THE CIVIL DEATH PENALTY: HOW LIFE WITHOUT PAROLE HAS BECOME AMERICA'S FAVORITE INHUMANE ANSWER TO CRIME

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INTRODUCTION

Sitting in a cell as you age, through the death of family members, the birth of children and grandchildren, you are stuck. You "feel[] like you have been sentenced to death . . . like someone or something is suffocating the life out of you slowly. The pain and suffering will be there 'till the day you die.'"[1] Hope will become difficult to find, and you will die like you lived—in a prison cell.[2]

One in six people who are incarcerated live like this, not knowing the end of their sentence.[3] Over two hundred thousand people are condemned to this perpetual penal confinement, their futures in the hands of a parole board's arbitrary decision-making authority or with no possibility of release at all.[4] Roughly one-hundred times more people are serving these "death in prison" sentences than are facing a true death sentence.[5] Out of these "lifers," about a quarter of them are facing life without parole ("LWOP").[6]

The popularity of life sentences began following the Supreme Court's decision in *Furman v. Georgia*, striking down capital sentencing structures across the states.[7] Life without parole and other life sentences were not unheard of before 1972, but only seven states had statutes authorizing LWOP.[8] Following *Furman*, some states responded by

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[1] JENNIFER TURNER, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 183 (Vanita Gupta et al., eds. 2013).

[2] "Even though someone is sick or dying, they live in a cell. That's what the rooms on the fourth floor are. They're cells." STEVE HERBERT, TOO EASY TO KEEP: LIFE-SENTENCED PRISONERS AND THE FUTURE OF MASS INCARCERATION 91 (2019).

[3] This figure has increased from 1 in 7 in 2021. *Compare,* Ashley Nellis & Celeste Barry, *A Matter of Life: The Scope and Impact of Life and Long Term Imprisonment in the United States*, THE SENT'G PROJECT (Jan. 8, 2025), [hereinafter *A Matter of Life*] https://www.sentencingproject.org/reports/a-matter-of-life-the-scope-and-impact-of-life-and-long-term-imprisonment-in-the-united-states/ [https://perma.cc/JEW7-64GF] (noting the increase in LWOP and life sentences to one in six incarcerated people); *with No End in Sight: America's Enduring Reliance on Life Sentences*, THE SENT'G PROJECT (Feb. 17, 2021), [hereinafter *No End in Sight*] https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/ [https://perma.cc/CAQ2-FB78] (highlighting how the statistics in 2021 were one in seven incarcerated individuals were sentenced to LWOP or life).

[4] *See A Matter of Life*, *supra* note 3.

[5] *See id.*; *Death Row Overview,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/overview [https://perma.cc/3C34-2JGX] (last visited Apr. 23, 2025).

[6] *No End in Sight*, *supra* note 3.

[7] Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, NW J. L. & SOC. POL'Y. 173, 178 (2020).

[8] Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, THE SENT'G PROJECT 1, 3 (2013).

passing new LWOP statutes.[9] LWOP became the alternative to the previously preferred death sentence. Even after the reaffirmation of capital punishment in *Gregg v. Georgia* in 1976, states began using life sentences in response to the Reagan-era crackdown on crime.[10] Today, every state except for Alaska has an LWOP statute in place, and even Alaska allows for determinate term-of-years sentences that amount to life.[11]

However, the growth of LWOP has not necessarily caused the eradication or large-scale disapproval of capital punishment. Instead, the rise of LWOP has added a new form of severe punishment to sentencing schemes across the United States. In recent years, alongside the significant rise in LWOP sentencing, executions have increased. There were only eleven American executions in 2021.[12] This number increased to twenty-five in 2024 and is likely to continue rising as the federal government has ended a recent moratorium on executions with President Trump's return to office.[13]

In this paper, I argue that LWOP sentences are unconstitutional under the Eighth Amendment because of their disproportionality and moral repugnance and therefore are cruel and unusual punishments. Further, I argue that LWOP sentences are distinct from, and worse in certain ways, than capital sentences and critique the rise of LWOP as an alternative to the death penalty in recent decades.

In Part I, this Note begins by explaining the varied ways the Court has interpreted the Eighth Amendment's Cruel and Unusual Punishments Clause, and how such a highly politicized framework has impacted the Court's willingness to regularly enforce the Amendment's protections. In Part II, this Note argues that despite its re-entrenchment as constitutional by the Supreme Court, LWOP constitutes a cruel and unusual punishment and is therefore unconstitutional. This paper concludes in Part III with a critique of what I have labeled the "progressive compromise," in which left-leaning anti-death penalty organizations and individuals name LWOP as an alternative punishment in their efforts to end capital punishment. I argue that LWOP is more "cruel and unusual" in its current form than capital punishment.

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[9] *See id.*

[10] *See id.* at 4.

[11] *See Life Without Parole*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/policy/sentencing-alternatives/life-without-parole [https://perma.cc/YGX2-HXMM] (last visited Apr. 15, 2025). Alaska's felony sentencing statutes allow for a sentence of 99 years. *See* Alaska Stat. Ann. § 12.55.125(a) (West 2024).

[12] *Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/data/executions?year=2022 [https://perma.cc/KR3K-9H37] (last visited Apr. 14, 2025).

[13] *See id.*; Exec. Order No. 14,164, 90 Fed. Reg. 8463 (Jan. 20, 2025).

I. THE SHAKY STANDARDS OF EIGHTH AMENDMENT JURISPRUDENCE

In 1878, the Supreme Court held in *Wilkerson v. State of Utah* that the death penalty was not a cruel and unusual punishment under the Eighth Amendment.[14] The Court explained that "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted."[15] This has proven true as the Court has attempted to define the contours of the Cruel and Unusual Punishments Clause.

The Supreme Court determined in *Weems v. United States* that cruel and unusual punishment "impl[ies] something inhuman and barbarous," and that "something more than the mere extinguishment of life" must be involved to implicate Eighth Amendment protections.[16] The Court first addressed this potentially ever-changing test in *Trop v. Dulles*. Chief Justice Earl Warren's majority opinion described this new test: "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[17] The Court extended this understanding in *Furman v. Georgia* when it overturned state death penalty statutes. In *Furman*, the Court found the applications of the statutes at issue were applied arbitrarily,[18] and Douglas's concurrence highlighted how the applications impacted certain marginalized populations at higher rates.[19] Because of its arbitrariness and unequal application, the Court found that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment."[20]

Soon after *Furman*, the Court reaffirmed the constitutionality of the death penalty in *Gregg v. Georgia*.[21] Despite *Gregg's* affirmation of capital punishment, the majority explained the two limits the Eighth Amendment places on a punishment's imposition: "[f]irst, the punishment must not involve the unnecessary and wanton infliction of pain," and "[s]econd, the punishment must not be grossly out of proportion to the

[14] Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878).
[15] *Id.*
[16] Weems v. United States, 217 U.S. 349, 368, 370 (1910).
[17] Trop v. Dulles, 356 U.S. 86, 100–01 (1958).
[18] Furman v. Georgia, 408 U.S. 238, 239–40 (1972).
[19] *Id.*
[20] *Id.* at 239. Notably, Justice William Brennan, joined by Justice Thurgood Marshall concurred with the Court's *per curiam* judgment but wrote separately to note that he would consider capital punishment in all circumstances to be cruel and unusual. Justice Brennan highlighted the importance of punishment "comport[ing] with human dignity" in determining whether it is cruel and unusual. *Id.* at 270. Respect for human dignity is fettered when individuals are given greater sentences than necessary for a penal purpose, according to Brennan. *Id.* at 280. And "rejection by society," Brennan added, "is a strong indication that a severe punishment does not comport with human dignity." *Id.* at 277.
[21] 428 U.S. 153 (1976).

severity of the crime."[22] These limits are encompassed in the notion that any punishment "must accord with the dignity of man, which is the basic concept underlying the Eighth Amendment."[23] Even though the *Gregg* Court approved death sentences, it nevertheless entrenched the requirement of upholding human dignity by stating that the Court's Eighth Amendment decisions have been informed by "contemporary values concerning the infliction of a challenged sanction."[24] *Gregg* did not argue against the evolving standards of decency analysis *per se*, but rather claimed that capital punishment was considered acceptable in American society at the time of the decision.[25]

Following *Gregg*, Eighth Amendment jurisprudence now analyzes the method of punishment and the proportionality between the punishment and offense. In this section I highlight the evolving standards of Eighth Amendment protections and elaborate on the historical background of long prison sentences in America.

A. Evolution of the Evolving Standards of Decency Test: Method and Proportionality in Punishment

The 2005 *Roper v. Simmons* decision marked the Court's continued interest in following the evolving standards of decency test.[26] The Court held the use of death sentences on individuals who committed their offense before the age of eighteen to be "cruel and unusual" based on the nation's growing understanding of criminal culpability, brain development, and the movements of similarly situated countries on this topic.[27] This decision followed *Atkins v. Virginia*, which similarly held that individuals with cognitive developmental disabilities cannot be sentenced to death because of these culpability concerns, which often impact the system's need for retribution and harsher punishment.[28] If one cannot be deemed completely culpable, sentencing them to the most irreversible and harsh punishment is not proportionate under the Eighth Amendment.

The Court continued to expand the limits on capital punishment after *Roper*. In 2008, the Court held that capital punishment for anything other than the crime of homicide is unconstitutional.[29] Specifically, the "[e]volving standards of decency counsel the court to be most hesitant before allowing extension of the death penalty, especially where no life

[22] *Id.* at 173.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 179–81.
[26] 543 U.S. 551, 563–64 (2005).
[27] *See* Roper v. Simmons, 543 U.S. 551, 573–79 (2005).
[28] *See* Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).
[29] Kennedy v. Louisiana, 554 U.S. 407, 435 (2008).

was taken in the commission of the crime."[30] Quoting Chief Justice Burger's dissent in *Furman*, the Court in *Kennedy v. Louisiana* noted that the extreme cruelty standard being what constitutes cruel and unusual punishment "remains the same, but its applicability must change as the basic mores of society change."[31] *Kennedy* further entrenched the evolving standards of decency analysis into Eighth Amendment constitutionality.[32] This was extended in *Graham v. Florida*, where the Court held that life without parole sentences for juvenile offenders who were convicted of non-homicide offenses are unconstitutional as cruel and unusual punishment.[33] Similar to the decisions in *Atkins* and *Roper*, "[t]his [irrevocable] judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability."[34] *Miller v. Alabama* continued this trend, holding that any law *mandating* life without parole for juvenile homicide offenders is cruel and unusual.[35] The Court took issue with the lack of individualized assessment available for juvenile offenders in these situations, and, likening life without parole to the death penalty, argued that the individualized sentencing requirements for the death penalty should

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[30] *Id.*

[31] *Id.* at 419 (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

[32] *See Kennedy*, 554 U.S. at 435.

