

# WHO’S REALLY SENTENCED TO LIFE WITHOUT PAROLE?: SEARCHING FOR “UGLY DISPROPORTIONALITIES” IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

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Critics argue that the American criminal justice system is rife with “ugly disproportionalities” and “brutal penalties on the undeserving.” One particularly brutal punishment is the sentence of life without the possibility of parole (LWOP). The punishment, conceived decades ago as a substitute for the death penalty, scarcely exists in the rest of the world. Today, while capital punishment wanes in the United States, steadily increasing numbers of defendants are sentenced to LWOP. Furthermore, according to a recent ACLU Report, over 3,000 of the 50,000 inmates serving LWOP were convicted of nonviolent offenses. There is no uglier disproportionality than a defendant, guilty of a minor crime, banished to prison for the remainder of his life.

This Article questions this narrative and therewith the contemporary wisdom as to the brutality of American criminal justice, at least in its imposition of LWOP sentences. The author conducted a detailed study of every inmate sentenced to LWOP in eight states. In a few states, it is impossible to find a single inmate sentenced to LWOP for any crime other than murder or the most serious violent crimes. Even in jurisdictions that impose LWOP for crimes labeled “nonviolent,” the inmates are few in number and often present aggravating factors, such as extensive criminal histories or previous violent crimes. Inevitably, criminals sentenced to LWOP will vary in culpability, and some will appear not to merit this punishment. Drawing attention to their plight can spur executive clemency in individual cases. But accusations that the American legal system is rife with “ugly disproportionalities,” at least insofar as this claim is applied to LWOP sentences in the states, appear to have little merit.

Introduction .....	790
I. The Rise of LWOP—and Its Critics .....	795
II. “Nonviolent” Offenses.....	807
A. Burglary .....	809
B. Drugs.....	811
C. Habitual Offenders .....	813
III. Anecdotal Evidence .....	814
A. Nonviolent Offenders.....	814

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B. Violent Offenders.....	820
C. Culpability Bell Curves.....	825
IV. Empirical Evidence .....	831
A. The ACLU Report .....	832
B. Comprehensive State-by-State Data.....	834
1. States Without the Death Penalty.....	835
a. Wisconsin.....	835
b. Iowa .....	838
c. Washington.....	840
d. Summing Up .....	844
2. States with the Death Penalty .....	844
a. Arkansas .....	844
b. Georgia .....	846
c. South Carolina .....	848
d. Alabama .....	851
e. Florida .....	854
f. Summing Up.....	860
Conclusion.....	861

#### INTRODUCTION

In a recent essay, Judge J. Harvie Wilkinson observed that “[t]he American criminal justice system is on trial.”<sup>1</sup> The critics, who now span the political spectrum, “issue their condemnations essentially as givens, often claiming that all reasonable people could not help but agree that fair treatment of the accused has been fatally compromised.”<sup>2</sup> Particularly within the academy, the radical defectiveness of the American criminal justice system is now more than consensus; it is established fact. The title of the posthumous work by the most celebrated criminal law professor of his generation encapsulates this view: *The Collapse of American Criminal Justice*. The book, by William Stuntz, was praised fulsomely. Illustrative is an essay in the *Harvard Law Review* by Stanford Law professor Robert Weisberg:

In *The Collapse of American Criminal Justice*, Stuntz demonstrates that American criminal justice is a disaster. It is a horrendous mess of mismatched means and ends, of legal protections thwarted and misguided, of political demagoguery imposing brutal penalties on the undeserving, and of willful inefficiencies in the institutions created to protect both public

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1. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1099 (2014).

2. *Id.* at 1100.

safety and the public fisc. Moreover, in his most declamatory message, Stuntz joins the large contemporary chorus that has denounced the state of incarceration in America for both its embarrassing magnitude and its ugly disproportionalities.<sup>3</sup>

Judge Wilkinson's essay is a forthright challenge to Professors Stuntz and Weisberg, and other academic critics of the American criminal justice system. When a jurist of Wilkinson's eminence takes the trouble to issue a report—from the trenches, as it were—it behooves those of us on the sidelines to reflect and respond: is the system really as broken as we think?<sup>4</sup> Wilkinson's essay focuses on the adjudicatory process and trial, but a concluding section engages academic critics of what is said to be “overpunishment” and “grossly disproportionate penalties.”<sup>5</sup> American sentencing schemes, like most of the criminal law, are the product of decentralized *democratic* control. As a corrective, Stuntz proposed that “courts . . . create the judicial equivalent of new criminal codes, and insulate them from legislative override by pegging them to due process.”<sup>6</sup> Wilkinson argues that this solution undermines the legitimacy of the criminal law: it deprives the people and their elected representatives of the final authority over such a salient issue as criminal punishment.<sup>7</sup>

The academic counter-response is that the public is ill-informed about crime rates<sup>8</sup> (and virtually everything else),<sup>9</sup> and legislatures are prone to grandstanding excesses in the interminable war on crime.<sup>10</sup> These excesses include the propensity to mandate penalties that bear no rational relationship to a crime's culpability. Judge Wilkinson offers a brief rejoinder, noting the counter-trends in American criminal justice that do not fit neatly into this narrative. Among other developments,

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3. Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1425 (2012) (reviewing WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011)).

4. For another article by a jurist expressing an opinion underrepresented, or simply unrepresented, within the legal academy, see Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663 (2007).

5. Wilkinson, *supra* note 1, at 1149 (quoting Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005)).

6. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 588 (2001).

7. Wilkinson, *supra* note 1, at 1151.

8. See, e.g., Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

9. See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013).

10. See, e.g., Luna, *supra* note 5; Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

legislatures have recently restricted mandatory minimum laws and extended procedural protections beyond what is judicially required.<sup>11</sup>

This Article expands on Judge Wilkinson's response. It questions whether the American criminal justice system is truly rife with, in Professor Weisberg's words, "ugly disproportionalities" and "brutal penalties on the undeserving." The Article's focus is on one particularly brutal punishment: the sentence of life without parole.<sup>12</sup> Known in the parlance of criminology by the infelicitous acronym "LWOP," the punishment hardly existed in America four decades ago and still scarcely exists elsewhere in the world.<sup>13</sup> Yet today, the number of defendants sentenced to LWOP by American courts approaches 50,000.<sup>14</sup> Capital punishment, although vanishing as an imposed sentence, still receives vast—indeed, disproportionate—attention in the academic literature.<sup>15</sup> In fact, what separates the American criminal justice system from the rest of the world, and brands it as distinctively harsh, is the number of inmates dispatched to prison for the duration of their lives, without offering a legal mechanism for freedom.

LWOP is indisputably a "brutal penalty," but when imposed for brutal crimes, there would seem to most Americans no disproportionality, ugly or otherwise.<sup>16</sup> And this brings us to what has become an increasingly common critique of the American criminal justice system. The American legal professoriate has tirelessly pursued an exposé of American sentencing policy as unjustly harsh.<sup>17</sup> If Exhibit

11. Wilkinson, *supra* note 1, at 1154–57; see also Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599.

12. This Article employs the conventional definition of "life without parole": a sentence of life imprisonment in which the inmate is never legally entitled to consideration for release.

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

14. THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE OF LIFE SENTENCES IN AMERICA, 1 (2013), [http://sentencingproject.org/doc/publications/inc\\_Life Goes On 2013.pdf](http://sentencingproject.org/doc/publications/inc_Life Goes On 2013.pdf) (counting 49,081 LWOP inmates).

15. The Westlaw search ("capital punishment" or "death penalty") and date (2014) generates 4,305 hits in "secondary sources." The Westlaw search (life /5 parole) and date (2014) generates 747 hits.

16. Is there such a thing as a "beautiful disproportionality?" However interesting, this question is beyond the scope of this Article and the competence of its author.

17. The literature is voluminous. See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001); Richard S. Frase, *Comparative Perspectives on Sentencing Policy and Research*, in SENTENCING

A in this critique is the persistence of the death penalty on American soil, Exhibit B has become the prevalence of LWOP sentences—and not simply the prevalence, but the haphazard and irrational nature with which the penalty is imposed.<sup>18</sup> LWOP, the argument runs, is dispensed without careful attention to either the nature of the crime or the culpability of the criminal. To a limited extent, recent Supreme Court cases restricting the imposition of LWOP on juveniles have addressed the problem,<sup>19</sup> but LWOP is still a weapon in the war on crime that is overused. And there is no uglier disproportionality than a man,<sup>20</sup> guilty of a minor crime, banished to a cage for the remainder of his life.

Yet is this a widespread problem? In 2012, a *New York Times* article profiled four inmates who had been sentenced to LWOP for nonviolent drug crimes.<sup>21</sup> These inmates constituted roughly 0.01% of the LWOP population; if that is the extent of the problem, then executive clemency is available as the surgical solution. But several articles gestured toward other similarly situated inmates, who were serving LWOP for minor offenses. Then, in November 2013, came the comprehensive validation. The American Civil Liberties Union released a 238-page report that sketched a rampant problem—thousands of LWOP sentences imposed for nonviolent, and therefore minor, crimes.<sup>22</sup> In addition to statistical data from 13 jurisdictions, the ACLU Report provided sympathetic portraits of 110 defendants, who were guilty of nonviolent crimes, now languishing in prison for the remainder of their lives. The Report promptly received favorable attention in the popular press and law reviews, which seconded both the

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AND SANCTIONS IN WESTERN COUNTRIES 259, 260 (Michael Tonry & Richard S. Frase eds., 2001).

18. The most important work in this nascent literature is *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

19. *Graham v. Florida*, 560 U.S. 48, 74 (2010) (the Eighth Amendment forecloses the imposition of LWOP on a juvenile for a crime other than homicide); *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012) (the Eighth Amendment forecloses the imposition of LWOP on a juvenile in any sentencing scheme that deprived the trial judge of the discretion to impose a lesser sentence).

20. Despite the modern convention of gender-neutral pronouns, this Article will use the masculine pronoun in describing, in general terms, those sentenced to LWOP. This is a concession to the reality that 97% of those sentenced to LWOP are men. See Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 *FED. SENT'G REP.* 27, 27 (2010).

21. John Tierney, *Life Without Parole: Four Inmates' Stories*, *N.Y. TIMES* (Dec. 12, 2012), <http://www.nytimes.com/2012/12/12/science/life-without-parole-four-inmates-stories.html>.

22. See ACLU, *A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES* (2013), <http://www.aclu.org/criminal-law-reform/living-death-life-without-parole-nonviolentoffenses>.

factual finding (many inmates are serving LWOP for nonviolent crimes) and the moral claim (such sentences are illegitimate).<sup>23</sup> All of this fits into the broader lament about a criminal justice system disfigured by “ugly disproportionalities.”

