5.

194. Baumgartner, De Boef, and Boydston, *The Decline of the Death Penalty*.

195. *Ibid.*, 173.

196. David Feige, "The Dark Side of Innocence," *New York Times Magazine*, June 15, 2003, 15. The 1 percent figure comes from David R. Dow, "The Problem of 'Innocence,'" in David R. Dow and Mark Dow, eds., *Machinery of Death: The Reality of America's Death Penalty Regime* (New York: Routledge, 2002), 5. For higher estimates, see Gordon P. Waldo and Raymond Paternoster, "Tinkering with the Machinery of Death: The Failure of a Social Experiment," in Thomas G. Blomberg and Stanley Cohen, eds., *Punishment and Social Control*, 2nd ed. (New York: Aldine de Gruyter, 2003), 312.

197. For a succinct overview of key European Court of Human Rights decisions regarding life-sentenced prisoners, see Dirk van Zyl Smit and John R. Spencer, "The European

Dimension to the Release of Sentenced Prisoners,” in Padfield, van Zyl Smit, and Dünkel, *Release from Prison*, 18–21.

198. Penal Reform International, “Alternatives to the Death Penalty.”

199. See Barkow, “Life without Parole,” 000.

200. For a development of these points, see Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press), chaps. 8–9.

201. Derral Cheatwood, “The-Life-without-Parole Sanction: Its Current Status and a Research Agenda,” *Crime & Delinquency* 34 (1988): 49.

202. Susan E. Martin, “Commutation of Prison Sentences: Practice, Promise, and Limitation,” *Crime & Delinquency* 29 (1983): 594.

203. Death Penalty Information Center, “Year That States Adopted Life without Parole (LWOP) Sentencing,” <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing> (accessed Jan. 14, 2011).

204. For example, in Louisiana punitive and progressive impulses collided to produce more draconian life sentences and penal policies. In the early 1970s, the state’s director of corrections called for the repeal of the 10/6 law because in her view it gave too much discretion to wardens to decide which lifers deserved to be released. Coming at about the same time, the *Furman* decision strengthened the push for repeal from an opposite direction as fears grew that many prisoners then on death row would be released under the state’s 10/6 law. Nelson, “A History of Penal Reform in Angola, Part I,” 17.

205. See, for example, the discussion of the Alabama case in Jim Stewart and Paul Lieberman, “What Is This New Sentence That Takes away Parole?,” *Student Lawyer* 11 (1982–83): 14–16.

206. See, for example, the discussion of the Georgia case in *ibid.*, 16–17.

207. Mona Lynch, “Mass Incarceration, Legal Change, and Locale: Understanding and Remediating American Penal Overindulgence,” *Criminology & Public Policy* 10.3 (August 2011): 688.

208. Bedau, “Imprisonment vs. Death,” 495.

209. Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972–1994* (New York: Oxford University Press, 1996), 140, 180; Wright, “Life-without-Parole,” 566; Raymond Paternoster, *Capital Punishment in America* (New York: Lexington Books, 1991), 287; and Scott Turow, “To Kill or Not to Kill: Coming to Terms with Capital Punishment,” *New Yorker*, Jan. 6, 2003, 47.

210. “A Matter of Life and Death,” 1839.

211. Haines, *Against Capital Punishment*, 179.

212. Steven Brill, “Throw Away the Key,” *American Lawyer*, July–Aug. 1987, 3. See also Steven Brill, “Trantino: Long Locked Up, Now Throw Away the Key,” *New Jersey Law Journal* 126 (July 26, 1990): 9, 36–37.

213. Mary E. Medland and Craig Fischer, “Life without Parole Offered as Alternative to Death Penalty,” *Criminal Justice Newsletter*, Jan. 16, 1990, 4.

214. Stewart and Lieberman, “What Is This New Sentence?,” 17.

215. Medland and Fischer, “Life without Parole Offered,” 4.

216. “A Matter of Life and Death,” 1847.