[33] 560 U.S. 48, 82 (2011). Although *Graham* analyzed *methods* of punishment, the decision also noted the failures of penological theory in justifying LWOP for children convicted of nonhomicide offenses, stating that "the absence of rehabilitative opportunities or treatment makes the *disproportionality* of the sentence all the more evident." *Id.* at 74 (emphasis added). Additionally, Justice Thomas's dissent proposed a strict limit on what methods of punishment should be barred under the Eighth Amendment, arguing that "the Cruel and Unusual Punishments Clause was originally understood as prohibiting torturous methods of punishment . . . specifically methods akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted." *Id.* at 99 (Thomas, J., dissenting).

[34] *Id.* at 74. A similar cohort of Justices who dissented in *Graham* wrote the majority in *Glossip v. Gross*, holding the use of midazolam for executions constitutional despite concerning outcomes in multiple instances of its use. Glossip v. Gross, 576 U.S. 863, 892–93 (2015) (discussing the botched executions of Clayton Lockett and Joseph Wood). The *Glossip* majority was "not persuaded" that midazolam was likely to cause serious pain in the execution process and brushed aside Justice Breyer's dissenting argument that this decision was "tantamount to allowing prisoners to be . . . 'slowly tortured to death.'" *Id.* at 893. The majority merely stated that it was "not true" and that the dissent's "resort to this outlandish rhetoric reveals the weakness of its legal arguments." *Id.* For a recent example of the cruelty of modern forms of execution, see Haley Bedard, *Alabama Execution Witnesses Report "Violent Thrashing" of Prisoner and More than 225 "Agonized Breaths" in Nitrogen Gas Execution*, DEATH PENALTY INFO. CTR. (Oct. 27. 2025), https://deathpenaltyinfo.org/news/alabama-execution-witnesses-report-violent-thrashing-of-prisoner-and-more-than-225-agonized-breaths-in-nitrogen-gas-execution [https://perma.cc/3S3K-FY7R].

[35] Miller v. Alabama, 567 U.S. 460, 489 (2012).

extend to juvenile offenders.[36]

Another subset of Eighth Amendment cases have invalidated sentences due to their disproportionality. The Supreme Court held that mandatory life sentences are not unconstitutional in *Rummel v. Estelle* because it is not a disproportionate punishment for minor financial crimes as convicted under a recidivist statute.[37] The Court quoted the *Furman* decision in noting that "the penalty of death differs from all other forms of criminal punishment," and that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[38] The Court revisited the question of proportionality in *Solem v. Helm*, finding that a sentence of life imprisonment without parole was disproportionate and therefore unconstitutional to the present offense of uttering a "no account" check.[39] Here, the Court stated that "this sentence is far more severe than the life sentence [it] considered in *Rummel v. Estelle*."[40] The Court emphasized the availability of parole in its proportionality analysis and concluded that because "commutation is more difficult to obtain than parole" and "the possibility of commutation is nothing more than a hope for 'an ad hoc exercise of clemency,'" Solem's sentence is far more severe than Rummel's.[41]

However successful this line of cases was in establishing the importance of proportionality in sentencing under the Eighth Amendment, this view of the Eighth Amendment has its critics.[42] Despite the Court's historical trajectory of increasing Eighth Amendment Protections, the Court in recent years has moved away from the *Trop v. Dulles* "evolving standards of decency" analysis, and has begun analyzing Eighth Amendment challenges under originalist, textualist, and policy-based separation of powers arguments. For example, the Court upheld a sentence of twenty-five years to life for felony grand larceny under the state of California's three strikes law as constitutional based on past

[36] *Id.* at 474–76.
[37] Rummel v. Estelle, 445 U.S. 263, 285 (1980) (petitioner was convicted of fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses, totaling $229.11).
[38] *Id.* at 272.
[39] Solem v. Helm, 463 U.S. 277, 303 (1983).
[40] *Id.* at 297.
[41] *Id.* at 300–02.
[42] Justice Scalia's majority opinion in *Harmelin v. Michigan* argued that the evidence from the Eighth Amendment's ratification "confirms the view that the [C]ruel and [U]nusual [P]unishments [C]lause was directed at prohibiting certain *methods* of punishment.'" 501 U.S. 957, 979 (1991). Justice Thomas is also critical of proportionality, arguing that the Court has "refashion[ed] the Eighth Amendment to accommodate [its] views," and that the Court is taking "yet another step 'on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime.'" Jones v. Mississippi, 593 U.S. 98, 123, 128 (2021) (Thomas, J., concurring).

proportionality inquiries under the Eighth Amendment in *Ewing v. California.*[43] The Court highlighted the "[s]tate's public-safety interest in incapacitating and deterring recidivist felons," marking a turn by the Court to look more at the purpose of a sentence rather than its severity.[44] This more conservative approach to the Eighth Amendment weakened the Amendment's protections and undermined the Court's precedents.

B. Historical Meanings

The Eighth Amendment's text is taken almost verbatim from the 1689 English Bill of Rights, in which both method and proportionality were taken into account.[45] This is evidenced by the first English court decision based on this clause—the case of Titus Oates.[46] Titus Oates was convicted of perjury and sentenced to life imprisonment.[47] In addition, Oates was to be "pilloried four times each year for life," dragged across London and whipped.[48] In this case, it was not the *method* of punishment that members of parliament were shocked by because these methods were commonplace in England at the time, but it was the disproportionality of the punishment to Oates' crime.[49] Because of the commonality of the punishments, "[i]f the punishments inflicted on Oates were unacceptably cruel, this could only be because they were disproportionate to the crime of perjury."[50] Justice Scalia's reading of the Titus Oates case in *Harmelin v. Michigan* was an oversimplification, focusing on the words used to describe the punishment that favored his, more limited, reading of the Eighth Amendment's purpose rather than the clear evidence of this relation to proportionality.[51]

Proportionality is further ingrained in the meaning of the Eighth Amendment when we look to the influences that led to that Amendment

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[43] Ewing v. California*,* 538 U.S. 11, 30–31 (2003).
[44] *Id.* at 29–30.
[45] *Compare* U.S. CONST. AMEND. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), *with* English Bill of Rights, 1689 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
[46] RACHEL E. BARKOW, JUSTICE ABANDONED: HOW THE SUPREME COURT IGNORED THE CONSTITUTION AND ENABLED MASS INCARCERATION 100–02 (2025).
[47] *Id.* at 101.
[48] *Id.*
[49] *Id.*; *see* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 934 (2011).
[50] Stinneford, *supra* note 49, at 934. Additional evidence of this perspective can be seen in the fact "that the punishments were described in the parliamentary debates as 'extravagant' and 'exorbitant,' which are synonyms for 'excessive' or 'disproportionate.'" *Id*.
[51] "A proper originalist take on the Oates case and the Eighth Amendment would therefore recognize that disproportionate punishments are disallowed." BARKOW, *supra* note 46, at 101.

being ratified. Early American punishment thought was heavily influenced by Italian thinker, Cesare Beccaria's promotion of dignity in the criminal justice system as written in his 1767 work, *On Crimes and Punishments.*[52] In emphasizing the importance of human dignity, Beccaria placed a limit on punishment, stating that it should be as efficient as possible to prevent unnecessary infliction of pain on the prisoner.[53]

We also see an entrenchment of certain methods of punishment being deemed unacceptable during the founding period—torture being the most notable. Benjamin Franklin wrote negatively about the use of torture in 1729, as did Thomas Jefferson in writing, "the General assembly [of Virginia] shall have no power . . . to prescribe torture in any case whatever."[54] Dr. Rush was staunchly opposed to the death penalty, writing that he "consider[ed] it as an improper punishment for any crime,"[55] and emphasizing that "murder itself is propagated by the punishment of death for murder."[56]

As the penitentiary system became popularized, lawmakers substituted Beccaria's preferred punishment—hard labor—for many crimes previously given death.[57] The purpose of this shift was clearly deterrence as it was noted that "[c]rimes are more effectively restrained" by hard labor rather than executing criminals.[58] Later, the state of Pennsylvania continued this trend by restricting executions only to those convicted of first degree murder in 1794.[59] Carceral punishment not only emphasized the importance of deterrence as a purpose of punishment, but also rehabilitation of the individual.

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[52] JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 431 (2014). Evidence of Beccaria's influence on American penal history is underscored by the fact that George Washington owned a copy of *On Crimes and Punishments* and limited the number of executions during the Revolutionary War because of the "necessity . . . of justice and policy of due proportion between crime and the penalties." *Id.* at 151, 155. Additionally, Beccaria's writings and ideas were incorporated within debates surrounding the creation of the Constitution. *Id.* at 205, 431–32. Other American thinkers displayed Beccaria's ideas in penal policy, including Dr. Benjamin Rush, who wrote that "[l]aws can only be respected and obeyed" if punishments are implemented with an "exact proportion to crimes." *Id.* at 212. Regular citizens were also involved in the discussion on punishment. One writer published a letter in *The Christian Disciple* in 1817 stating that "society has no right to inflict punishments of greater severity than its security demands" and "[a]ny punishment which these interests do not require is indicted without authority, is gratuitous cruelty, and is an act of usurpation." *Id*. at 270; JOHN HOSTETTLER, CESARE BECCARIA: THE GENIUS OF 'ON CRIMES AND PUNISHMENTS 118 (2010).

[53] HOSTETTLER, *supra* note 52, at 53; *see infra* Section II.A.