This Article puts this consensus to the test. Section I provides background. It explores how LWOP became such a prominent feature of the American criminal justice system. At least in part, opponents of the death penalty are responsible for this development. Just two decades ago, many abolitionists hailed LWOP as a humane alternative to capital punishment. With the waning of the death penalty, erstwhile proponents of LWOP have come to regret their role in popularizing the sentence. Movements to abolish LWOP altogether, or to restrict it to aggravated murderers, are politically impracticable today. Accordingly, several critics have settled upon the more modest effort to limit the punishment to those convicted of “violent” crimes. This is the proposal set forth in the ACLU Report.

But there are difficulties with equating “nonviolent,” particularly as the ACLU Report has defined the term, with “low culpability.” As explored in Section II, several “nonviolent” crimes reflect great culpability. Furthermore, a conviction for burglary or drug crimes, or under habitual offender statutes, does not preclude the possibility that the defendant also committed acts of violence.

To make a compelling case for restricting the application of LWOP, the ACLU Report draws upon actual stories of nonviolent offenders sentenced to LWOP. Section III considers the uses that can fairly be made of such anecdotal evidence. It is worthwhile to be reminded of how the criminal law works in individual cases. Nonetheless, profiling defendants whose crimes were minor can present a distorted picture of the overall sweep of LWOP inmates. It is perilous to draw facile inferences from either the left or right tails of a bell curve.

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23. See, e.g., Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151 (2014); Brenda Gazer, *ACLU: Thousands Serving Life Sentences Without Parole for Nonviolent Crimes*, L.A. DAILY NEWS (Nov. 18, 2013), <http://www.dailynews.com/general-news/20131118/aclu-thousands-serving-life-sentences-without-parole-for-nonviolent-crimes>; Denver Nicks, *8 Most Shocking Facts from the ACLU's Report on Life Without Parole*, TIME (Nov. 14, 2013), <http://nation.time.com/2013/11/14/8-shocking-facts-from-the-aclu-report-on-life-without-parole/print/>; Ed Pilkington, *Over 3,000 US Prisoners Serving Life Without Parole for Non-violent Crimes*, GUARDIAN (Nov. 13, 2013), <http://www.theguardian.com/world/2013/nov/13/us-prisoners-sentences-life-non-violent-crimes>; Nicholas Tomsho, *ACLU: More than 3,200 Serving Life Without Parole for Nonviolent Crimes*, JURIST (Nov. 13, 2013), <http://jurist.org/paperchase/2013/11/aclu-more-than-3200-serving-life-without-parole-for-nonviolent-crimes.php>.

To get a better sense of the overall LWOP population, Section IV presents complete data from eight states. Every inmate sentenced to LWOP, along with his crimes, has been cataloged.<sup>24</sup> What emerges is a more balanced portrayal of the American criminal justice system. In certain states it is impossible to find a single inmate sentenced to LWOP for any crime other than murder or the most serious violent crimes. Even in jurisdictions that impose LWOP for crimes labeled “nonviolent,” the inmates are few in number and often present aggravating factors, such as extensive criminal histories or previous violent crimes.

There is much that is wrong with the American criminal justice system. It is even certain that there are inmates serving grossly disproportionate sentences. But the data presented in this Article suggest that, at least in the eight states studied here, LWOP is imposed rarely, if at all, for nonviolent offenses. To the extent that the American criminal justice system imposes LWOP for nonviolent offenses, particularly drug crimes, the federal system is most likely responsible.

#### I. THE RISE OF LWOP—AND ITS CRITICS

It is an irony, rich for those inclined to savor it, that several of LWOP's critics today were once among its advocates. To explain this puzzle, some historical background is required.

A century ago, the death penalty was a commonly imposed punishment in the American criminal justice system. From 1900 to 1925 there were 2,995 executions, or 120 per year. From 1925 to 1950 there were 3,644 executions, or 146 per year.<sup>25</sup> World War II marked a turning point in sentiment about the death penalty across the world. Every nation in Western Europe abandoned the death penalty, and its usage in America plummeted. Some states abolished the practice altogether, and those that persisted did so under the increasingly watchful eye of the United States Supreme Court. In *Furman v. Georgia* (1972),<sup>26</sup> the Court imposed a temporary moratorium on the

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24. For one state, Alabama, the author was unable to catalog the names of each of the inmates sentenced to LWOP; however, information provided by the state's Sentencing Commission made possible a detailed analysis.

25. *US Executions from 1608-2002*, DEATH PENALTY PROS & CONS, <http://deathpenalty.procon.org/view.resource.php?resourceID=004087> (last updated Jan. 7, 2011).

26. 408 U.S. 238 (1972).

practice, but the death penalty returned in the late 1970s, and in 1999 there were 98 executions in America.<sup>27</sup>

Nonetheless, *Furman* had one long-lasting effect: it provoked interest in LWOP. Within a year of that decision, and directly in response to it, the Alabama legislature enacted a law creating an LWOP sentence.<sup>28</sup> Other states rapidly followed suit. When the death penalty returned as a legal possibility in 1976,<sup>29</sup> abolitionists rallied to the cause of the LWOP sentence. It is doubtful that many abolitionists embraced the retributivism that undergirds LWOP, but for debating purposes the sentence proved indispensable. A stumbling block in efforts to abolish the death penalty was the absence of any punishment that could be said comparably to satisfy the penological goals of retribution and deterrence. Defenders of the death penalty could plausibly argue that the most gruesome murderer, if not sentenced to “death,” would receive nothing more than an eight-year prison term, albeit masquerading as a “life” sentence.<sup>30</sup> A life-without-parole sentence could alleviate this concern by offering a harsh alternative to the death penalty. As late as the 1990s, when the trend lines suggested a resurgence of the death penalty, the ACLU celebrated LWOP, at least when compared to the death penalty.<sup>31</sup> Religious leaders also lobbied in favor of LWOP, precisely to lure citizens from the temptation of executing any criminals.<sup>32</sup> In some jurisdictions, debates about LWOP created allies among groups one would ordinarily regard as antagonists. Death penalty abolitionists teamed up with law-and-order groups to lobby in favor of laws creating LWOP sentences.<sup>33</sup> In Texas, curiously, prosecutors and victims-rights groups opposed the creation of an

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27. *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last updated Sep. 1, 2015).

28. ALA. CODE § 13A-5-9 (LexisNexis 2013). For discussions of this development, see Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 548 (1990); Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1841 (2006).

29. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

30. See Malcolm Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62, 76 n.71 (1972).

31. See, e.g., ACLU, BRIEFING PAPER: THE DEATH PENALTY (1999), <https://www.aclu.org/files/FilesPDFs/deathpenalty.pdf>.

32. See, e.g., Paul Van Slambrouck, *Clergy Unite, Urging Followers to Oppose the Death Penalty*, CHRISTIAN SCI. MONITOR, Oct. 8, 1998, at 3, <http://www.csmonitor.com/1998/1008/100898.us.us.5.html>.

33. See Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 158 (2008); see also Note, *supra* note 28, at 1854.

LWOP sentence, precisely because they recognized its seductive appeal as an alternative to the death penalty.<sup>34</sup>

In opposing the death penalty, abolitionists were often in the odd position of highlighting the harshness of LWOP, as if it were an even more severe punishment than death.<sup>35</sup> Indulging the public's thirst for vengeance, the argument seemed to be: LWOP is nearly as brutal as the death penalty. The strategy proved to be a resounding success. LWOP swept the country. In 1970, only seven states recognized LWOP as a legal possibility (and even there, it was rarely, if ever, imposed).<sup>36</sup> By 2014, every American jurisdiction except Alaska and possibly New Mexico had adopted LWOP as a sentence.<sup>37</sup> Meanwhile from its post-*Furman* high of 98 executions in 1999, executions had dropped to 39 in 2013 and 35 in 2014.<sup>38</sup> (If we scaled execution rates from 1900 to 1950 to the present-day American population, we would be witnessing 325 to 350 executions per year.)<sup>39</sup> The availability of LWOP contributed to the declining appeal of the death penalty to voters and jurors.

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34. Note, *supra* note 28, at 1843.

35. In 1990, Professor Robert Johnson wrote "An Open Letter to Governors of States with the Death Penalty," which included a horrifying depiction of LWOP:

A life sentence is a humane alternative to the death penalty. . . . A life sentence is also a just alternative to the death penalty. A life sentence is, in fact, a "civil" death sentence, which takes freedom but preserves life, while categorically rejecting the violence of executions. The notion that a life sentence is a civil death penalty sounds strained at first, but it has merit. True, these prisoners can forge a life of sorts behind bars, but one organized on existential lines and etched in suffering, for at a deeply human level they experience a civil death, the death of freedom. The prison is their cemetery, a six by nine-foot cell their tomb. Their freedom is interred in the name of justice.

HERBERT J. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA* 137 (1996).

36. *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR. (Aug. 31, 2015), <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing> (Maine, Massachusetts, Michigan, Mississippi, Nevada, Pennsylvania, and West Virginia).

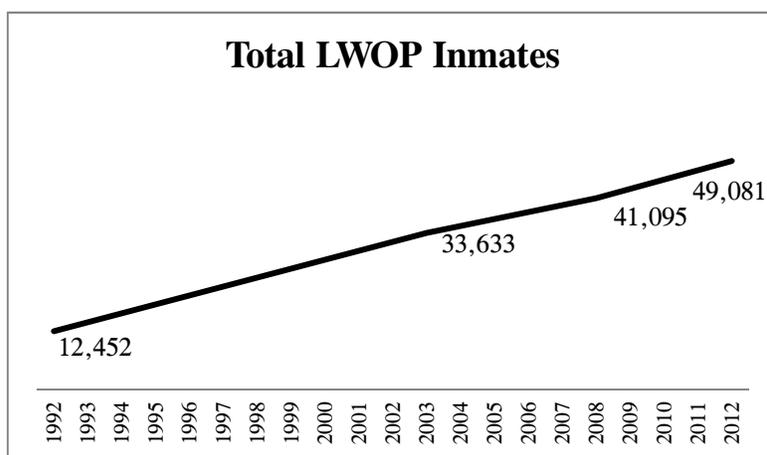
37. *Id.* The status of LWOP in New Mexico is unclear. In its law books, New Mexico recognizes the possibility of an LWOP sentence. *See* N.M. STAT. ANN. § 31-18-14 (LexisNexis 2009) ("When a defendant has been convicted of a capital felony, the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole."). Nonetheless, it does not appear that there are any persons serving LWOP in New Mexico prisons today. *See* THE SENTENCING PROJECT, *supra* note 14, at 6.

38. *Executions by Year*, *supra* note 27.

39. The population of America from 1900 to 1950 ranged from 76 million to 152 million. *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, <http://www.census.gov/population/estimates/nation/popclockest.txt> (last updated June 28, 2000).