217. *Ibid.*, 1829.

218. Mauer, King, and Young, “The Meaning of ‘Life,’” 12.
219. “A Matter of Life and Death,” 1838.
220. William W. Hood III, “Note: The Meaning of ‘Life’ for Virginia Jurors and Its Effect on Reliability in Capital Sentencing,” *Virginia Law Review* 75 (1989): 1605, 1624–25, cited in “A Matter of Life and Death,” 1838.
221. “A Matter of Life and Death,” 1844.
222. Danya W. Blair, “A Matter of Life and Death: Why Life without Parole Should Be a Sentencing Option in Texas,” *American Journal of Criminal Law* (1994–95): 191–214.
223. “A Matter of Life and Death,” *Harvard Law Review*, 1843.
224. *Ibid.*
225. “Symbolic Justice: LWOP for Serial Rapists Creates More Problems Than It Solves,” *Grits for Breakfast* (blog), May 7, 2011, <http://gritsforbreakfast.blogspot.com/2011/05/symbolic-justice-lwop-for-serial.html> (accessed May 25, 2011).
226. See Human Rights Watch and Amnesty International, “The Rest of Their Lives.”
227. Amnesty International, “Review of AI Work against the Death Penalty—Original Discussion Paper” (ACT 51/003/2002) and Full Draft Report (ACT 50.008/2002), quoted in Peter Hodgkinson, “Replacing Capital Punishment: An Effective Penal Policy Approach,” University of Westminster, Centre for Capital Punishment Studies, Occasional Paper Series—Special Edition, vol. 3, “Managing Effective Alternatives to Capital Punishment: Conference Papers,” June 24, 2005, n.p.
228. National Coalition Against the Death Penalty, “Death Penalty Overview: Ten Reasons Why Capital Punishment Is Flawed Public Policy,” <http://www.ncadp.org/index.cfm?content=5> (accessed Mar. 31, 2011).
229. “NewsNight with Aaron Brown: Interview with Innocence Project Cofounder Barry Scheck,” CNN, Dec. 10, 2004, cited in “A Matter of Life and Death,” 1838n. 2.
230. See, for example, the testimony of Larry Peterson, Gerald L. Zelizer, Kate Hill Germond, Jack Johnson, Richard C. Dieter, Edith Frank, and Sandra K. Manning before the New Jersey Death Penalty Study Commission, Trenton, New Jersey, July 19, 2010.
231. Somerset County Chapter, ACLU-NJ, written testimony for the New Jersey Death Penalty Study Commission, Trenton, New Jersey, July 19, 2006, 331x; and “At Death’s Door: Interview by David Cook,” *Sun*, Aug. 2010, as excerpted in *Utne Reader*, Nov.–Dec. 2010, <http://www.utne.com/Politics/At-Deaths-Door-Sister-Helen-Prejean-Death-Penalty.aspx> (accessed Jan. 31, 2011).
232. Robert Johnson, testimony before the New Jersey Death Penalty Study Commission, Trenton, New Jersey, July 19, 2006, 58.
233. Under the commission’s proposal to abolish the death penalty, judges would be required to impose LWOP in all first-degree murder cases if the jury found that the crime fit any of a dozen categories of “aggravated” murder. Jurors would no longer weigh mitigating circumstances, as they did in capital cases.
234. “The Other Death Penalty Project Announces Letter-Writing Campaign to Anti-Death Penalty Groups,” news release, Feb. 22, 2010, <http://www.prnewswire.com/news-releases/the-other-death-penalty-project-announces-letter-writing-campaign-to-anti-death-penalty-groups-84945657.html> (accessed Nov. 22, 2010); and Gordon Haas and Lloyd Fillion, “Life without Parole: A Reconsideration” (Jamaica Plain, MA: Criminal Justice Policy Coalition, Nov. 30, 2010).