[54] BESSLER, *supra* note 52, at 47.

[55] *Id.* at 435.

[56] *Id.*

[57] *Id.* at 323.

[58] *Id.* at 385.

[59] *Id.* at 386.

The Eighth Amendment's Cruel and Unusual Punishments Clause is meant to protect individuals from serious governmentally imposed harms and to promote human dignity in the criminal legal system.[60] In recent years, the Supreme Court has avoided discussing the clause's implications and has largely turned away from its own jurisprudence interpreting the breadth of the clause's protections, as well as the history and context of the clause's creation.[61] But, as is true for capital punishment and many other punishments deemed acceptable before the founding, "the history of this punishment is one of successive restriction."[62] The evolution of punishment as being restricted in both different methods and severity evidences "not that [certain punishments are] an inevitable part of the American scene, but that [they have] proved progressively more troublesome to the national conscience."[63]

II. THE "PROGRESSIVE COMPROMISE": THE RISE OF LWOP AS AN ALTERNATIVE TO DEATH AND THE MOVE TOWARD EXTENDED TERMS OF INCARCERATION

A. LWOP's Beginnings

Before LWOP became popularized, perpetual penal servitude or confinement was common. Although less popular because of the difficulty of housing an inmate for decades, it was seen as an alternative to capital punishment even in the eighteenth century.[64]

Early punishment theorist, Cesare Beccaria, was a proponent of perpetual penal servitude as a replacement for the death penalty because he believed it would have a greater deterrent effect on criminal activity.[65] In response to critiques that death has the greatest deterrent effect, Beccaria promoted an early version of the "death is different" narrative.[66] He posited that "[i]t is not the intensity of the punishment that has the

[60] Furman v. Georgia, 408 U.S. 238, 270, 280 (1972) (Brennan, J., concurring).
[61] *See generally* City of Grants Pass, Oregon v. Johnson, 603 U.S. 520 (2024) (declining to extend Eight Amendment protections to prevent criminalization of involuntary statuses such as homelessness).
[62] *Furman*, 408 U.S. at 299 (1972) (Brennan, J., concurring).
[63] *Id.*
[64] *See* Matthew W. Meskell, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 846–48 (1999).
[65] Christopher Seeds, *Historical Modes of Perpetual Penal Confinement: Theories and Practices Before Life Without Parole*, 44 L. & SOC. INQUIRY 305, 308 (2019).
[66] BESSLER, *supra* note 52, at 49. Beccaria's writings include the question of whether penal servitude is crueler than death: "if all the miserable moments in the life of a slave were collected into one point, it would be a more cruel punishment than any other; but these are scattered through his whole life, whilst the pain of death exerts all its force in a moment." Seeds, *supra* note 65, at 311.

greatest effect on the human mind . . . but its extension."[67] Recent evidence on the efficacy of certain forms of punishment shows that this proposition may not be true,[68] but Beccaria's influence on supporting life-long incarceration was premised on this idea.

Additionally, Dr. Benjamin Rush's writings are cited as being influential on the creation of prisons as a rehabilitative method of punishment.[69] Release from early penitentiaries was a goal of their creation, but not always a reality.[70] Initially, penitentiaries were seen as the opposite of a punishment that is "cruel" or "sanguinary" like torture, or, for some scholars, capital punishment.[71] However, prisons at this time were not necessarily easy places to grow and change but were described as a place of "soul death."[72]

As penitentiaries became commonplace, and scholars began subscribing to the belief that some prisoners may not be reformable, a move towards indeterminate sentences occurred. Some punishment theorists argued that a system of penal confinement, in which the incarcerated person would be eligible for release based on positive changes, good behavior, and carceral conduct, would lead to reformed individuals.[73] This indeterminate sentencing is similar to current sentences of life *with* parole or the possibility of parole. However, as effective life sentences increased, so did the idea that some prisoners are "incurable."[74]

B. Punishment Policy: Three Strikes and LWOP

Prisons became a place not for punishment but to secure and incapacitate dangerous people.[75] This concept of a class of "incurable" people or a "criminal class" increased in popularity in the United States during the mid to late twentieth century as the tough on crime era unfolded.[76] During this point, legislators and media pushed a narrative of

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[67] BESSLER, *supra* note 52, at 49.

[68] Scholars have generally found that certainty of punishment is far effective in deterring criminal behavior than the severity of the punishment. *See* VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE 1 (2010).

[69] *Id.* at 212; Seeds, *supra* note 65, at 314.

[70] Seeds, *supra* note 65, at 314.

[71] BESSLER, *supra* note 52, at 317.

[72] Seeds, *supra* note 65, at 314. Practices like solitary confinement occurred in an effort to reform by self-reflection, in which a prisoner was "confined in a narrow cell; his allowance of food . . . much diminished . . . condemned to his own thoughts." BESSLER, *supra* note 52, at 317.

[73] Seeds, *supra* note 65, at 316–17 (explaining Frederick Wines' book *Punishment and Reformation: a Study of the Penitentiary System*).

[74] *Id.* at 325–26.

[75] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON, 275 (1977).

[76] *See* Frank R. Baumgartner et al., *Throwing Away the Key: The Unintended Consequences of "Tough-on-Crime" Laws*, 19 PERSPECTIVES ON POL. 1233, 1236

heightened violent crime rates and anti-drug propaganda.[77]

With fear of violent crime at an all-time high, the public was afraid not of crime but of criminals. They were afraid "of a people who were believed to be criminal and seditious as a whole," and they believed in the "myth of the barbaric, immoral and outlaw class which" permeated their lives through the discourse of legislators.[78] A new perspective continued to arise—that crime is "almost exclusively committed by a certain social class" and that "it is not crime that alienates an individual from society, but that crime is itself due to the fact that one is in society as an alien."[79] This can be seen in the "superpredator" myth that alienized and criminalized young Black men in the 1990s. Professor John DiLulio coined the term "superpredator" in a conservative magazine article in 1995, writing that certain populations struggled with "moral poverty" of which the only answer could be religion.[80] After its introduction, the term skyrocketed in use, being printed nearly 300 times in top newspapers and magazines.[81] One sub-heading to an article even asked: "[s]hould we cage the new breed of vicious kids?"[82]

This alienation and dehumanization of certain groups further supported "tough on crime" policies of the mid to late 1990s.[83] For legislators and the public, it was easier to disappear young people under the guise of the "forever-criminal." The state of Washington passed the first "three strikes" law in 1993, providing mandatory life sentences for people convicted of even nonviolent felonies so long as they met the criteria of a persistent offender.[84] Other states followed suit shortly

(2021).

[77] *See, e.g.*, Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, THE BRENNAN CENTER (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs [https://perma.cc/EZX4-CVJZ].

[78] FOUCAULT, supra note 75.

[79] *Id.* at 275–76.

[80] John DiLulio, *The Coming of the Super-predators*, WASH. EXAMINER (Nov. 27, 1995, at 5:00 ET), https://www.washingtonexaminer.com/magazine/1558817/the-coming-of-the-super-predators/ [https://perma.cc/ZJ7F-L375].

[81] Carroll Bogert & Lynnell Hancock, *"Superpredator": the Media Myth that Demonized a Generation of Black Youth*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth [https://perma.cc/57U9-ZHFT] (last visited Apr. 15, 2025).

[82] *Id.*

[83] Marc Mauer, *Bill Clinton, "Black Lives" and the Myths of the 1994 Crime Bill,* THE MARSHALL PROJECT, https://www.themarshallproject.org/2016/04/11/bill-clinton-black-lives-and-the-myths-of-the-1994-crime-bill [https://perma.cc/89YD-JJYN] (last visited Apr. 15, 2025).

[84] Cary Aspinwall, Weihua Li, & Dan Sullivan, *Two Strikes and You're in Prison Forever*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2021/11/11/two-strikes-and-you-re-in-prison-

thereafter, and, by 1997, around two dozen states had mandatory LWOP statutes in place as a response to habitual offending.[85]

The federal government similarly reacted to the fear not of crime but of criminals by enacting statutes that increased funding for policing and established mandatory minimum sentences for a variety of offenses. The Anti-Drug Abuse Act of 1986 was a continuation of the federal war on drugs effort that began in the 1970s.[86] This Act increased minimum sentences, stripped federal courts of some discretion in sentencing, and authorized millions of dollars to fund the creation of new federal prisons.[87] The 1994 Crime Bill responded to an increase in violent crime rates, which peaked in 1991.[88] The Bill authorized harsh sentences for an increased number of crimes and introduced a federal three-strikes sentencing policy for repeat offenders.[89]

The creation of these laws that over sentence with little individual determination of need or proportionality analysis led to an increase in incarceration rates. Incarceration more than quadrupled between the mid-1970s and the mid-2000s due to the long terms people were regularly serving.[90]

Three-strikes laws are seemingly less popular in the federal system today. Between 2016 and 2021, only 709 individuals were incarcerated for life, and 799 incarcerated for *de facto* life, although these statutes are still regularly used.[91] Some states have even decreased their habitual offender requirements to only require two strikes before someone is "out." Florida passed their 1997 Prison Releasee Reoffender Act, and in 2021, had over

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forever [https://perma.cc/BST2-XWBV] (last visited Apr. 15, 2025).

[85] *Id.*; *see generally* John Clark, James Austin, & D. Alan Henry, "*Three Strikes and You're Out": A Review of State Legislation*, DOJ: NAT'L. INSTITUTE OF JUST. (1997) (detailing the expansion of LWOP statutes over time).

[86] Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CENTER FOR JUST. (Sep. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice [https://perma.cc/FEV7-UGCB].

[87] H.R. 5484, 99th Cong. (1986); *see* Eisen *supra* note 86.

[88] Matthew Friedman, Ames C. Grawert, & James Cullen, *Crime Trends: 1990–2016*, BRENNAN CENTER FOR JUSTICE, 1 (2017).

[89] The bill authorized the creation of sixty new capital offenses. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. (1994). The new law required "that a person convicted . . . of a serious violent felony be sentenced to life imprisonment" if "the person has been convicted on separate prior occasions in a Federal or State court of two or more serious violent felonies, or of one or more serious violent felonies and one or more serious drug offenses" and each was "committed after the defendant's conviction of the preceding serious violent felony or serious drug offense." *Id.* § 70001(c).