Yet having pushed for LWOP's adoption to address a discrete concern—the death penalty—abolitionists were dismayed to discover that others had more ambitious plans for the punishment. In the midst of a crime wave in the 1980s and 1990s, LWOP seemed to many Americans an excellent idea for *all* murderers, even those who would not have qualified for the death penalty. Although the Supreme Court provided capital defendants with a plethora of procedural protections, including the requirement of individualized sentencing,<sup>40</sup> no such protections extended to LWOP. Thus it was possible, legislatively, to mandate LWOP for all convicted murderers. And although the Supreme Court had restricted the death penalty to murderers,<sup>41</sup> no such restriction applied to LWOP. So it was also possible to extend that punishment to felonies other than homicide, and even to felonies that did not even involve acts of violence.<sup>42</sup>

With virtually every American jurisdiction imposing LWOP for more and more crimes, the results were predictable: steadily increasing numbers of inmates sentenced to life without the possibility of parole<sup>43</sup>:



40. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

41. See *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Coker v. Georgia*, 433 U.S. 584 (1977).

42. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

43. In 1992, a study found 12,453 LWOP inmates nationwide; a 2003 study found 33,633 LWOP inmates; a 2008 study found 41,095; a 2012 study found 49,081. See ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 9–10 fig.2 (2009), [http://sentencingproject.org/doc/publications/publications/inc\\_NoExitSept2009.pdf](http://sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf); THE SENTENCING PROJECT, *supra* note 14, at 13.

Many defendants sentenced to LWOP could not, consistent with contemporary understandings of the Eighth Amendment, have been sentenced to death. For example, Rubio Angel was convicted of several counts of malicious wounding, abduction with intent to defile, and object sexual penetration.<sup>44</sup> Because he was a minor at the time of the offenses and because none of his offenses constituted murder, Angel was doubly ineligible for the death penalty. Yet he received an LWOP sentence, which was affirmed by the Virginia Supreme Court.<sup>45</sup>

In 2015, nearly four decades after the Supreme Court effectively overturned *Furman*, the death penalty is still a feature of the criminal justice system that receives much academic interest. However, it is imposed roughly one-third as often as it was just fifteen years ago, its post-*Furman* high. Some credit for the death penalty's decline is owed to LWOP sentences, and in that respect the early advocates of LWOP have succeeded. It is unclear that public opinion on the death penalty is much different today than it was a decade or two ago; and in the absence of the possibility of LWOP, it is likely that more murderers would be executed. Yet the courts have encumbered the death penalty process with such onerous procedural obstacles that even without LWOP the punishment is unlikely to return to its frequency of a century or even a decade ago.

Having contributed to the creation of LWOP, many groups have come to regret their role in popularizing the sentence. With the death penalty cabined to a few jurisdictions, and seldom imposed even there, the once vigorous proponents of LWOP have felt emboldened to criticize the expansion of LWOP.<sup>46</sup> These criticisms can be divided into three categories, with each criticism corresponding to a different vision

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44. *Angel v. Commonwealth*, 704 S.E.2d 386, 389 (Va. 2011).

45. Even though Angel's crimes were all nonhomicides, the court held his LWOP sentence complied with *Graham v. Florida*, which prohibits LWOP for juvenile nonhomicides, because Angel is technically eligible for geriatric release at the age of sixty. *Id.* at 402.

46. This development was foretold in candid remarks by an experienced capital attorney three decades ago:

[W]e may need to be less coy about life imprisonment without parole as an alternative to the death penalty. Out of the plus or minus 80 percent [of Americans] who support the death penalty, those who support it primarily out of a fear of individual murderers and a desire to protect society may be the most reachable, as opposed to those whose support is more integrally related to other conservative or religious political views. This is a tough issue, but it's one that can't be evaded. *LWOP can be changed and amended later, as crime and public sensibilities that [seem] to accompany the reinstitution of legalized prisoner-killing may take a very long time to undo.*

HAINES, *supra* note 35, at 137 (emphasis added) (quoting David Bruck).

of the punishment and therewith its appropriate scope. From the most fervent denunciation of LWOP to the least, the criticisms are:

1. LWOP is a barbarity that should never be imposed on any criminal. According to this view, LWOP is a repudiation of the humanity of the offender and has no place in a civilized criminal justice system.<sup>47</sup> Every human being has the capacity to rehabilitate himself and return to civil society; LWOP, as a denial of this capacity, is inconsistent with human dignity. Most European legal systems reflect this perspective and categorically reject LWOP sentences. According to a study from 2010, the Netherlands and England<sup>48</sup> are the only two European countries that both recognize LWOP as a possibility and actually impose it, although on a small scale.<sup>49</sup> (There are roughly thirty-seven inmates serving LWOP sentences in the Netherlands and thirty-six in England.) The European Court on Human Rights has raised doubts about whether an LWOP sentence violates the requirement, codified in Article 3 of the European Convention of Human Rights, that all criminal punishment respect the dignity inherent in all human beings, even serial murderers.<sup>50</sup>

Whatever its appeal within the American academy,<sup>51</sup> the European perspective<sup>52</sup> on LWOP enjoys negligible support among the American

47. See, e.g., Catherine Appleton & Brent Grever, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 612 (2007) (“LWOP faces many, if not all, of the objections of the death sentence, and therefore is equally untenable in civilized society.”); see also *infra* note 51.

48. “England” here refers to “England and Wales.” Scotland and Northern Ireland have independent criminal justice systems.

49. van Zyl Smit, *supra* note 13, at 40–41.

50. See *Vinter v. United Kingdom*, App. Nos. 66069/09, 130/10 & 3896/10, (Eur. Ct. H.R. 2013), <http://hudoc.echr.coe.int/eng?i=001-122664>. For a discussion of the case, see Ernie Walton, *Preserving the European Convention on Human Rights: Why the UK’s Threat to Leave the Convention Could Save It*, 42 CAP. U. L. REV. 977, 980–83 (2014).

51. See, e.g., William W. Berry III, *The Mandate of Miller*, 51 AM. CRIM. L. REV. 327, 342 (2014) (“[I]n certain ways, a sentence of life without parole can be worse than a sentence of death. . . . To the extent that living in prison constitutes suffering, life without parole allows for greater suffering, or at least a longer time for suffering.”); Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 359 (2013) (“Death fades into insignificance when compared with life imprisonment.” (quoting Lewis E. Laws, *Why I Changed My Mind*, in VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975, at 192, 194 (1976))); Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in LIFE WITHOUT PAROLE, *supra* note 18, at 66, 76 (LWOP sentences “fail to recognize the intrinsic worth of the incarcerated person”); Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439, 457 (2013) (“[I]n both an execution and a life sentence without the possibility of parole, there is no hope for redemption or reform, despite the reality that many people turn

public. To be sure, some jurisdictions have rejected LWOP for classes of crimes and criminals. In the 1983 case *Solem v. Helm*,<sup>53</sup> the Supreme Court foreclosed LWOP for those convicted of minor crimes. Although a subsequent case limited the reach of *Solem* as a constitutional decision,<sup>54</sup> some states have legislatively eliminated LWOP as a possible sentence for certain crimes.<sup>55</sup> However, legislatures have also added many crimes to statutory lists of offenses that allow for the possibility of an LWOP sentence. In a compendium of all the nonviolent crimes that can give rise to an LWOP sentence, a student author, Caitlyn Hall, counted several hundred laws, scattered across all of the fifty jurisdictions that deploy the sentence.<sup>56</sup>

Another American development, which more significantly intimates a convergence with European attitudes on sentencing, is the adoption of limits on the imposition of LWOP on juvenile criminals. In *Graham v. Florida*,<sup>57</sup> the United States Supreme Court outlawed juvenile LWOP sentences for all nonhomicides; in *Miller v. Alabama*,<sup>58</sup> the Court outlawed the imposition of LWOP on juveniles for any crime, including homicide, when the sentence was imposed by a trial judge who did not have the discretion to impose a lesser sentence. Both cases reasoned that even the most heinous of crimes, when committed by juveniles, may not reveal a heart so hardened that rehabilitation is impossible. A few state legislatures have gone even further than the

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away from their criminal pasts and go on to live law-abiding lives where they could contribute in a positive way to society.”); Michael M. O’Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT’G REP. 1, 7 (2010) (“If the capacity for change and moral growth is regarded as a core attribute of humanity, then LWOP might be seen as a profoundly inhumane punishment—as a denial of the offender’s capacity to live a fully realized human life.”).

52. England does not appear to share this “European perspective.” See Walton, *supra* note 50, at 977 (referring to a poll showing that “90% of Brits favor ‘boycotting’ the European Court on Human Rights”). It is an open question whether most Europeans share the “European” perspective or whether the law in Europe more accurately reflects the views of elites than does the law in the United States and England.

53. 463 U.S. 277 (1983).

54. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

55. For example, in 1998 the Michigan legislature repealed its law that had imposed LWOP on any inmate convicted of distributing more than 650 grams of cocaine. Compare MICH. COMP. LAWS ANN. § 333.7401(2)(a)(ii) (West 2012) with MICH. COMP. LAWS § 333.7401(2)(a)(i) (1981); see also Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2249 n.41 (2014).

56. Caitlyn Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1101 (2013).

57. 560 U.S. 48 (2010). For a criticism of *Graham*, see Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309 (2011).

58. 132 S.Ct. 2455 (2012).

Supreme Court and categorically foreclosed juvenile LWOP for all crimes.<sup>59</sup>

These developments have substantially altered sentencing practices. The peak age at which violent crime is committed is roughly twenty-two years of age;<sup>60</sup> inevitably, then, minors commit hundreds of murders, rapes, aggravated kidnappings, and armed robberies each year. Under the laws of almost all American jurisdictions, such crimes would, if committed by an adult, render the offenders eligible for LWOP sentences. *Graham* and *Miller* have restricted the ability of all American jurisdictions to impose LWOP on these juvenile defendants. However, the reasoning in *Graham* and *Miller* focused on the allegedly peculiar vulnerability and plasticity of youth. Consequently, these cases have dubious precedential value for adult defendants. Perhaps the one exception is the mentally retarded, who can analogize their condition to juveniles and argue that, given their special vulnerabilities, LWOP is also inappropriate.<sup>61</sup> Aside from juvenile and possibly mentally retarded criminals, LWOP sentences are unaffected by *Graham* and *Miller*, a point already driven home in many lower court cases.<sup>62</sup> If one's goal is to limit the usage of LWOP in the United States, a more modest claim is in order, which brings us to:

2. LWOP is equal in severity to the death penalty and should be imposed only on defendants convicted of aggravated murder. Unlike the first critique, which likens LWOP to an antiquated punishment that is simply beyond the pale, this perspective recognizes, grudgingly, that LWOP has a limited place in a modern criminal justice system. But that

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59. See *Hawaii Abolishes Life Without Parole Sentence for Juveniles*, KHON2 (July 2, 2014, 4:02 PM), <http://khon2.com/2014/07/02/hawaii-abolishes-life-without-parole-sentence-for-juveniles/>; *States Adopt Sentencing Changes Following Supreme Court Ruling on Juvenile Lifers*, PRISON LEGAL NEWS (May 19, 2014), <https://www.prisonlegalnews.org/news/2014/may/19/states-adopt-sentencing-changes-following-supreme-court-ruling-juvenile-lifers/>.