235. Kenneth Hartman, “The Other Death Penalty,” Other Death Penalty Project, Feb. 22, 2010, <http://www.theotherdeathpenalty.org/foundingdocument.htm> (accessed Oct. 20, 2010).
236. Marlene Martin, “National Initiatives and Resolution,” *New Abolitionist*, Jan. 2009, http://www.nodeathpenalty.org/new_abolitionist/Jan.-2009-issue-47/national-initiatives-and-resolution (accessed Jan. 27, 2011).
237. For an overview of these cases, see Gottschalk, *The Prison and the Gallows*, 207–8.
238. Jack Greenberg, *Cases and Materials on Judicial Process and Social Change: Constitutional Litigation* (St. Paul, MN: West, 1977), 431.
239. David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence: University Press of Kansas, 2010), 61.
240. *Ibid.*, 95–107.
241. For an excellent critical overview of the Supreme Court’s record on race and criminal justice in noncapital cases, see Alexander, *The New Jim Crow*, chap. 3.
242. Nellis and King, “No Exit,” 11.
243. African Americans make up 35 percent of second-strikers in California and 45 percent of third-strikers, even though they constitute barely 6 percent of the state’s adult population. Elsa Y. Chen, “The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California’s Three Strikes Law,” *Journal of Ethnicity in Criminal Justice* 6.2 (2008): 83, 85.
244. Nellis and King, “No Exit,” 11.
245. *Ibid.*, 13.
246. *Ibid.*, 23.
247. *Ibid.*, 20 and also 21–22, table 8.
248. Vera Institute of Justice, “It’s about Time,” 4.
249. B. Jayne Anno et al., “Correctional Health Care: Addressing the Needs of the Elderly, Chronically Ill, and Terminally Ill Inmates” (Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2004), cited in Vera Institute of Justice, “It’s about Time,” 5.
250. For a somewhat skeptical view of the likelihood that the economic crisis means the beginning of the end of mass incarceration in the United States, see Marie Gottschalk, “The Great Recession and the Great Confinement: The Economic Crisis and the Future of Penal Reform,” in Richard Rosenfeld, Kenna Quinet, and Crystal Garcia, eds., *Contemporary Issues in Criminological Theory and Research: The Role of Social Institutions* (Belmont, CA: Wadsworth, 2010), 343–70.
251. For example, in July 2009, when California’s inmate population topped 170,000, the state had only 11,000 substance-abuse treatment slots in its prisons and just 200 slots for anger-management programs. The state had no sex-offender treatment programs even though 9 percent of California’s prisoners are currently serving a term for a sex-crime conviction. Prison Census Data, “Characteristics of Inmate Population” (California Department of Corrections, Aug. 2009), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Offender_Information_Reports.html, cited in Robert Weisberg and Joan Petersilia, “The Dangers of Pyrrhic Victories against Mass Incarceration,” *Daedalus*, Summer 2010, 130. Just two days after this report was released, the California legislature approved budget cuts that slashed spending on prisoner-educational

tion, drug-treatment, and job-training programs. Weisberg and Petersilia, “The Dangers of Pyrrhic Victories,” 131.

252. When asked why lifers were increasingly denied access to prison employment, higher education, and other programs and activities in Pennsylvania’s prisons, then secretary of corrections James Beard “stated that he had to [use] his limited resources to prepare those who would return to the streets,” according to Julia Hall, a board member of the Pennsylvania Prison Society and chair of Pennsylvania’s Coalition for the Fair Sentencing of Youth. Julia Hall, personal e-mail communication, Feb. 6, 2011.

253. Kenneth E. Hartman, “The Other Death Penalty,” quoted in James Ridgeway and Jean Casella, “Voices from Solitary: Kenneth E. Hartman on ‘The Other Death Penalty,’” Solitary Watch, May 19, 2010, <http://solitarywatch.com/2010/05/19/voices-from-solitary-kenneth-e-hartman-on-the-other-death-penalty/> (accessed Nov. 22, 2010).