[90] BARKOW, *supra* note 46, at 85.

[91] *Life Sentences in the Federal System*, U.S. SENT'G COMM'N. 1 (2017) https://www.ussc.gov/research/research-reports/life-sentences-federal-system [https://perma.cc/DXS3-E3Q4].

13,000 individuals serving LWOP in their state prisons.[92]

C. The Growth of Modern LWOP and its Bipartisan Support

Although the 1990s tough-on-crime wave is seemingly over, LWOP and other long terms of incarceration continue to be used in shocking numbers.[93] In contrast to tough-on-crime LWOP policy, modern LWOP is not promoted through fearmongering, and instead is largely hidden from public scrutiny. The narrative around imposing an LWOP sentence has shifted from a deliberate "tough on crime" policy decision in the late-twentieth century, to a regular decision made with "complacency and disregard" today.[94] The public does not see the experience of lifers and is largely ignorant of the many failures of long-term incarceration. Even those harsh punishments that people do know, like the death penalty, are still seen as generally acceptable, with some bipartisan support.[95]

LWOP has become known as a more palatable alternative to the death penalty for those who are opposed to the barbarity of capital punishment, and a sufficiently brutal and harsh punishment for those who support capital punishment.[96]

The bipartisan support for LWOP and its promotion as a more "humane" alternative to capital punishment is a unique phenomenon. Typically, those who are against harsh punishments are against them in all forms. However, the concept of "death is different," and the irreversible nature of capital punishment, made some death penalty abolitionists see LWOP as a genuinely better form of punishment. One formerly

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[92] Aspinwall, *supra* note 84.

[93] In 2024 there were over 56,000 people serving LWOP sentences in the U.S. *A Matter of Life*, *supra* note 3.

[94] Kempis Songster, Terrell Carter, & Rachel López, *Regarding the Other Death Penalty*, 124 COL. L. REV. FORUM 114, 119 (2024).

[95] One 2015 poll found that 77 percent of Republicans and 40 percent of Democrats support the death penalty. *Pew Resource Center 2015 Poll on Political Affiliation and the Death Penalty*, DEATH PENALTY INFO CTR., https://deathpenaltyinfo.org/policy-issues/policy/public-opinion-polls/political-affiliation-and-the-death-penalty [https://perma.cc/7BLW-VTA5] (last visited Apr. 15, 2025).

[96] *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 1, 1993) [hereinafter *Sentencing for Life*], https://deathpenaltyinfo.org/research/analysis/reports/in-depth/sentencing-for-life-americans-embrace-alternatives-to-the-death-penalty [https://perma.cc/FQG3-5XEN] (last visited Apr. 15, 2025). The Death Penalty Information Center ("DPIC") gathered state opinion polls and noticed that support for capital punishment grows when people are given a choice between capital punishment and "sentences which assure lengthy incarceration." *Id.* The DPIC states that "[o]ne of society's best kept secrets is that the length of sentences which people would support over the death penalty are already in place and functioning in most of the United States." These sentences are carried out much more in silence than capital punishment, but the Center seems to be promoting them as a positive alternative to death. *Id.*

incarcerated scholar wrote that long-term incarcerated people "saw the opponents of the death penalty as [their] allies," but were wrong.[97] The "death is different" crowd is not wrong that death *is* of course a different punishment, but "[i]s not death the aim of both sentences" and do they not care that "'life' sentences are just as final and fatal as death sentences?"[98]

III. CRITIQUE OF THE "PROGRESSIVE COMPROMISE": LIFE WITHOUT PAROLE IS MORE "CRUEL AND UNUSUAL" IN ITS CURRENT FORM THAN THE DEATH PENALTY

To some, LWOP is more inhumane than capital punishment because of its lack of autonomy.[99] The "finality in spite of the possibility of change,"[100] of an LWOP sentence is harsher than death due to the lack of adequate review measures as compared to the procedural protections afforded for capital sentences[101] and not knowing when the sentence—one's life—is going to end.

The Supreme Court understands "cruel and unusual punishment" to mean those punishments that are repugnant to the "evolving standards of decency that mark the progress of a maturing society."[102] This Note argues that sentences of life without parole are cruel and unusual under this test for three reasons: LWOP sentences (1) are cruel and unusual because they are beyond what is necessary for any established purposes of punishment, (2) are disproportionate sentences for any conviction, and (3) fall within the definition of torture. Next, this note argues that LWOP is uniquely cruel and unusual due to the social and fiscal costs, the racial disparities it perpetuates, and the fewer opportunities for review or leniency it offers.

A. Cruel and Unusual

1. Disproportionate and Unjustified

Proportionality is inextricably linked to *why* we punish. Proportionality can be viewed as a limit on punishment from a retributive lens. If someone is only morally culpable for a certain, less severe crime,

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[97] Songster, *supra* note 94, at 116–17.
[98] *Id.*
[99] Robert Johnson & Sandra McGunigall-Smith, *Life without Parole, America's Other Death Penalty: Notes on Life under Sentence of Death by Incarceration*, 88 PRISON J. 328, 336 (2008).
[100] Charles J. Ogletree & Austin Sarat, *Lives on the Line: From Capital Punishment to Life without Parole*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 1, 13 (Charles J. Ogletree & Austin Sarat, eds., 2012).
[101] Rachel Demma, *Sentenced to Life Without Parole: The Need to Apply Capital Sentencing Procedures to Current LWOP Sentencing Schemes*, 35 GEO. J. LEGAL ETHICS 627, 640–41 (2022).
[102] Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

their punishment is proportionally limited to what they are found to be morally culpable. Someone convicted of manslaughter is accordingly given a lower sentence than someone convicted of first-degree murder due to the differences in moral culpability or "wrongfulness" present in each of the acts. If we care about proportionality in sentencing, as the Supreme Court has indicated it does, we must also care about why we punish and how best to achieve the outcomes sought from punishment.

In his dissent in *Gregg*, Justice Marshall stated that when a punishment is "unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution," that penalty is "excessive" and therefore "forbidden."[103] LWOP sentences cannot be justified through traditional purposes of punishment rationales.[104] 18 U.S.C. § 3553(a)(2) outlines the federal system's stated purposes for sentencing: "(a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; (c) to protect the public from further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[105] This provision describes retribution, deterrence, incapacitation, and rehabilitation rationales, respectively—none of which are sufficient to justify the severity of an LWOP sentence.

Retributive punishment, or punishment based on one's moral culpability, cannot justify LWOP sentences. In jurisdictions without the death penalty, LWOP is the most severe sentence one can be given and should thus be limited to those who commit the most serious offenses. Imposing LWOP on offenders with lesser convictions undermines the criminal law's moral and proportional credibility.[106] As some scholars argue, "[i]f our goal is justice, the bedrock principle of proportionality in punishment requires that we reserve this ultimate punishment for the ultimate crime: capital murder."[107]

Many people sentenced to LWOP have been sentenced under habitual offender statutes or "three strikes" laws created to promote "tough-on-crime" political agendas. But these statutes are not retributive because imprisonment is "imposed without regard to the culpability of the offender

[103] Gregg v. Georgia, 428 U. S. 153, 241 (1976) (Marshall, J., dissenting).
[104] Ogletree & Sarat, *supra* note 100, at 14–15.
[105] 18 U.S.C. § 3553(a)(2). 18 U.S.C. § 3553(a) also imposes a broad parsimony principle that sentences be "sufficient, *but not greater than necessary* to comply with' the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation." *Id.* (emphasis added).
[106] Paul H. Robinson, *Life without Parole under Modern Theories of Punishment*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 138, 145–46 (Charles J. Ogletree & Austin Sarat, eds., 2012).
[107] Johnson & McGunigall-Smith, *supra* note 99, at 344.

or [the] degree of social harm caused by the offender's behavior."[108] Instead, they focus on the simple fact that someone re-offended.[109]

Deterrence as a justification for LWOP is just as ambiguous in its efficacy. Deterrence has been strongest when punishment for a given offense is certain rather than severe.[110] So, LWOP's general deterrent properties are not increased based on its "without parole" provisions or its severity. There is evidence that the death penalty is not an effective deterrent, meaning life without parole, a seemingly "lesser" sentence, similarly is not.[111]

Many view the main purpose of LWOP to be its incapacitation of an offender who presents a danger to the community.[112] Fears of future dangerousness largely inform sentencing decisions without there being accurate measures to determine it.[113] This means, many people who are sentenced with the goal of incapacitation do not necessarily need to be incapacitated.[114]

LWOP sentences largely exist without much judicial discretion through the use of three-strike laws, effectively overlooking the importance of balancing public safety needs with the liberties of

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[108] Ewing v. California, 538 U.S. 11, 51–52 (2003) (Breyer, J., dissenting) (quoting Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & C. 395, 427 (1997)).

[109] *Id.*

[110] *Five Things About Deterrence*, DEPT. OF JUST.: NATIONAL INSTITUTE OF JUSTICE (2016).

[111] *Murder Rate of Death Penalty States Compared to Non-Death Penalty States,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states [https://perma.cc/RK7T-HBEM] (last visited Apr. 15, 2025); Ross Kleinstuber & Jeremiah Coldsmith, *Is life without parole an effective way to reduce violent crime? An empirical assessment*, 19 CRIMINOLOGY & PUB. POL'Y 617, 638 (2020) ("[E]ven though LWOP sentences might be producing modest reductions in crime, they do not seem to be any more effective than life with parole, and given the existing literature on deterrence and incapacitation, we suspect that the effect of increasing sentencing severity likely maxes out at some point less than life with parole.").

[112] *See* Miao, *supra* note 7, at 179.

[113] Ogletree & Sarat, *supra* note 100, at 5–6; *see LAW REVIEWS: Predictions of Future Dangerousness Contribute to Arbitrary Sentencing Decisions*, DEATH PENALTY INFO. CTR. (2017), https://deathpenaltyinfo.org/law-reviews-predictions-of-future-dangerousness-contribute-to-arbitrary-sentencing-decisions [https://perma.cc/M8Z3-WB7P] (last visited Apr. 15, 2025). Future dangerousness is difficult to accurately pred ict; however, some have proposed the use of data-driven predictive algorithms to alleviate human error and bias in sentencing. These algorithms have a host of their own problems, for more on this see Pamela Ugwudike, *Predictive Algorithms in Justice Systems and the Limits of Tech-Reformism*, 11 INT'L J. FOR CRIME JUST. & SOC. DEMOCRACY 1 (2022).