60. See Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NATURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 377, 382 (Kevin M. Beaver et al. eds., 2014).

61. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); see also Craig S. Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 36 (2012).

62. See, e.g., *United States v. Pierre*, 433 F. App'x 905, 913 (11th Cir. 2011) (per curiam) ("Pierre's motion lacked merit as *Graham v. Florida* does not apply to adult offenders such as Pierre."); *United States v. Evans*, No. 2:92CR163-5, 2014 WL 1165858, at \*9 (E.D. Va. May 8, 2015) ("Evans possesses adult liability, making *Graham* inapplicable . . ."); *Moss v. United States*, Nos. CV413-178, CR491-176, 2014 WL 346758, at \*2 (S.D. Ga. Jan. 30, 2014) ("[T]he lower courts have consistently held that enhancing an adult offender's sentence based upon juvenile conduct in no way implicates *Graham*.").

place extends no further than as a substitute for the death penalty. Not meaningfully different in severity from the death penalty, LWOP should be restricted to those cases in which the ultimate punishment might otherwise be appropriate.

The 2011 American Law Institute (ALI) draft revision to the Model Penal Code on sentencing issues lays out this critique.<sup>63</sup> For many years, the ALI had clung to the position that LWOP was such a barbaric punishment that it should never be imposed for any crime. By 2011 this position had been as resoundingly trounced in the court of public opinion as presidential candidate Walter Mondale: fifty of fifty-two<sup>64</sup> American jurisdictions authorized and imposed LWOP sentences.<sup>65</sup> In its 2011 Report the ALI revised its stance and allowed that LWOP might be appropriate for “offenders who could [otherwise] be recipients of death sentences.”<sup>66</sup> With commendable frankness, the authors concede that they would prefer to abolish both the death penalty and LWOP; however, given the existence of the death penalty in some jurisdictions, and the possibility of its return in others, LWOP should exist: “the political momentum of proposed death-penalty legislation may be offset if the credible alternative of a whole-life tariff is brought forward.”<sup>67</sup> The authors add that LWOP should be reserved for intentional murder, and they encourage legislatures to adopt “procedural protections” comparable to those used in capital cases.<sup>68</sup>

The ALI position has the virtue of being consistent with the origins of LWOP, that is, as an alternative to the death penalty. There is still some vitality in this explanation of LWOP. In recent years, governors who have vetoed death penalty legislation, or signed legislation abolishing the penalty, have emphasized that LWOP, as an extraordinarily harsh punishment, exists as a substitute to punish the worst of murderers.<sup>69</sup> Yet as a description of current practices, the

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63. MODEL PENAL CODE: SENTENCING § 6.06 cmt. 2 (Tentative Draft No. 2, 2011).

64. The fifty states plus the District of Columbia and the federal government add up to fifty-two jurisdictions.

65. Walter Mondale won two jurisdictions in 1984, Minnesota and the District of Columbia.

66. § 6.06 cmt. 2.

67. *Id.*

68. *Id.*

69. Peter Applebome, *Bill to Repeal Death Penalty in Connecticut Goes to Governor*, N.Y. TIMES (Apr. 12, 2012), <http://www.nytimes.com/2012/04/12/nyregion/connecticut-house-votes-to-repeal-death-penalty.html> (quoting Governor Malloy: “Let’s throw away the key and have them spend the rest of their natural lives in jail.”); Mario M. Cuomo, *New York State Shouldn’t Kill People*, N.Y. TIMES (June 17, 1989), <http://www.nytimes.com/1989/06/17/opinion/new-york-state-shouldn-t-kill->

origins of LWOP give no sense of its vast scope today—that is, for murderers who would not be eligible for the death penalty and for many nonhomicide offenders. Furthermore, if the ALI critique were robust, one would predict less interest in LWOP in those jurisdictions that dispensed with the death penalty long ago and in which there is no realistic possibility of its return. For example, in states like Iowa, which abolished the death penalty over 50 years ago, and Wisconsin, which abolished the death penalty over 150 years ago, LWOP would seem to be unnecessary. As will be explored in detail in Part IV.B, this prediction is not borne out. Both jurisdictions, and in particular Iowa, impose LWOP for murder and even nonhomicide offenses. And although a minority of jurisdictions includes procedural protections for LWOP sentences, there is no discernible legislative or public interest in restricting LWOP to cases of aggravated murder. So we turn at last to the most politically viable critique of LWOP:

3. LWOP is an extraordinary punishment and should be reserved for crimes that involve acts of violence. This approach concedes a limited place for LWOP sentences. It should be imposed only, as the recent ACLU Report argues, “for the most serious offenses.”<sup>70</sup>

The ACLU’s 238-page report has already received much attention for both its normative argument (LWOP is inappropriate for nonviolent offenses) and its empirical claim (thousands of nonviolent defendants have received LWOP sentences). After a terse definitional section, which lays out what is intended by “violent” and “nonviolent,” the Report presents its basic finding, drawn from the federal system and a dozen states, of 3,278 inmates serving LWOP for nonviolent offenses.<sup>71</sup> According to the Report, this is the result of an indiscriminate “war on drugs,” together with overused mandatory minimum and habitual offender laws.<sup>72</sup> The bulk of the Report, at least measured in pages, is the next section, which catalogs 110 “case studies” of inmates “sentenced to die in prison for nonviolent crimes.”<sup>73</sup> These portraits drive home the suffering of inmates serving LWOP.

Three brief sections conclude the Report. The first purports to depict the “reality of serving life without parole,” which is said to be one of restricted access to vocational and educational programs; furthermore, there is “virtually no chance of clemency or

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people.html (Governor Cuomo writes that LWOP is “a sentence of death in incarceration.”).

70. ACLU, *supra* note 22, at 2.

71. *Id.* at 22.

72. *Id.* at 32–37.

73. *Id.* at 38–181.

compassionate release.”<sup>74</sup> The Report then depicts the financial costs of incarcerating prisoners for decades,<sup>75</sup> and it concludes by demonstrating that American LWOP practices are inconsistent with sentencing policies elsewhere in the world and possibly with international treaties as well.<sup>76</sup>

A notable lacuna in the ACLU Report is the absence of any argument defending LWOP for violent criminals. It might be said that such an argument does not promote, and is unrelated to, the Report's immediate goal: the elimination of LWOP for nonviolent offenses. However, there are grounds to speculate that the Report's authors are skeptical of LWOP even for violent criminals—that is, the authors of the ACLU Report in fact agree with the “European” critique of LWOP, but are modulating their criticism to make their proposal more palatable to an American audience. As a logical matter, opposing LWOP for nonviolent offenses does not imply support for LWOP for violent offenses. And the Report's embrace of international practices, together with its elaborate depiction of LWOP's horrors, seems designed to instill doubt about the appropriateness of LWOP in all circumstances. Consider this passage from the Report's executive summary:

A life-without-parole sentence means society has given up on a person, regardless of whether he or she exhibits any capacity for growth or change. It robs these prisoners of hope. It is essentially a sentence to die in prison: prisoners are not released. These men and women are categorically ineligible for parole, and once their post-conviction appeals are exhausted, their only chance for release is rarely-granted commutation or clemency by the president or governor of their state or similarly infrequent compassionate release shortly before they die. Without a date on which they know they will be set free, prisoners wake up each day facing a lifetime of imprisonment with no hope of release. They grow old, fall ill, and eventually die behind bars. The sentence turns prisons into geriatric wards where ailing, aging prisoners who no longer pose any risk to society are warehoused until their deaths.<sup>77</sup>

Defenders of LWOP could argue that this passage overstates the cruelty of an LWOP sentence. The chance of release is not quite as remote as the Report suggests. Either through executive clemency or

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74. *Id.* at 182–93.

75. *Id.* at 194–99.

76. *Id.* at 200–06.

77. *Id.* at 9–10.

successful appeals, more than a scattering of inmates serving LWOP do not, in fact, die behind bars.<sup>78</sup> Furthermore, inmates serving LWOP often *do* have access to the same, or virtually the same, educational and vocational programs as other inmates; at least to this extent, it is not clear that society has “given up on a person.”<sup>79</sup>

These facts do not deny the harshness of an LWOP sentence, but they do suggest that the Report presents that harshness in controversially unmitigated terms. The Report, for example, quotes inmates sentenced to LWOP to the effect that their sentence is “akin to being dead,” “a slow, painful death,” and, finally, “a slow, horrible, torturous death.”<sup>80</sup> But if LWOP is akin to torture, then it should not be countenanced for *any* crime. The “capacity for growth” is intrinsic to our humanity and is not lost upon the commission of even the worst of crimes: even many murderers repent. And this is precisely why most European nations do not condone LWOP for any crimes.

Is there an argument that justifies LWOP for violent offenses, but not nonviolent ones? The classic penological rationales arise from theories of deterrence and retribution. Arguments from deterrence, however, are unavailing in drawing a distinction between nonviolent and violent crimes. Although the prospect of an LWOP sentence might deter crimes,<sup>81</sup> it would deter *all* crimes. For example, general deterrence would arguably support the imposition of LWOP for a third DWI offense or even for price-fixing.<sup>82</sup> Deterrence thus fails to justify limiting LWOP to violent offenses.

However, a retributivist could argue that an LWOP sentence is a severe but humane punishment, which is proportionate to the severity of certain, but not all, offenses.<sup>83</sup> LWOP is akin to the ancient

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78. See *infra* text accompanying notes 119–20.

79. The results of a nationwide study of programs available to LWOP inmates are reported in Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101, 1145–48 (2013).

80. ACLU, *supra* note 22, at 9, 185.

81. It is unclear that the prospect of an LWOP sentence is of greater deterrent effect than the prospect of a long, but determinate, prison term. See *United States v. Jackson*, 835 F.2d 1195, 1199–200 (7th Cir. 1987) (Posner, J., concurring).

82. For an example of a third DWI offense resulting in a life sentence, albeit with the possibility of parole, see Abby Phillip, *Texas Man Sentenced to Two Life Terms for 10th DWI Offense*, WASH. POST (Feb. 13, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/13/texas-man-sentenced-to-two-life-sentences-after-10th-dwi/>. On the theoretical plausibility, at least from the perspective of deterrence, of executing violators of antitrust laws, see Michael K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price-Fixer Now and Then?*, 68 GEO. L.J. 1131, 1132 (1980).

83. This retributivist argument in favor of LWOP is sketched more fully in Lerner, *supra* note 79, at 1162–71.

punishment of banishment, and by imposing this sentence the community pronounces that it is forever expelling the offender from its midst. Yet it is not accurate to say that the community renounces all interest in the offender's humanity. After all, LWOP exists in contradistinction to the death penalty. Capital cases place in bold relief that the two punishments are not understood as identically severe. It is commonplace in capital sentencing proceedings for defense counsel to argue that LWOP, not the death penalty, is appropriate precisely because the defendant is capable of rehabilitation—that is, rehabilitation in prison. And American prisons welcome and even encourage such rehabilitation, providing most LWOP inmates with opportunities for self-improvement, the ability to move to medium-security institutions, and the chance, albeit remote, of legal relief or executive clemency. Harsh though it is, LWOP is not intended to be as harsh as a death sentence.

LWOP reflects the conflicted judgment of a community that on the one hand intends to banish the offender forever, but on the other hand entertains the hope that the offender may rehabilitate himself. Given the harshness of such a sentence, the ACLU Report writes that “[o]ne should expect that the American criminal justice system [will impose LWOP] only for the most serious offenses.”<sup>84</sup> This expectation is well-founded; the question then turns to sketching what is meant by “most serious offenses.”

## II. “NONVIOLENT” OFFENSES

If LWOP should exist at all, and if it is appropriate in cases other than aggravated murder, a morally legitimate criminal justice system should limit it to extraordinary crimes. To this end, the ACLU Report proposes restricting LWOP to cases involving only the “most serious offenses.”<sup>85</sup> Yet what are these offenses? The Report states (or implies) that only “violent offenses” qualify as “most serious.”<sup>86</sup> At first blush, this accords with an intuition that violent crimes cause greater harms than nonviolent crimes and reflect greater culpability in the offender. But, as set forth below, this moral intuition proves difficult to operationalize. One cannot easily distinguish between violent and nonviolent offenses; nor is it evident, assuming such a line could be drawn, that it accurately tracks a crime's seriousness.

The ACLU Report proposes as its definition of a “violent crime” any offense that entails “the use or threat of physical force against a

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84. ACLU, *supra* note 22, at 2.

85. *Id.* at 14–15.

86. *Id.* at 2.

person.”<sup>87</sup> Yet as an attempt to capture “the most serious offenses,” this definition is both over- and under-inclusive. Such a definition includes murder and rape, but it also includes crimes of a more indeterminate gravity. Kidnapping, robbery, and battery can entail the gravest of harms. Indeed, given the vagaries of state law, as explored below, it is not uncommon for kidnapping to be charged in cases of sexual battery.<sup>88</sup> But it is also possible to imagine kidnappings, robberies, and batteries that entail much lesser harms and do not qualify as “most serious.” Yet all of these crimes qualify as violent offenses, and under the division proposed by the ACLU all could justify an LWOP sentence.

On the other hand, Aldrich Ames and Robert Hanssen neither used violence, nor threatened the use of it, against another human being.<sup>89</sup> Nonetheless, their acts of treason caused monumental damage to national security and resulted in the exposure of many agents working for the United States; it is estimated that a dozen of these agents were executed. Their “nonviolent” crimes would seem amply to justify, at a minimum, the LWOP sentences they received. The ACLU Report does not consider treason, but it does raise the problem posed by child pornography cases.<sup>90</sup> At least in those cases in which the offender played no role in creating the material, the crime does not involve “the use or threat of physical force against a person.” But in some instances such crimes are extraordinarily serious. And the ACLU Report includes the possession of child pornography in its list of crimes meriting LWOP.

The inclusion of possession of child pornography is an implicit concession that “violent crime,” as the Report defines it, fails to capture some serious crimes. Are there other crimes that might also be sufficiently serious as to merit LWOP? We consider below three categories of criminals: those sentenced for burglary, for drug offenses, and as habitual offenders. Each of these are excluded from the ACLU Report’s definition of a violent offense,<sup>91</sup> but this omission fails to consider the heterogeneity of these crimes and the possibility that, in

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87. *Id.* at 18.

88. To take one example, first degree kidnapping in Iowa, which results in an LWOP sentence, includes sexual battery as an element of the offense. *See infra* text accompanying note 195.

89. *See* SANDRA GRIMES & JEANNE VERTEFEUILLE, CIRCLE OF TREASON, A CIA ACCOUNT OF ALDRICH AMES AND THE MEN HE BETRAYED (2012); DAVID WISE, SPY: THE INSIDE STORY OF HOW THE FBI’S ROBERT HANSEN BETRAYED AMERICA (2002).

90. ACLU, *supra* note 22, at 18–19.

91. *Id.*

some instances, these “nonviolent” crimes can qualify as extraordinarily serious.

### A. Burglary

At common law, burglary was the breaking and entering of the house of another in the night time, with intent to commit a felony therein.<sup>92</sup> The invasion of the home at night has always inspired horror and indignation. Invoking the Roman poet Tully (“For what is more sacred, more inviolate than the home of every citizen.”), Blackstone pronounced burglary a “very heinous offense.”<sup>93</sup> Anglo-American criminal law traditionally classified burglary as a capital offense.<sup>94</sup> Yet early in American history, the justice of this punishment came into question. At common law, “burglary” can range from cases in which an armed criminal invades a home, assaults the owners, and absconds with valuables to cases in which an unarmed criminal enters an unoccupied home and leaves without taking any item. (As long as the offender in the latter case intended to commit larceny when he entered, it is irrelevant that he did not consummate the offense.) Both crimes qualify as common law burglary, but it is doubtful in the latter case, at least to modern sensibilities, that the death penalty is merited. As early as 1805, Massachusetts changed its law to provide that only burglars who assaulted a home’s occupant could face the death penalty.<sup>95</sup>

A further complicating development is that, over the past two centuries, burglary has been statutorily redefined in increasingly broader ways. Most jurisdictions have abandoned the “nighttime” element, and many have expanded burglary to include the uninvited entry into *any* building, including non-residential dwellings.<sup>96</sup> Finally, many jurisdictions provide that the prosecution need prove that the

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92. 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 549–50 (1736).

93. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*223.

94. The law on the European continent contained no category of crime for burglary. See Minturn T. Wright III, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 424–27 (1951).

95. Anthony Vaver, *Early American Crimes: Burglary, Part II*, EARLY AM. CRIME (Nov. 25, 2009, 9:44 AM), <http://www.earlyamericancrime.com/crimes/burglary-2>.

96. See, e.g., *Lewis v. Commonwealth*, 392 S.W.3d 917, 920 (Ky. 2013) (Commonwealth’s burglary statute “scarcely” resembles the common law definition of burglary); *State v. White*, 330 P.3d 482, 484 (Nev. 2014) (legislature abandoned the “nighttime” and “residential building” elements of the common law definition of burglary); *Commonwealth v. Rolan*, 549 A.2d 553, 558 (Pa. 1988) (legislature expanded the common law definition of burglary by abandoning the “nighttime” element and by including uninvited entry into any building or structure).

burglar's purpose in entry was to commit *any* crime: a misdemeanor will suffice.<sup>97</sup> Perhaps the most famous burglar in American history, Clarence Earl Gideon, as in *Gideon v. Wainwright*,<sup>98</sup> is illustrative of the capacious nature of what is now contemplated by "burglary." His crime was to break into a poolroom with the purpose of committing a misdemeanor (stealing beer and wine and pilfering the jukebox and cigarette machine).<sup>99</sup> As *Gideon* demonstrates, it is now possible that a person could be convicted of burglary without using or threatening force against another person.

Yet as state legislatures have expanded the meaning of "burglary," they have statutorily distinguished among two or more grades of the crime. For example, the state of Washington defines three categories of burglary. Entry into a commercial dwelling is called second degree burglary.<sup>100</sup> Entries into homes are sub-divided into residential burglary on the one hand and first degree burglary on the other.<sup>101</sup> First degree burglary, the only one to be classified as a violent offense, is any residential burglary in which the defendant is armed with a deadly weapon or commits an assault.<sup>102</sup> Other state codes, such as those in Wisconsin and Florida, provide similar distinctions, with the goal of segmenting common law burglary as a distinctive category.<sup>103</sup> Thus, the ACLU Report's claim that "some jurisdictions define violent crime to include burglary"<sup>104</sup> is doubtless true, but gives an inaccurate impression of burglary law today. Jurisdictions often tend to define only certain categories of burglary as violent offenses, and these tend to track common law burglary.

As already indicated, however, even common law burglary, like first degree burglary in Washington, spans cases that are both violent

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97. See, e.g., *State v. Gardner*, 889 N.E.2d 995, 1002–03 (Ohio 2008) (by broadening the scope of the mens rea required for the crime of burglary, the legislature intended to encompass all criminal offenses); *State v. Miranda*, 776 N.W.2d 77, 83 (S.D. 2009) (legislature intended to criminalize entry of an unoccupied structure with the intent to commit any crime).

98. 372 U.S. 335 (1963).

99. *Id.* at 336; Bruce R. Jacob, *The Gideon Trials*, 99 IOWA L. REV. 2059, 2060–61 (2014).

100. WASH. REV. CODE § 9A.52.030(1) (2014).

101. §§ 9A.52.020–.52.025.

102. § 9A.52.020(1).

103. See, e.g., WIS. STAT. § 943.10 (2013–14) (distinguishing between armed and unarmed burglary); FLA. STAT. § 810.02 (2014) (distinguishing between armed burglary and burglary assault (burglary in the first degree), burglary of an occupied or unoccupied dwelling, or occupied structure or conveyance (burglary in the second degree), and burglary of an unoccupied structure or conveyance (burglary in the third degree)).

104. ACLU, *supra* note 22, at 18.

and nonviolent, as the ACLU Report defines the terms. It would be first degree burglary if a criminal entered a home with a gun, shot and maimed an occupant, and then left with jewelry, but it would also be first degree burglary if a criminal, while armed, entered a home, but no one was physically confronted. The ACLU Report classifies all burglary as “nonviolent,” and therefore insufficiently serious to merit LWOP, but this is doubly problematic. First, there are some burglaries that *would* qualify as violent—that is, those in which an occupant is assaulted. Second, if a burglar enters a home armed with a gun, he presumably anticipates the possibility of encountering a resident (or else why bring the gun?) and further anticipates the possibility of brandishing the weapon (ditto). Thus, even if the burglar does not actually threaten an occupant, it is hardly clear that the community is unreasonable in treating such a crime as among the most serious offenses. For present purposes, it is sufficient to note that the ACLU Report’s exclusion of burglary from the category of “violent offenses” misses some burglaries that *are* violent by its own definition; furthermore, the Report misses some burglaries that may not qualify as “violent” under its idiosyncratic definition, but which the community may plausibly regard as very serious. Subsequent sections of this Article will unravel whether, in jurisdictions such as Washington and Florida, LWOP is being imposed indiscriminately on convicted burglars without regard for the seriousness of their offense.