[114] Robinson, *supra* note 106, at 142–45.

offenders.[115] This assumes incapacitation is required based on criminal history alone, leading to lengthier punishments than needed for public safety.[116] Some judges have expressed concern about this type of sentencing, calling LWOP "pointless" and "not just" given their lack of discretion in sentencing some LWOP cases.[117]

Assuming an individual's existence alone allows for continued wrongdoing, creating the categorization of the "born criminal" and the "irredeemable" is not only inhumane and legally questionable, but fundamentally incorrect. Numerous studies show that people "age out" of criminal behavior.[118] Similarly, those who have been released after significant prison stays have very low rates of recidivism.[119] Even people released from life imprisonment have low rates of recidivism, including those with violent criminal histories.[120] Ultimately, the imposition of incapacitating sentences to those who are not dangerous undermines our system of punishment and further ignores the due process right to individualized assessments of sentencing needs.[121]

When considering the promotion of public safety as the purpose of punishment, whether through crime deterrence or incapacitating offenders, more harm than good is done in imprisoning individuals who present no demonstrated propensity for dangerousness. Keeping some people incarcerated despite their significant positive change deprives

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[115] *See* Jo Ann Harris, *"Three Strikes,"* Criminal Resource Manual 1032, DEP'T. OF JUST. (1995), https://www.justice.gov/archives/jm/criminal-resource-manual-1032-sentencing-enhancement-three-strikes-law [https://perma.cc/3SRK-2A3P] (last visited Apr. 15, 2025).

[116] Ogletree & Sarat, *supra* note 100, at 7.

[117] Ashley Nellis, *Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 29 (Oct. 2010). Part of this concern comes from the fact that many of those sentenced to LWOP were given the sentence based on repeat-offender laws, regardless of general dangerousness or propensity for further recidivism.

[118] *The Older You Get: Why Incarcerating the Elderly Makes us Less Safe*, FAMS. AGAINST MANDATORY MINIMUMS [hereinafter *The Older You Get*], https://famm.org/wp-content/uploads/2021/10/Aging-out-of-crime-FINAL.pdf [https://perma.cc/QKU2-RKM5] (last visited Apr. 15, 2025); James V. Ray & Shayne Jones, *Aging Out of Crime and Personality Development: A Review of the Research Examining the Role of Impulsiveness on Offending in Middle and Late Adulthood*, 16 PSYCH. RES. BEHAV. MGMT. 1587 (2023); Amy Fettig & Steven Zeidman, *People Age Out of Crime. Prison Sentences Should Reflect That*, TIME (Sep. 9, 2022, at 7:30 ET), https://time.com/6211619/long-prison-sentences-youthful-offenders/ [https://perma.cc/7LU7-BZWB].

[119] Fettig & Zeidman, *supra* note 118.

[120] Ogletree & Sarat, *supra* note 100, at 7.

[121] Robinson, *supra* note 106, at 142. This "preventative" style of detention is ineffective because of the failure to properly assess future dangerousness, the fact that aging inmates age out of criminal behavior, and the fact that people can and *do* change. Robinson argues that justifying LWOP based on this not only "fails to protect the community efficiently but also fails to deal fairly with those who are being preventively detained." *Id.* at 144.

society of the important characteristics that returning citizens presents.[122] Returning citizens can guide at-risk youth and often work in public safety roles within the communities they were removed from.[123] Incarcerating people long-term also indefinitely decreases familial stability and leads to a cycle of incarceration that increases victimization down the line.[124] The incarceration of a parent has a significant impact on familial economic hardship and increases the risk of homelessness and residential instability.[125] As studies have shown, this cycle of harm, financial instability, and familial separation can lead to further criminal behavior, increasing crime rather than deterring it.[126]

It is clear based on the "without parole" aspect of LWOP that rehabilitation and reentry are not goals of the sentence. As Justice Breyer wrote in his dissent in *Ewing v. California*, "'rehabilitation' is obviously beside the point," to punishments that do not anticipate release.[127] Despite this, it has been shown that people serving LWOP sentences are capable of reform, growth, and can become productive members of the public.[128] One person serving a life sentence indicated that he changed while incarcerated because he "just grew up" and at twenty-four he "start[ed] doing the right thing," although already being incarcerated long-term.[129]

For example, people who have spent significant periods in prison take advantage of the myriad of opportunities for education and skill-building that are present in the facilities.[130] One institutional study noted that lifers

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[122] Fettig & Zeidman, *supra* note 118.
[123] *Id.*
[124] Leah Wang, *Both sides of the bars: how mass incarceration punishes families*, PRISON POL'Y INITIATIVE (Aug. 11, 2022).
[125] Hedwig Lee, Lauren C. Porter, & Megan Comfort, *Consequences of Family Member Incarceration: Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government*, ANN. AM. ACAD. POL. SOC. SCI. (2015), https://pmc.ncbi.nlm.nih.gov/articles/PMC4501034/ [https://perma.cc/CP5L-7A8D].
[126] *See* N. Jeanie Santaularia, Marizen R. Ramirez, Theresa L. Osypuk, & Susan M. Mason, *Economic Hardship and Violence: A Comparison of County-Level Economic Measures in the Prediction of Violence-Related Injury.* 38 J. OF INTERPERSONAL VIOLENCE 4616, 4616–39 (2023) (analyzing the various types of economic hardship and how they relate to violent crime); Stacey Bosick & Paula Fomby, *Family Instability in Childhood and Criminal Offending during the Transition into Adulthood*, 62 AM. BEHAV. SCIENTIST 1483–1504 (2018) (showing how repeated familial structure change is associated with higher rates of arrest and incarceration for some populations). Foucault believed that this was part of the plan, that prison was meant to perpetuate crime and drive certain groups who are followed with these criminal "brandings" to recidivate, and for their communities to be impacted. FOUCAULT, *supra* note 75, at 272. He wrote that "the direct effect of a penalty, which, in order to control illegal practices, seems to invest certain of them in a mechanism of 'punishment-reproduction. *Id.* at 278.
[127] Ewing v. California, 538 U.S. 11, 52 (2003).
[128] Herbert, *supra* note 2, at 4; FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 118.
[129] Herbert, *supra* note 2, at 16–17.
[130] Margaret E. Leigey & Doris Schartmueller, *The Fiscal and Human Costs of Life without Parole*, 99 PRISON J. 241, 251 (2019).

"made positive contributions to the prison as they started self-help groups, facilitated programs, and tutored [other] inmates."[131] Many people serving LWOP sentences are deemed by prison staff as "easy keepers" because they "don't commit any infractions, they keep their cells clean and tidy, and they follow the rules."[132] These individuals often change with time and programming, gaining greater awareness and compassion.[133]

Because of the unclear rationale behind most LWOP sentences, it is also uncertain as to who benefits from these sentences. For example, certain studies have found that victims of crime do not directly benefit from strict punishments such as LWOP. In fact, about 61 percent of victims support shorter prison sentences and are in favor of greater spending on crime prevention, treatment, education, and rehabilitation efforts.[134] Despite the initial feeling of revenge and increased safety brought about through incapacitation and retribution-focused punishments, victims do not become whole or healed throughout the process of conviction, sentencing, and incarceration. One study shows that alternative responses to criminal behavior, such as restorative justice practices, can decrease the fear and anxiety of victims more than the "conventional legal processes" tend to.[135]

2. How LWOP Compares to the Known "Cruel and Unusual"

LWOP is comparable, if not worse, than the punishments that the Court has previously held to be cruel and unusual. It has been regularly reaffirmed that it is "cruel and unusual punishment to hold convicted criminals . . . in unsafe conditions."[136] Similarly, "[d]eliberate indifference" to a prisoner's serious medical needs is sufficient to violate the Eighth Amendment.[137] Prison conditions as a whole, including overcrowding and failure to properly provide mental healthcare, have been deemed relevant for an Eighth Amendment analysis and can rise to the

[131] *Id.*
[132] Herbert, *supra* note 2, at 1.
[133] *See id.* at 124.
[134] *Crime Survivors Speak*, ALL. FOR SAFETY & JUST. 15–16, https://build.allianceforsafetyandjustice.org/sites/default/files/2025-09/Crime-Survivors-Speak-Report.pdf [https://perma.cc/C65R-E5GB] (last visited Jan. 19, 2025).
[135] Ana M. Nascimento, Joana Andrade, & Andreia de Castro Rodrigues, *The Psychological Impact of Restorative Justice Practices on Victims of Crimes—a Systematic Review,* 24 TRAUMA VIOLENCE ABUSE 1929, 1940 (2023).
[136] Youngberg v. Romeo*,* 457 U. S. 307, 315–16 (1982); *see e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002) (holding that handcuffing a prisoner to a hitching post for prolonged periods of time violates the Eighth Amendment).
[137] Estelle v. Gamble, 429 U.S. 97, 106 (1976); *see e.g.* Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that exposure to secondhand smoke that poses "an unreasonable risk of serious damage to [an inmate's] future health," is a violation of the Eighth Amendment.)

level of a constitutional violation.[138]

An LWOP sentence is a combination of physical discomfort of prison, mental illness, health issues, intentional deprivation, and complete loss of civil personhood that the Supreme Court's Eighth Amendment doctrine contemplates. For example, the Court held in *Graham v. Florida* that imposing LWOP sentences on juvenile non-homicide offenders constitutes cruel and unusual punishment.[139] In *Miller v. Alabama,* the Court went further, holding that mandatory LWOP sentences themselves are *per se* cruel and unusual for juvenile offenders, even those who have been convicted of homicide.[140] The *Miller* Court, like in *Graham*, found this severe punishment was "not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability."[141]

However, by failing to extend these understandings to other severe, adult offenses, the Court has failed to adequately consider an adult offender's capacity for change, and the arbitrariness of drawing the line at eighteen years of age. An individual's capacity for change, regardless of their offending behavior, must be considered to properly uphold human dignity, the "basic concept of the Eighth Amendment."[142]

3. LWOP as Torture

The Justices seemingly agree that torturous punishments are barred by the Eighth Amendment. The Court in *Wilkerson v. Utah* held that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]."[143] In fact, the Court has opined that the "primary concern of the drafters" when drafting the Eighth Amendment was to prevent "torture[s]" and other "barbar[ous] methods of punishment."[144] "Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury."[145]

Some scholars argue that capital punishment is itself a form of torture.[146] Similarly, this argument can be extended to encompass LWOP.

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[138] Brown v. Plata, 563 U.S. 493, 545 (2011).
[139] 560 U.S. 48, 82 (2011).
[140] 567 U.S. 460, 489 (2012).
[141] *Graham*, 560 U.S. at 74.
[142] Hope v. Pelzer, 536 U.S. 730, 738 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).
[143] 99 U.S. 130, 136 (1878).
[144] Estelle v. Gamble, 429 U.S. 97, 102 (1976).
[145] Hudson v. McMillian, 50 U.S. 1, 9 (1992).
[146] *See, e.g.*, JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION (2017).

Torture includes acts "specifically intended to inflict severe physical or mental pain or suffering" not including such pain or suffering incidental to lawful sanctions.[147] Ultimately, all torturous punishments imposed in the United States are not "lawful sanctions" as they are barred by the Eighth Amendment.[148] The Eighth Amendment clearly protects against instances of physical torture but also protects against modes of psychological torture.[149]

LWOP presents both issues of psychological torture and physical torture. First, LWOP denies human dignity and intentionally dehumanizes individuals. Long terms of incarceration "treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded," making them "inconsistent with the fundamental premise" of the Eighth Amendment and the idea that "even the vilest criminal remains a human being possessed of common human dignity."[150]

LWOP strips an individual of all political and social life—"weaponizing the prisoner's own body as the means for prolonging their punishment."[151] Removing someone's physical and civil dignity through incarceration is different from the additional removal of hope that LWOP inmates experience by being labeled as irredeemable.[152] John Stuart Mill characterized the sentence of life imprisonment as "living in a tomb, there to linger out what may be a long life . . . without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from earthly hope."[153] Life sentences deny human dignity at its core by failing to recognize the worth of the individual by effectively stating one cannot and will not change, causing this "civil death."[154]

This perpetual denial of dignity and individual autonomy is exacerbated every time one is reminded of their inability to leave.[155] Even

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[147] 18 U.S.C. § 2340(A).

[148] *See Wilkerson*, 99 U.S. at 136.

[149] "It is not hard to imagine inflictions of psychological harm . . . that might prove to be cruel and unusual punishment," and "[e]ven though there may be involved no physical mistreatment [or] primitive torture . . . severe mental pain may be inherent in the infliction of a particular punishment." *McMillian*, 50 U.S. at 16 (Blackmun, J., concurring); Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring). Additionally, the Eighth Amendment's prohibition reaches beyond "physical mistreatment" and "primitive torture," but also reaches forms of punishment that destroy an accused's "political existence." Trop v. Dulles, 356 U.S. 86, 101 (1958).

[150] *Furman*, 408 U.S. at 273 (Brennan, J., concurring).

[151] Dichter, T. A*., Worst of the Worst: Rehabilitationist Roots of Life without Parole*, 17 L., CULTURE & HUMANITIES 529, 546 (2021).

[152] Johnson & McGunigall-Smith, *supra* note 99, at 339.

[153] Jessica S. Henry, *Death-in-prison Sentences: Overutilized and Underscrutinized*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 66, 73 (Charles J. Ogletree & Austin Sarat, eds., 2012).

[154] *See id.* at 76.

[155] Preservation of hope is not easy because "[j]ust as lifers can point to prisoners who were released, so too can they list those who have died in the prison hospital." Herbert,

for those who are able to find some purpose to their carceral existence, "nobody wants to spend their life in [t]here."[156] The difficulty in finding meaning when your life is confined to a prison leads to an increased likelihood of mental illnesses and self-harm.[157] The rate of mental illness in carceral facilities is already twice as high as it is in the general population.[158] Due to a lack of adequate mental health staff and funding, inmates are not given sufficient mental health care.[159]

Prisoners sentenced to LWOP have been shown to suffer from serious depression at higher rates than parole-eligible prisoners, and "the despair caused by the lack of hope of being released" actually exacerbates mental illness in these individuals.[160] Many individuals sentenced to LWOP end up "wish[ing] . . . that they would've just [been] killed" instead of being relegated to a life of suffering.[161] This kind of experience is so torturous for individuals that they are eager for their sentence to end even if it ends in death. Timothy Hartman, who had served only thirteen years of an LWOP sentence at the time explained to the ACLU that "[m]entally, you break. You have to or else you cannot justify staying alive. It's pointless. You put a human being in a situation so bad, so evil, death is the only end."[162] "[D]ying is easy," Joseph Parsons, an individual who dropped his appeals and was executed in 1999, stated, "it takes guts" to live in prison.[163]

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supra note 2, at 37. For someone to survive incarceration for this period, they need to have more than hope, but acceptance and individual goals that can be achieved without the unlikely outcome of release. *Id.*

[156] *Id.* at 31.

[157] Turner, *supra* note 1, at 184–85.

[158] Christopher Etienne, *The Link Between Our Prison System and Untreated Mental Illness*, PRISON JOURNALISM PROJECT (Sep. 30, 2020), https://prisonjournalismproject.org/2020/09/30/the-link-between-our-prison-systems/?gad_source=1&gbraid=0AAAAAo-SeB6WctKSYhVKxESZiXEfmd7gm&gclid=Cj0KCQjwqv2_BhC0ARIsAFb5Ac8_wHWcyySeo7oeMK2--67HWPEaFxtehwCh4vwK7eGC3eDKJ37uXAoaApaPEALw_wcB [https://perma.cc/RKW2-KMXM];
Mental Health Treatment While Incarcerated, NAT'L ALL. ON MENTAL ILLNESS (2025), https://www.nami.org/advocacy/policy-priorities/improving-health/mental-health-treatment-while-incarcerated/ [https://perma.cc/3S2N-H89X].

[159] Jeffrey Mckee, *Inside the Mental Health Unit at Washington State Penitentiary*, PRISON JOURNALISM PROJECT (Oct. 26, 2023), https://prisonjournalismproject.org/2023/10/26/mental-health-in-prisons-inside-look/?gad_source=1&gbraid=0AAAAAo-SeB6WctKSYhVKxESZiXEfmd7gm&gclid=Cj0KCQjwqv2_BhC0ARIsAFb5Ac8z2oLZrE07ZbXuKNeFrfAbQajBTf8kqaWhc2tFv9c0fS-_MRARQMkaAkLKEALw_wcB [https://perma.cc/837R-LSK3].

[160] Turner, *supra* note 1, at 184–85.

[161] *Id.* at 185.

[162] *Id.*

[163] Johnson & McGunigall-Smith, *supra* note 99, at 333.

On top of the mental torture inherent in lifelong incarceration, prison conditions can be said to impose forms of physical torture as well. Prison is a disabling environment for everyone who experiences it.[164] Incarceration is "definitively linked to poor health."[165] Both the lack of access to healthy food and the postponement of important medical care lead to the prison population aging at a faster rate than non-incarcerated individuals.[166] The rapid decline of one's physical health and the stress on one's body from poor mental health take years off of an inmate's life.[167] Those who are physically aged may "isolate themselves, self-conscious as they are of their limitations and, perhaps, fearful of any of the more predatory prisoners."[168] Even as one begins to die while incarcerated, their experience is similar to torture because of the limitations present in medical treatments in these facilities. Jails and prisons were not built to house people until their deaths, and "[s]ome of the things we would do for people at hospice at home—like massive amounts of meds" cannot be done in a prison facility because of a lack of resources and staffing.[169] Even when the death that a person sentenced to LWOP longed for finally comes, they may die alone and in pain.

One more obvious physical impact on individuals serving LWOP sentences is the impact of guard and inmate violence. While many lifers are deemed "easy keepers," some have the mentality of "when you don't have nothing, then you don't have nothing to lose" [170] which can cause problems in the facility. People in prison experience physical violence at very high rates. About thirty-five percent of incarcerated men experience physical violence.[171] Twenty-one percent of incarcerated people were assaulted by staff over a six-month period in 2005, and there were over twenty thousand inmate-on-inmate assaults reported that same year.[172] In

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[164] Emily Widra, *The aging prison population: Causes, costs, and consequences*, PRISON POL'Y INITIATIVE (Aug. 2, 2023), https://www.prisonpolicy.org/blog/2023/08/02/aging/ [https://perma.cc/Y5Q5-HBRA].

[165] Olga Cunha, Andreia de Castro Rodrigues, Sónia Caridade, Ana Rita Dias, Telma Catarina Almeida, Ana Rita Cruz, & Maria Manuela Peixoto, *The impact of imprisonment on individuals' mental health and society reintegration: study protocol*, BIOMED CENTRAL, 11, 215 (2023).

[166] Herbert, *supra* note 2, at 49, 84; *see generally* Brie A. Williams, et al., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, 60 J. AM. GERIATRICS SOC. 1150 (2012) (explaining how incarcerated people experience "accelerated aging" based on risk factors commonly seen in carceral settings).

[167] Widra, *supra* note 164.

[168] Herbert, *supra* note 2, at 73.

[169] *Id.* at 91.

[170] *Id.* at 36.

[171] Emily Widra, *No escape: The trauma of witnessing violence in prison,* PRISON POL'Y INITIATIVE (Dec. 2, 2020), https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/ [https://perma.cc/2RB4-BJMB].