### *B. Drugs*

The ACLU Report also defines as nonviolent all “drug offenses,” which it notes includes crimes such as “possession, possession with intent to distribute, manufacture, sale, and trafficking of controlled substances.”<sup>105</sup> As with burglary, this spans a wide range of offenses, from a teenager picked up with a quarter ounce of marijuana to the mastermind of a conspiracy supplying methamphetamine to thousands of addicts. By lumping all such crimes together as “nonviolent,” the ACLU Report glosses over the meaningful distinctions in criminal codes across the United States. The U.S. Code distinguishes among broad classes of drugs (e.g., Schedule I versus Schedule II), within classifications (e.g., marijuana versus cocaine), and finally with respect to the amounts involved. For crack cocaine, a tripartite division separates sales of less than 28 grams of crack cocaine, of between 28 grams and 280 grams, and of more than 280 grams; and only with respect to the final category, at least as a first offense, is LWOP a

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105. *Id.* at 19.

possible sentence.<sup>106</sup> New York's criminal law is even more nuanced, with six distinctions drawn according to the amount of crack cocaine sold.<sup>107</sup>

The ACLU Report regards these distinctions as irrelevant: none of these crimes involve the use or threatened use of violence. For obvious reasons, however, dealing in large quantities of drugs often goes hand-in-glove with the use or threatened use of violence. According to the coding scheme of the ACLU Report, the most notorious—and among the most violent—drug dealers in modern American history, Rayful Edmond, is presumably classified as a nonviolent LWOP offender: he was sentenced for being the participant in a continuing criminal enterprise involving the sale of vast quantities of cocaine.<sup>108</sup> It is unclear how many murders he also either directly ordered or indirectly sanctioned in the course of that conspiracy.<sup>109</sup> And it is unfortunate—and indeed problematic<sup>110</sup>—that he was prosecuted under drug distribution laws and not directly for his violent crimes.<sup>111</sup>

Even in the rare case of a major drug dealer who somehow plies his trade without using or threatening violence, which at some level of distribution strains credulity, there is still the resulting harm to the community caused by the drugs. Given the dozens of ruined lives, it is not clear that the community's decision to impose stiff punishment, particularly on those who repeatedly violated the law, is morally illegitimate. Of course, for small-time drug dealers, an LWOP sentence is disproportionate. Whether these are the sort of recidivist drug dealers regularly sentenced to LWOP will be considered in subsequent sections.

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106. 21 U.S.C. § 841 (2012).

107. N.Y. PENAL LAW § 220.03 (McKinney Supp. 2015); N.Y. PENAL LAW §§ 220.06, 220.09, 220.16, 220.18, 220.21 (McKinney 2008).

108. See *United States v. Edmond*, 730 F. Supp. 1144, 1146 (D.D.C. 1990).

109. See Liz Sly, *Drug Trial Gives D.C. a Taste of Columbia*, CHI. TRIB. (Oct. 11, 1989), [http://articles.chicagotribune.com/1989-10-11/news/8901210082\\_1\\_major-drug-cartel-kingpin-rayful-edmond-iii](http://articles.chicagotribune.com/1989-10-11/news/8901210082_1_major-drug-cartel-kingpin-rayful-edmond-iii).

110. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 623–25 (2005). As Professors Stuntz and Richman observe, federal pretextual prosecutions have a long, and not entirely proud, history, dating back at least to the tax prosecution of Al Capone. As they argue, such prosecutions, while often indispensable, risk undermining public confidence in the criminal law.

111. For another example, consider Reginald White, sentenced to LWOP for a third offense for manufacturing and selling crack cocaine. He was also accused of raping a woman when children were present in a home and unlawful neglect of children, in separate incidents. See Anthony Dys, *Clover Drug Dealer, Accused Rapist, Sentenced to Life in Prison Without Parole*, HERALD (Jan. 15, 2015), <http://www.heraldonline.com/2015/01/15/6706511/clover-drug-dealer-accused-rapist.html>.

*C. Habitual Offenders*

Another category of nonviolent criminals groups together all those sentenced to LWOP under habitual offender or “3-strike” statutes. The ACLU Report argues that such statutes, enacted widely in the 1990s, “had a dramatic effect on sentencing throughout the country” and are in part responsible for the soaring rates of nonviolent offenders sentenced to LWOP.<sup>112</sup> In assembling its list of habitual offenders sentenced to LWOP, the Report apparently includes only those offenders whose triggering crimes were nonviolent—that is, habitual offenders sentenced to LWOP for violent crimes are sensibly excluded from its list of nonviolent offenders.

Yet a distinction must be drawn among those styled nonviolent habitual offenders. Some of these criminals had prior convictions for violent offenses (“subcategory 1”), whereas others accumulated a pathetic litany of nonviolent offenses (“subcategory 2”). As an example of subcategory 1, consider an offender who is convicted of rape and robbery, is incarcerated for a decade, and then emerges into civil society only to sell drugs or commit larceny. Such a criminal emerges, dubiously, on the ACLU Report’s list of nonviolent habitual offenders. True, the gravity of his crimes may be declining over time. On the negative side, however, the persistent refusal to obey the law arouses the belief that such a criminal is an intractable threat to society, notwithstanding the happenstance that his most recent crime qualified as nonviolent.

More morally problematic are the LWOP sentences imposed on offenders falling into subcategory 2, that is, those who commit minor crime after minor crime, but never an act of violence. The community is entitled to a measure of indignation, but it is fair to question whether an LWOP sentence is disproportionate, even given the cumulative gravity of the offenses. The ACLU Report elides the difference between these two subcategories, although there would seem to be a gulf between them, both with respect to the offender’s culpability and the moral defensibility of an LWOP sentence. To get a sense of the magnitude of the issue, we would need to know which of the two subcategories predominates—that is, how many exclusively nonviolent habitual offenders are sentenced to LWOP? But this would require more granular data than what is provided in the ACLU Report. We will now turn to individual cases of defendants sentenced to LWOP, both for nonviolent and violent offenses, to assess whether the punishment is calibrated to the culpability of their crimes.

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112. ACLU, *supra* note 22, at 35.

## III. ANECDOTAL EVIDENCE

The criminal law is driven by anger and vindictiveness, and its implements are cages, shackles, and nooses (or, in our civilized world, hypodermic needles). It operates on flesh and blood, and it is worthwhile to be reminded of real cases.<sup>113</sup> Statistical data, while valuable, can and should be complemented by “anecdotal evidence.” To this end, this section considers the lives and crimes of inmates actually sentenced to LWOP. The claim that America is rife with disproportionate LWOP sentences is thus put to the test. The section first considers some of the nonviolent offenders identified in the ACLU Report. Several mistakes in the Report are identified, and its truncated accounts of the crimes often fail to portray the gravity of the offenses. The section then identifies a sample of the most violent and culpable offenders sentenced to LWOP. These are the sort of offenders who receive little attention in the academic literature, but who need to be considered to account for LWOP’s intransigent appeal among the population at large. The section’s concluding part draws upon the full sweep of the anecdotal evidence to speculate on the overall culpability of inmates sentenced to LWOP.

*A. Nonviolent Offenders*

Critics of LWOP sentences tell sympathetic “stories” about inmates whose crimes do not seem to merit severe punishment.<sup>114</sup> In this vein, the longest and most compelling section of the ACLU Report is entitled “Case Studies: 110 Offenders Sentenced to Die in Prison for Nonviolent Crimes.”<sup>115</sup> Most of those profiled were convicted of drug crimes or under recidivism statutes, with a scattering sentenced for burglary or other so-called nonviolent offenses. In the ACLU Report and popular journals, the crimes are portrayed as minor, and the evidence of the offender’s guilt is often called into question. LWOP’s critics also present the offenders’ progress toward rehabilitation, which further calls into question the fairness of LWOP sentences.

Although regularly cited, the ACLU Report was never peer-reviewed, and there are several mistakes, which have been credulously

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113. Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1618–23 (1986).

114. See, e.g., John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 12, 2012, at A1; Saki Knafo & Ryan Reilly, *These 32 People Are Spending Their Lives in Prison for Nonviolent Crimes*, HUFFINGTON POST (Nov. 11, 2013), [http://www.huffingtonpost.com/2013/11/13/life-without-parole\\_n\\_4256789.html](http://www.huffingtonpost.com/2013/11/13/life-without-parole_n_4256789.html).

115. ACLU, *supra* note 22, at 38–181.

adopted by others. At least three of the offenders who were supposedly “sentenced to die in prison,” did not, in fact, receive LWOP sentences: Oscar Giles was sentenced to life with the possibility of parole;<sup>116</sup> Robert E. Booker was sentenced to 360 months imprisonment;<sup>117</sup> and Paul Carter was sentenced to life with the possibility of parole after 20 years.<sup>118</sup> Yet another inmate profiled in the ACLU Report, Libert Roland, had his LWOP sentence overturned on appeal within a month of the publication of the ACLU Report.<sup>119</sup> One cannot fault the ACLU Report for its failure to predict the outcome of Roland’s legal appeal. Nor can the Report be faulted for its failure to anticipate that four more profiled inmates—Clarence Aaron, Stephanie George, Jason Hernandez, and Reynolds Wintersmith—would have their sentences commuted by President Obama and be released from prison in 2014.<sup>120</sup>

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116. *Id.* at 119–20. The error here seems to have arisen from a failure to recognize that Giles committed his crime in 1979, before Florida instituted sentencing guidelines in 1984. In fairness to the ACLU, Florida’s sentencing rules over the past few decades are of byzantine complexity, but at least with respect to pre-1984 offenses, the law is clear: for *all* such offenses, inmates are eligible for parole. See *infra* note 279 and accompanying text.

117. According to the ACLU Report, Robert E. Booker Sr., “[a] first-time offender with no criminal record, . . . was sentenced to LWOP nearly two decades ago for operating a crack house, despite the sentencing judge’s stated belief that he should serve only 20 years in prison.” ACLU, *supra* note 22, at 50. Booker’s sentencing was complicated. A district court judge sought to impose a more lenient sentence than what was apparently required by the federal guidelines, and he was twice reversed by an impatient Seventh Circuit, which at last reassigned the case to a new judge. See *United States v. Booker*, 134 F.3d 374, 1998 WL 31754, at \*1 (7th Cir. 1998); ACLU, *supra* note 22, at 50. But when that trial judge totaled up the points under the then-binding Guidelines, he arrived at the sum of 42, one short of the 43 needed to mandate LWOP. See *Booker*, 1998 WL 31754, at \*1. As a result, “[t]he district judge sentenced Booker to 360 months’ imprisonment.” *Id.*

118. According to the ACLU Report, “Paul Carter has been incarcerated for 16 years, serving life without parole for possession of a trace amount of heroin residue.” ACLU, *supra* note 22, at 8–9. Under the relevant habitual offender law, Carter *should* have been sentenced to LWOP, but the trial court did not, instead sentencing him to life *with* the possibility of parole. *State v. Carter*, 773 So. 2d 268, 278–79 (La. Ct. App. 2000). The appellate court was emphatic on this point: “[T]he trial court did not deny defendant the benefit of parole. Defendant could be paroled after serving twenty years of his sentence and having his life sentence commuted to a fixed term of years.” *Id.* at 279.