[172] *Id.*

many jails, people live in fear for their lives.[173]

B. Criticism and Alternative

For LWOP to be considered disproportionately cruel, those being sentenced to LWOP must not truly "deserve" its severity. Some people may contend that those individuals convicted of violent crimes are justly given a sentence of perpetual punishment. These arguments often ignore the purposes of punishment beyond retribution, assuming even if someone is capable of change, that these individuals still deserve to be locked up forever. However, retribution has a natural stopping point when it is not feasible despite the justified anger and fear surrounding certain crimes and criminals.[174]

Retribution is only sufficient for punishment so long as an individual is criminally culpable and is limited based on the seriousness of the crime convicted. Ultimately, retribution has been re-packaged as respect for victims and their families. But retribution should not be calculated based on what each individual victim *feels* is deserved about a given situation, as this cannot be applied uniformly. Retribution can be seen as the moral reason *why* we punish, not the practical reason or the procedural how.

When we think about LWOP and those people who seemingly "deserve" it, we must remember how relatively few violent criminals there actually are in the broader context of all criminal activity. In 2022, the FBI reported there were 1,954 property crimes per 100,000 people, but only approximately 381 violent crimes per 100,000 people.[175] While violent crime may seem common and flashy from a media standpoint, its actual occurrence is typically lower than one would believe. Additionally, not everyone who commits a violent crime is prone to recidivism, and most people "age out" of criminal behavior with time.[176] So, it follows that even violent criminals may be capable of reform if given the opportunity.

I do not attempt to argue that violent people do not exist. In fact, the majority of those sentenced to LWOP in the United States were convicted

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[173] Nazish Dholakia, *Prisons and Jails are Violent; They Don't Have to Be,* VERA INSTITUTE (Oct. 18, 2023), https://www.vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be [https://perma.cc/96FF-BPFG]; Jeff Levine, *Increase in Stabbings Only Part of Inmate Safety Problem at DC Jail*, D.C. WITNESS, (Jul. 25, 2024), https://dcwitness.org/d-c-witness-exclusive-increase-in-stabbings-only-part-of-inmate-safety-problem-at-dc-jail/#:~:text=One%20of%20the%20biggest%20measures,and%202023%2C%20including%20one%20fatality [https://perma.cc/M3HM-VS39].

[174] *See supra* Section III.A.

[175] John Gramlich, *What the Data Says About Crime in the US*, PEW RSCH. (Apr. 24, 2024), https://www.pewresearch.org/short-reads/2024/04/24/what-the-data-says-about-crime-in-the-us/ [https://perma.cc/Y6AX-8UYL].

[176] *See supra* Section III.A.

of a violent crime.[177] However, I argue that those who are truly dangerous long term are the exception rather than the rule. Many of those sentenced to LWOP, even if their sentence was imposed for a violent offense, have changed or are capable of change. Because judges, prosecutors, and the public cannot predict the future when sentencing or condemning an individual for life, doing so should not be a legal option. Judicial and prosecutorial predictions of future dangerousness are often considered at the sentencing stage, but experts have called these predictions "junk science."[178] A system that strips individuals of their rights and is wrong a lot of the time is not a system that should be upheld as constitutional.

An alternative for these hard cases is to reform the system of life imprisonment and ensure that it focuses on the rehabilitation of incarcerated people. A regular individualized review process by social workers, not a parole board, can ensure those who are not genuine dangers to the public can return to the outside with a second chance, with no extra trauma, or additional burden on American taxpayers by being incarcerated for life.[179] For those who truly cannot or will not change, these reviews can serve as the "without parole" version of LWOP. If someone is not deemed ready to be released, they shall not be released.

C. Costs of LWOP

1. Personal, Familial, and Social Costs

LWOP presents unique challenges that most other sentences do not present, both personal struggles for those incarcerated and their families, and fiscal difficulties that occur when indefinitely incarcerating someone. Not only is LWOP a punishment for those incarcerated, but it also punishes families and loved ones.[180] Children and families are impacted by a parental figure's incarceration. Being a child of an incarcerated adult is linked to a child's own justice system involvement[181] and can negatively

[177] The Sentencing Project reported that the majority of people serving life sentences in 2024 were convicted of a violent crime such as: homicide (59%), sex crimes (21%), robbery (6%), aggravated assault (5%), or kidnapping (2%). *A Matter of Life*, *supra* note 3, at 19.

[178] A 2004 study in Texas found that prosecution experts were wrong 95% of the time when predicting that a capital defendant would pose a continuing risk of violence. *LAW REVIEWS: Predictions of Future Dangerousness Contribute to Arbitrary Sentencing Decisions*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/law-reviews-predictions-of-future-dangerousness-contribute-to-arbitrary-sentencing-decisions [https://perma.cc/8V4K-RBBN].

[179] *See infra* Section III.C.

[180] *See supra* Section III.A.1.

[181] *See* Daniel P. Mears & Sonja E. Siennick, *Young Adult Outcomes and the Life-Course Penalties of Parental Incarceration*, 53 J. RSCH. CRIME & DELINQUENCY 3, 35 (2016).

impact a child's health and educational outcomes.[182] Additionally, families will grow and change while a member is incarcerated for life, often "fall[ing] out with time."[183] Even for those who are allowed to visit with their families, it can be difficult to face your loved ones when you are incarcerated.[184]

Those who are serving LWOP sentences are often not best serving the public while incarcerated. These individuals become interested in helping younger incarcerated people who are sentenced to traditional term-of-years sentences.[185] Many people serving LWOP sentences "sought to improve the circumstances of those around them," both to "atone for their past offenses" but also just to mentor in hopes that the younger people will not recidivate.[186] People sentenced to LWOP are usually not the violent stereotypes that got them into prison, but people capable of change and growth. One lifer noted that one thing he does to get by is "do the right thing," and maybe, change someone's life in the process.[187] Some of the impact of individual deterrence presented by incarcerating offenders, therefore, could be attributed to the altruism and mentorship of reformed incarcerated elders. This help, however, would be better served by going a step further and preventing crime before it occurs. Some people serving LWOP want to "give back" by helping similarly "troubled kids."[188] By keeping the non-dangerous, reformed, and eager individuals incarcerated, the prison system robs each individual of personhood and robs the public of the benefits they may bring if released.

2. Fiscal Costs

Although people view LWOP as an alternative to the death penalty,[189] partially due to the cost of capital punishment, LWOP imposes similar costs. Since there is a higher rate of crime among young adults, those sentenced to LWOP likely have decades to spend incarcerated, which requires public tax dollars.[190] Costs vary state-by-state, but the average daily cost of housing an inmate in a federal facility is $65 and $83 for medium and high-security facilities respectively.[191] An estimate by the Sentencing Project concludes that a state will spend over $33,000 per year

[182] *Id.* at 20.
[183] Herbert, *supra* note 2, at 52.
[184] Incarcerated people "wonder whether their family members are really well-served through involvement with someone with a life sentence," leading to increased isolation of the inmate and increased impact on their family. *Id.*
[185] *See supra* Section III.A.1.
[186] Herbert, *supra* note 2, at 20.
[187] *Id.* at 18.
[188] *Id.* at 64.
[189] *See Sentencing for Life*, *supra* note 96.
[190] *The Older You Get*, *supra* note 118.
[191] Leigey & Schartmueller, *supra* note 130, at 247–48.

to house an average prisoner, which doubles once an individual reaches fifty.[192] This means it costs upwards of $1 million to incarcerate a person for forty years (between the ages of 30 and 70).[193]

Medical facilities require even higher daily costs, and as people serving LWOP sentences get older, their medical needs increase.[194] Aging prisoners are faced with the same barrage of medical difficulties as non-incarcerated elderly folks, but at potentially higher rates. People who are incarcerated not only get diabetes and common ailments that require blood thinners or IV medications, but also rare forms of cancer and complex medical challenges made even more difficult in the prison setting.[195] Additional cost is incurred by the increase in emergency medical actions that occur as the average age of the incarcerated population increases.[196] Additionally, people who are incarcerated present physical and mental disabilities at a higher rate than the general population, which reflects the potentially disabling effect of incarceration and increases the overall financial burden of prolonged periods of incarceration.[197]

D. Racial disparities perpetuated

Although part of the push against capital punishment was based on its arbitrary, often racially-motivated use,[198] the use of LWOP is similarly disparate. The incapacitation justification for LWOP—the categorization of certain offenders as "irredeemable"—has a noticeably disparate impact on racial minorities, particularly Black and Latin men. Black people who are incarcerated are grossly overrepresented within the population of inmates serving life sentences and are significantly less likely to be granted parole.[199] These systemic inequities have entrenched LWOP as a distinctly distressing sentence targeting already struggling communities.[200] The more the public views incarcerated people as incapable of redemption and change, the less white prison populations

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[192] Joshua Rovner, *Juvenile Life Without Parole: an Overview*, THE SENT'G. PROJECT (Apr. 7, 2023), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/ [https://perma.cc/3QUZ-K8AY].
[193] Nellis, *supra* note 117, at 30.
[194] Leigey & Schartmueller, *supra* note 130, at 247–48.
[195] Herbert, *supra* note 2, at 82–83.
[196] *Id.* at 86.
[197] *See generally* Laurin Bixby, Stacey Bevan, & Courtney Boen, *The Links Between Disability, Incarceration, And Social Exclusion*, 41 HEALTH AFFS. 10 (Oct. 2022), https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00495 [https://perma.cc/Y5FV-3834] (explaining that 66% of incarcerated people reported having a disability).
[198] When polled about the death penalty, forty-eight percent of people responded that the issue of racism in the application of the punishment raised some doubts about its use. *Sentencing for Life*, *supra* note 96.
[199] Ogletree & Sarat, *supra* note 100, at 8.
[200] *Id.*; Dichter, *supra* note 151, at 547.

have become.[201] The presumption of the hardened and irredeemable criminal is impacted by the same racially biased policies and practices that run throughout the criminal legal system.

Overall, the sentences Black individuals receive are longer than those of their white counterparts, and these sentences are growing at a rate of one percent or more every year.[202] Similarly, the time Black individuals served for violent crimes grew twice as fast as the time served by white individuals for violent crimes between 2000 and 2016.