119. *State v. Rowland*, No. 48,514-KA, 2013 WL 6537210 (La. Ct. App. Dec. 11, 2013).

120. Press Release, The White House, President Obama Grants Pardons and Commutation (Dec. 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/19/president-obama-grants-pardons-and-commutation>.

LWOP, although characterized as an “irrevocable” sentence,<sup>121</sup> does not appear to be quite as irrevocable as advertised.

The ACLU Report also contains factual mistakes about crimes that the so-called nonviolent offenders committed. Of Paul Carter, for example, the ACLU Report writes that “[h]e was sentenced under Louisiana’s three-strikes law because of decade-old convictions for simple escape and possession of stolen property.”<sup>122</sup> Here is Carter’s criminal history:

In resentencing defendant, the trial court noted in detail defendant’s juvenile record: 9/13/81–criminal trespass, probation; 9/26/81–theft and resisting an officer, one year probation; 4/4/82–simple damage to property and theft, pled guilty; 8/31/83–shoplifting, six months probation; 2/29/84–simple robbery and simple battery, six months probation; 4/16/84–shoplifting, six months probation; 4/2/85–shoplifting, one year Department of Corrections (DOC); 7/15/85–theft and possession of stolen property, six months DOC; 8/22/85–simple escape, fourteen months DOC. The trial court also noted defendant’s adult record: 4/14/87–possession with intent to distribute PCP and marijuana, possession of stolen property, refused; simple escape, six months parish prison; 3/17/90–possession of stolen property valued between \$100 and \$500, two years parish prison, suspended except for thirty days; 3/17/90–battery on a police officer and carrying a concealed weapon, two years parish prison, suspended except for thirty days; aggravated battery, theft under \$100, refused; 6/19/90–resisting an officer and flight from an officer, refused; possession of cocaine and possession of stolen automobile valued at over \$500, three and one-half and seven and one-half years at hard labor, concurrent; 5/30/95–battery, no record found; 4/28/97–criminal trespass, no record found; 11/13/97–first degree murder during crime, refused; 11/13/97–instant offense,

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121. *See Graham v. Florida*, 560 U.S. 48, 74 (2010) (“By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society.”).

122. ACLU, *supra* note 22, at 8–9. A web article picked up on the ACLU Report and states, “For more than 16 years, Paul Carter has languished in a New Orleans prison, sentenced to life without parole after being convicted of possessing an amount of powdered heroin so small it couldn’t be weighed.” Solvej Schou, *Majority of Americans—Including Republicans—Want Treatment for Drug Crimes*, TAKEPART (Apr. 3, 2014), <http://www.takepart.com/article/2014/04/03/no-more-war-drugs-americans-support-treatment-instead-jail>.

distributing false drugs, which charge was pending at the time of the presentence investigation.<sup>123</sup>

At a minimum, Carter's battery on a police officer conviction undermines his portrayal as a "nonviolent" offender.

With respect to other inmates, the ACLU Report presents their crimes in such a spare form that the LWOP sentence is rendered unintelligible. Consider Sylvester Mead. The ACLU Report states he "was sentenced to mandatory life without parole for a drunken threat to a police officer while handcuffed and sitting in the back of a patrol car on the way to a police station."<sup>124</sup> A fuller sense of Mead's crimes might be helpful. In 2000, police arrived at Sylvester Mead's home in response to a report of domestic violence.<sup>125</sup> His wife testified that Mead had threatened her with a butcher's knife.<sup>126</sup> His fifteen-year-old stepdaughter testified that he yelled "I'll kill you" and "I'll kill all y'all in this house."<sup>127</sup> An officer subdued Mead and put him in the back of his cruiser, which was equipped with a recorder. During the ride to the jail, defendant was recorded saying, "I should have shot you this time,' and something to the effect of, 'if you come back again you better bring your arsenal.'"<sup>128</sup> Characterizing all of this as "a drunken threat" does not quite capture what occurred, and this crime should be put in context of Mead's history:

This Court finds that Defendant committed a number of prior felony offenses which have resulted in his current legal consequences. At least two offenses were serious enough for purposes of the Louisiana Felony Habitual Offender Statute, to wit: Armed Robbery and Aggravated Battery. Defendant's propensity to be violent has continued even during the time of his confinement at Angola as evidenced by the letters Defendant acknowledged writing and said letters were

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123. *Carter*, 773 So. 2d at 284.

124. ACLU, *supra* note 22, at 96. *The Economist* and *The Nation* magazines profiled Mead in their claims that American prisons are rife with nonviolent offenders serving LWOP sentences. *Throwing Away the Key*, *ECONOMIST* (Nov. 16, 2013), <http://www.economist.com/news/united-states/21589868-shocking-number-non-violent-americans-will-die-prison-throwing-away-key>; Liliana Segura, *Why Should Thousands of Prisoners Die Behind Bars for Nonviolent Crimes?*, *NATION* (Nov. 13, 2013), <https://www.thenation.com/article/why-should-thousands-prisoners-die-behind-bars-nonviolent-crimes/>.

125. The facts of Mead's case are drawn from *State v. Mead*, 823 So. 2d 1045, 1047-48 (La. Ct. App. 2002).

126. *Id.* at 1047.

127. *Id.*

128. *Id.* at 1048.

additional evidence that Defendant has the propensity to act poorly and make poor decisions.<sup>129</sup>

It is fair to ask whether, even in light of Mead's criminal history, an LWOP sentence was appropriate for his final offense. Indeed, the trial judge initially imposed a ten-year sentence, which was reversed on appeal.<sup>130</sup> Several more appeals and petitions followed, culminating in a federal district court opinion putting the final seal on Mead's sentence fourteen years after the crime.<sup>131</sup> This elaborate account of Mead's offenses is offered not to defend his LWOP sentence, but to suggest that the ACLU Report's terse account of his crimes and trial fails to do justice to Louisiana's sentencing rules and practices.

Another example of an offender whose crimes are dubiously characterized is Dicky Joe Jackson. The ACLU Report states that he "has served 17 years of a life-without-parole sentence because he transported and sold methamphetamine to pay for a life-saving bone marrow transplant and other medical treatments for his son."<sup>132</sup> An LWOP sentence for such a crime would indeed reflect a deranged sentencing scheme. Some more information about Jackson calls this conclusion into question.<sup>133</sup> Jackson was at the center of a conspiracy that transported over 81 kilograms of methamphetamine into the Fort Worth area from southern California. The conspiracy covered a two-year period, from 1993 to 1995, but there was evidence that Jackson was involved in the sale of methamphetamine going back to 1988. To give a sense of the scale of the conspiracy, one of Jackson's confederates buried over \$500,000 in cash. Although the defendants, inevitably, contested the amount of drugs attributed to the conspiracy, their argument was contradicted by, among other evidence, taped conversations between Jackson and a government informant.

On the issue of the gravity of Jackson's crimes, it is fair to note that the drug conspiracy he masterminded distributed over 81 kilograms of methamphetamine, which corresponds to roughly 32,000 individual dosages, which arguably translates into dozens of ruined lives.<sup>134</sup>

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129. *State v. Mead*, 988 So. 2d 740, 749 (La. Ct. App. 2007).

130. *State v. Mead*, 927 So. 2d 1259, 1261-62 (La. Ct. App. 2006).

131. *Mead v. Warden*, No. 10-CV-1084, 2014 WL 434106, at \*1 (W.D. La. Feb. 3, 2014).

132. ACLU, *supra* note 22, at 3.

133. All facts below are drawn from Brief for the United States at 4-12, *United States v. Jackson*, 116 F.3d 475 (5th Cir. 1997) (No. 96-10598), 1997 WL 33575146. The Fifth Circuit opinion affirming all convictions in the conspiracy supplied no factual background. *Jackson*, 116 F.3d 475.

134. The data on the harms from methamphetamine are contested. For a skeptical account, see CARL HART, JOANNE CSESTE & DON HABIBI, METHAMPHETAMINE: FACT VS. FICTION AND LESSONS FROM THE CRACK HYSTERIA 11-12

Furthermore, Jackson was convicted of being in possession of illegal firearms, and there was testimony that he had constructed a silencer for a rifle. In general, given the customers and competitors of such a drug conspiracy, it is unlikely that it will be pristinely “nonviolent.” With respect to the defense of “duress”—that is, the claim that some of the proceeds were used to pay his son’s medical bills—Jackson requested a downward departure from his Guidelines sentence. Both trial and appellate courts considered and rejected his argument, as one would expect, given how narrowly cabined the excuse of duress is in Anglo-American law.<sup>135</sup> Perhaps the excuse of duress should be broadened, and perhaps Jackson’s sentence is excessive, either in light of this mitigating circumstance or the generally nonviolent nature of his crimes. These are plausible arguments; the fuller account of his crimes provided here is intended not to justify the sentence, but to rebut the claim that the punishment bore no plausible relationship with his crime.

A final tactic employed by critics of LWOP sentences is to cite cases in which such sentences were imposed despite underwhelming evidence of guilt. Danielle Metz, for example, is cited for this proposition. According to the ACLU Report, there was little evidence tying Metz to a drug conspiracy; she is “a mother of two serving three life sentences plus 20 years for her involvement in her husband’s cocaine distribution enterprise, her first offense.”<sup>136</sup> To be convicted of *any* crime, let alone sentenced to LWOP, merely because one’s husband was involved in drug distribution is illegitimate. But there are two issues here that need to be unraveled. First is the factual issue of what Metz did. Second is the moral issue of whether the punishment is proportionate to the crime. The ACLU Report and many other LWOP critics compress these issues. But *any* criminal could depict his sentence as disproportionate if he was wrongly convicted. In this vein, Charles Manson is serving a life sentence for being a misunderstood mystic. With respect to Danielle Metz, a jury found beyond a reasonable doubt that her role was *not* simply that of the unknowing spouse, and the appellate court agreed. Indeed, it found “overwhelming evidence” of her intimate involvement in every stage of the conspiracy, including the

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(2014), <http://www.opensocietyfoundations.org/sites/default/files/methamphetamine-dangers-exaggerated-20140218.pdf>.

135. *See generally* MODEL PENAL CODE § 2.09 cmt. 2 (1985) (rejecting duress on the basis that “the actor lacked the fortitude to make the moral choice”). In any event, his claim more closely resembles necessity than duress.