The argument some death penalty abolitionists make regarding racial bias in capital punishment sentencing is not an argument against the death penalty, but "an argument against our justice system" and the "unfairness of the system itself," which would "still exist if you're pursuing [LWOP]."[203]

E. Fewer Procedural Safeguards and Opportunities for Meaningful Review

The procedural difference between LWOP and capital punishment is stark and displays the lack of care given to defendants outside of the death penalty context. People serving life sentences "do not have the same constitutional protections guaranteed [to] those sentenced to capital punishment," despite the permanence and severity of their sentence.[204] These procedural failures begin at the initial pretrial stages and continue until well after conviction.

Before trial in the federal system, there are a few additional safeguards for capital defendants compared to non-capital defendants. First, there is a pretrial notice requirement for the government to inform the defense of its intent to seek the death penalty in a given case.[205] Additionally, parties are given double the number of peremptory challenges to strike jurors before a capital trial begins.[206] Capital defendants are also sometimes able to acquire counsel who specialize in defending individuals accused of capital crimes.[207] Similar resources and guarantees do not exist for

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[201] Dichter, *supra* note 151, at 538.

[202] Weihua Li, *The Growing Racial Disparity in Prison Time*, THE MARSHALL PROJECT (Dec. 3, 2019), https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time [https://perma.cc/FUJ5-A4K9] (specifically noting that the sentences for drug and property crimes are increasing at this rate).

[203] HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994, 185 (Oxford Univ. Press Inc., 1996).

[204] Songster, *supra* note 94.

[205] Charles Doyle, *Federal Capital Offenses: An Overview of Substantive and Procedural Law* (Jul. 5, 2023), https://www.congress.gov/crs-product/R42095 [https://perma.cc/6UQM-8D92].

[206] Federal capital cases allow parties to have twenty peremptory challenges as compared to the typical ten. *Id.*

[207] *See Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, American Bar Association, 31 HOFSTRA L. REV. 913–1090 (2003).

individuals facing LWOP sentences. Because LWOP is seen as the norm, there is no additional training that defense attorneys may feel they need before being able to adequately represent someone facing life.

One of the most striking differences between procedural safeguards in capital cases versus LWOP cases is the requirement for a bifurcated sentencing phase. The Supreme Court in *Gregg v. Georgia* held that for capital punishment to be constitutional, it must proceed in a two-step process—first being the guilt phase and second being the penalty phase.[208] The Court emphasized that "[t]he obvious solution" to avoid arbitrarily sentencing individuals death, "is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but, once guilt has been determined, opening the record to the further information that is relevant to sentence."[209] This bifurcated process allows for, and requires, the consideration of various mitigating and aggravating factors. In this stage of capital sentencing, we see the "respect for human dignity" being upheld by requiring the "consideration of aspects of the character of the individual offender" as well as the circumstances of the particular offense.[210] Mandatory capital punishment in any case is therefore unconstitutional due to its failure to treat the individual offender as an individual for purposes of sentencing. This is not the case, however, for sentences of life and LWOP.

There is no bifurcated sentencing process required for LWOP sentencing, and in some instances, LWOP is a mandatory sentence. This completely strips judges and juries of their ability to consider aggravating and mitigating factors about an individual offender, preventing consideration of individual penal needs beyond what state legislatures consider "irredeemable." Of the states that have abolished the death penalty, only four require a unanimous jury decision before sentencing an individual to LWOP.[211] This is striking when compared with the fact that the vast majority of states require jury unanimity to impose capital sentences.[212]

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[208] Gregg v. Georgia*,* 428 U.S. 153, 191 (1976).

[209] *Id.* (quoting Model Penal Code § 201.6*,* cmt. 5, (Am. L. Inst., Tent. Draft 1954)).

[210] Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976) (emphasizing the importance of states ensuring this individualized analysis at the sentencing stage by striking down a North Carolina statute that "impermissibly treat[ed] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty").

[211] *Life Without Parole*, *supra* note 11.

[212] *When Jurors Do Not Agree, Should a Death Sentence Be Imposed?,* DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/when-jurors-do-not-agree-should-a-death-sentence-be-imposed [https://perma.cc/FR6L-G7P9] (explaining how Missouri and Florida allow non unanimous juries in capital cases). Of the eleven states that have abolished capital punishment since 2007, eight states allow mandatory LWOP sentences for certain crimes. *Life Without Parole, supra* note 11. Additionally, the states

After conviction and sentencing, review for people sentenced to LWOP is similarly inadequate when compared to the opportunities for review that people convicted of capital offenses receive. The Court has not found that an individual has a right to counsel following sentencing except for initial appeals under an equal protection lens.[213] Indigent people who are incarcerated are not given the right to appointed counsel for discretionary appeals to state courts after this initial appeals stage.[214] While this remains true in the capital punishment context, too, appointed counsel is less necessary for capital defendants due to the many organizations committed to representing them pro bono in post-conviction proceedings.[215] People sentenced to LWOP are often not given this type of zealous post-conviction representation unless able to present convincing evidence of innocence.

Even for the lucky few who have counsel for post-conviction appeals, their likelihood of success is slim. Capital sentences "face stringent review by the Supreme Court to make sure they comply with the Eighth Amendment."[216] Conversely, adult non-capital sentences never meet the threshold for the Court to intervene.[217] Eighth Amendment review of non-capital punishments largely focuses on proportionality.[218] Since then, the Court has regularly held long sentences to be constitutional due to the high bar for proportionality review.

Although parole is considered "the normal expectation in the vast majority of cases," and "a regular part of the rehabilitative process," this possibility is, of course, foreclosed by a sentence of LWOP.[219] The only other options for release for a person sentenced to LWOP are "retroactive legislative reduction and executive clemency."[220] Executive clemency is

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that still use capital punishment also regularly use mandatory LWOP sentencing. *Id.*

[213] Douglas v. California*,* 372 U.S. 353, 357–58 (1963).

[214] Ross v. Moffitt, 417 U.S. 600, 609–11 (1974).

[215] Murray v. Giarratano, 492 U.S. 1, 7–10 (1989) (holding that States are not required to appoint counsel for indigent death row inmates seeking state postconviction relief); *see, e.g.*, *Innocence and the Death Penalty,* INNOCENCE PROJECT, https://innocenceproject.org/innocence-and-the-death-penalty/ [https://perma.cc/2L36-8MNR] (explaining how the organization represents inmates on death row in post-conviction proceedings); *Death Penalty*, EQUAL JUST. INITIATIVE, https://eji.org/issues/death-penalty/ [https://perma.cc/6MJX-M5AX] (last visited Apr. 24, 2025) (same); *What We Do*, THE DEATH PENALTY PROJECT, https://deathpenaltyproject.org/what-we-do/ [https://perma.cc/S2JM-F3QT] (last visited Apr. 24, 2025) (same).

[216] BARKOW, *supra* note 46, at 85.

[217] *Id.*

[218] Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (affirming the sentence of LWOP for possession of cocaine as constitutional because it was not "grossly disproportionate" to the crime).

[219] Solem v. Helm, 463 U.S. 277, 300 (1983).

[220] *Harmelin*, 501 U.S. at 996.

"exceptionally rare" for people serving LWOP sentences.[221] Retroactive legislative changes are similarly uncommon, although they have become more popular for certain harsh sentences, drug crimes, and as amendments to past three-strikes laws.[222]

These many procedural differences and the general inability of people serving LWOP sentences to receive review fail to afford those sentenced to LWOP procedural due process. This is a serious failure of both the federal and state governments, who are unable to see that LWOP, like capital punishment, is extreme and is "just as final, just as painful, and just as worthy of the careful scrutiny to which we subject traditional capital sentences."[223]

CONCLUSION

Although the Court's Eighth Amendment jurisprudence has been inconsistent, the fundamental underpinning of the cruel and unusual punishments clause remains the same: ensuring a respect for human dignity even in a penal context.[224] Over the years, the Court has held various punishments to be violative of the Eighth Amendment, including mandatory LWOP sentences for juveniles, [225] but the Court has failed to extend its reasoning to limit similarly harsh sentences for adults.

As society slowly moves away from the use of capital punishment, the use of LWOP has boomed. The increase of LWOP sentences in the late twentieth century and its steady climb since can be attributed to not only the "progressive compromise" of death penalty abolitionists, but tough-on-crime conservative policies and a shift towards viewing crime not as a symptom, but criminal propensity as an incurable disease.

LWOP is far too common in the United States. LWOP's imposition is not only concerning for those worried about mass incarceration, but those who value the purposes of sentencing and adherence to Constitutional norms. LWOP sentences are disproportionate to many crimes, insufficient

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[221] One scholar found that on average, less than one grant of executive clemency is made per year in the states sampled. Daniel Pascoe, *Worthless Checks? Clemency, Compassionate Release, and the Finality of Life Without Parole*, 118 NW. UNIV. L. REV. 1393, 1416–18 (2024) (states analyzed were AZ, CA, FL, MA, MN, MT, NE, OK, PA, VT, and WA). In the past approximately thirty years, only 388 individuals serving LWOP were granted executive clemency through their states, and only 423 individuals were granted executive clemency on the federal level since George H.W. Bush's Presidency. *Id.* at 1418. Additionally, three states have banned the use of discretionary LWOP commutation. *Id.* at 1417.

[222] *Retroactivity*, RESTORE JUST., https://www.restorejustice.org/legal-explainer/explainer-retroactivity/ [https://perma.cc/CM5V-W3T6] (last visited Apr. 24, 2025).

[223] Johnson & McGunnigal-Smith, *supra* note 99, at 344.

[224] *See* Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

[225] Miller v. Alabama, 567 U.S. 460, 489 (2012).

to satisfy the purposes of punishment, create significant hurdles for the prison system, cost taxpayers, and deny fundamental human dignity.

LWOP as it currently exists, is a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause and often denies people sentenced to LWOP their due process rights as well. In this Note, I outlined the many problems with LWOP sentencing in America. I argued its severity in relation to capital punishment and proposed a potential solution. This solution, removing the "without parole" option for all life or de facto life sentences, is merely a band-aid to the greater problem of mass incarceration and over-criminalization. Both this alteration and others are not going to remove all the issues I have presented. Instead, much of what will need to change before a true solution can be found is society's perspective of crime and those who commit crimes. If the modern Court is ever going to respect the "evolving standards of decency" test again, I hope it is when the public finally views those who have committed crimes as human beings.