136. ACLU, *supra* note 22, at 44. For an article drawing upon the ACLU account, see Nicholas Kristof, Op-Ed., *Serving Life for This?*, N.Y. TIMES (Nov. 13, 2013), <http://www.nytimes.com/2013/11/14/opinion/kristof-serving-life-for-this.html>.

distribution of \$350,000 to \$400,000 in cash.<sup>137</sup> Metz can contest this evidence and insist on her factual innocence; if she is correct, then her LWOP sentence, and even her conviction, should be reversed. But if there was indeed “overwhelming evidence” of her involvement in an extensive conspiracy, her claim to receiving a disproportionate sentence is less compelling.

In sum, the ACLU Report and LWOP’s critics have identified several nonviolent offenders whose crimes were of such a character that legitimate questions are raised about their sentences. By drawing attention to these cases, advocates have succeeded in securing executive clemency in some instances. There are other inmates whose crimes were sufficiently minor and whose rehabilitation is sufficiently compelling that executive clemency or geriatric release should be considered.<sup>138</sup> However, this part of the Article has drawn attention to still other cases, in which the ACLU Report and LWOP’s critics do not present a complete account of the offenders’ crimes and the careful judicial processes that resulted in their sentences.

### *B. Violent Offenders*

The previous part profiled nonviolent offenders sentenced to LWOP. This part considers violent offenders. It does so without any claim to random selection, and in this respect mirrors the approach taken by the ACLU Report. That Report identified offenders least deserving of LWOP; this part identifies offenders richly deserving of, at a minimum, LWOP. The facts of the crimes are set forth with sufficient, and even uncomfortable, detail to give a sense of the crimes’ horror. Although several Supreme Court Justices disfavor such graphic depictions, deeming them intended to stir up demons and legally unnecessary,<sup>139</sup> the facts of the crimes are essential data for our purposes. The issue here is whether LWOP sentences are imposed for crimes that do or do not merit such sentences, or, more fundamentally, whether the American criminal justice system is rife with “brutal disproportionalities.” How can these issues be resolved unless we know what crimes were committed? And to know the crimes means to know

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137. *United States v. Tolliver*, 61 F.3d 1189, 1213 (5th Cir. 1995), *judgment vacated sub nom. Moore v. United States*, 519 U.S. 802 (1996).

138. The cases of Ricky Minor, Timothy Tyler, and Alice Johnson, to take just three examples, merit strong consideration. *See* ACLU, *supra* note 22, at 6–7, 56–58, 83–84.

139. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 440 n.1 (1985) (Brennan, J., dissenting) (“However heinous [defendant’s] crime, the majority’s vivid portrait of its gruesome details has no bearing on the issue before us.”).

what really happened—that is, to avoid the vague abstractions and convenient ellipses that obscure the grotesque reality of the crimes.

Here are five murderers sentenced to LWOP:

Murder 1. A trial judge stated:

The evidence in this case seems to me to be about a person who was really cold hearted, almost inhuman in his participation in his brutal, heinous, evil doing. One of the most brutal crimes I have ever seen in all the years I've spent in this building.

About 40 stab wounds, gang rape, driving over this young girl in a car, after having her in the trunk. One can almost not imagine any worst [*sic*] facts. Nightmarish is almost too weak a word. It staggers the imagination.<sup>140</sup>

Murder 2. A trial judge stated:

Joseph McManus, you were not satisfied with killing alone. You tormented [Kelly]. Stabbed her painfully and repeatedly without killing her swiftly and instantly, and then left her while she was still alive and conscious, in need of help, dying in the arms of her children, to punish [Kelly] and to execute vengeance upon her.<sup>141</sup>

Murder 3. An appellate court summarized the evidence:

Medical evidence indicated Vidar Lillelid was killed first as Delfina Lillelid and their two children watched. Delfina Lillelid, while mortally wounded by several gunshots, was still alive when struck by the van. Tabitha, who cried throughout much of the ordeal, watched as her parents were brutally murdered before her own execution. . . . The three shots to the chest of Delfina Lillelid in the shape of a triangle were beyond that necessary to produce death. Expert testimony established that two separate weapons were utilized. Delfina Lillelid may have been alive when her daughter's body was placed over hers in the shape of a cross.<sup>142</sup>

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140. *People v. Croft*, 6 N.E.3d 739, 741 (Ill. App. Ct. 2013).

141. *State v. McManus*, 941 A.2d 222, 235 (R.I. 2008).

142. *State v. Howell*, 34 S.W.3d 484, 510 (Tenn. Crim. App. 2000).

Murder 4. An appellate court summarized the evidence:

The Court finds the facts to be that the nude body of the victim, Quenette Shehane, was found in a wooded area during an extremely cold period. Her body bore the signs of trauma in that there were numerous abrasions, bruises, scratches and gunshot wounds. It was determined that the victim had been shot with a .22 caliber pistol one time in the chest, three times in the buttocks, and two times in the left elbow. The above mentioned abrasions being found on her chest, abdomen and lower extremities. The victim's clothes did not have bullet holes in them, indicating that she was nude at the time she was shot. The Court finds that the killing of Quenette Shehane was outrageous and extremely wicked, vile and shockingly evil. The Court finds from the evidence that the victim was abused and tortured prior to her death.<sup>143</sup>

Murder 5. An appellate court summarized the evidence:

Appellant Michelle Gauvin pled guilty to the confinement, neglect, and murder of her four-year-old stepdaughter. . . .

Michelle often tied up Aiyana and put duct tape over her mouth. . . . Michelle frequently struck Aiyana with her hand or with pieces of a wooden cutting board. . . .

Aiyana slept in a small room adjacent to the garage with a plywood floor but no insulation or forced air heating. The room was "exceptionally cold," about ten to fifteen degrees colder than the rest of the house. . . . Aiyana's room contained a bed without bedding, and she was prevented at times from sleeping even on that. Instead, she was forced to sleep bound either in her booster seat or on a small plastic tray in the corner on the floor.

The Gauvins also photographed Aiyana in varying states of bondage and forced her to view these pictures herself. . . . In one of the photographs, Aiyana is tied to her bed, wearing an overflowing diaper and lying in excrement. . . .

Aiyana had difficulty eating and vomited. In response, Michelle covered Aiyana's mouth with duct tape and put her in her room to go to sleep, still strapped to the booster seat. . . .

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143. *Ex parte Thomas*, 460 So. 2d 216, 222-23 (Ala. 1984) (quoting *Thomas v. State*, 460 So. 2d 207, 215 (Ala. Crim. App. 1983)).

The following morning . . . emergency personnel found Aiyana not breathing, without a pulse and cold to the touch. She had red marks and bruising on her face, arms, chest, and legs. . . .

The pathologist estimated that Aiyana had been struck at least four or five times on her head and more than two dozen times on the rest of her body. . . . She was malnourished and dehydrated.<sup>144</sup>

One could argue, following most European criminal justice systems, that none of these crimes merit LWOP, because each of these murderers could repent and rehabilitate himself. As discussed earlier, the American Law Institute has abandoned this position and now acknowledges the legitimacy of LWOP in cases of aggravated murder.<sup>145</sup> As for violent crimes other than murder, however, the ALI continues to regard LWOP as illegitimate. Here is a pair of violent offenders to test this absolutist position. The first case gives some sense of why many Americans became disenchanted with sentencing schemes that include parole as an embedded feature.

Nonhomicide 1. The trial court summarized the evidence:

[The petitioner] is not a violent predator. He's a violent sexual predatory monster. That's what the [petitioner] is, a monster. He began his career as a youth, a minor, at the age of 15 years of age and continued, and he began on December 10 of '72 with the first burglary at the age 15. The next year he was 16 with another offense, a vehicle code section; and then again at 17, the following year, as an adult he was convicted of [assault with a deadly weapon], and he was 18 years old and committed to CYA. His convictions did not stop. He continued. He was discharged from CYA, and within a short time thereafter, he committed the rape, the attempted sodomy and forcible oral copulation. That was around June 15 of '78. He was paroled in 10/25 of '81, and within one month, one month, he committed another residential burglary, and he went away to state prison for seven years. He was paroled again, and it's not clear when exactly, because he was paroled and returned to state prison for a violation on 4/29/86, but he had another new commitment on January 29, '88, and that was a two count

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144. *Gauvin v. State*, 883 N.E.2d 99, 101-02 (Ind. 2008).

145. *See supra* text accompanying note 66.

burglary conviction that occurred on April 14 of '87, for which he got 22 years. That didn't stop the [petitioner.] He was paroled on the 8th of July of the year 2000, and these offenses occurred five months later. He is a monster. There are no other words to describe him. What the victim in Count Two [Tiffany M.] went through was a horror story, absolute horror story. [The petitioner dragged Tiffany M. away from her apartment, attempted to rape her, and kned her in the face several times, before being scared away. He invaded the home of another victim, bound and gagged her, beat her with a wire hanger, and raped her.]<sup>146</sup>

Nonhomicide 2. An appellate court summarized the evidence:

Bady tried to hit Senner with a chair, threw a stool at her, and eventually pinned her on the bed. He told her that if she didn't answer his questions, she would die, and he began to slap her face. When Senner cried for help, he lit a cigarette, told her to stop yelling, and burned her on the neck. He then hit her across the arms with a belt multiple times, and tried to hold a plastic bag over her mouth and nose. When she resisted, he tried to shove pieces of the bag down her throat, telling her that he was going to kill her.

Senner began to see black spots and lose consciousness. Bady grabbed a second plastic bag, shoved it down her throat, and covered her mouth and nose with a third bag. Senner lost consciousness. She awoke on the floor to Bady standing over her. . . . [He] grabbed Senner and threw back her on the bed. . . . Bady threatened to kill Senner if she did not remain quiet.<sup>147</sup>

A final offender to consider is Ariel Castro, the Cleveland man who, over the course of a decade, held three young women hostage in his basement and sexually abused them.<sup>148</sup> Many Americans would lament not the harshness, but the leniency of Castro's LWOP sentence (an issue that was mooted when he committed suicide). One could, along these lines, advance the thesis that LWOP is a disproportionate

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146. *Vetter v. Ayers*, No. CV 06-1728-R(RC), 2009 WL 3672829, at \*13 (C.D. Cal. Nov. 3, 2009) (the defendant technically received not an LWOP sentence, but a sentence of 490 years to life).

147. *State v. Bady*, 116 Wash. App. 1059, 2003 WL 21000994, at \*1 (2003).

148. See Michael Muskal, *Ariel Castro Sentenced; Victim Says His 'Hell Is Just Beginning'*, L.A. TIMES (Aug. 1, 2013), <http://articles.latimes.com/2013/aug/01/nation/la-na-ariel-castro-20130802>.

sentence, but its critics get the direction of the disproportion exactly reversed: LWOP is often imposed when a more severe punishment, at a minimum death, is better calibrated to the gravity of the offense. LWOP sentences reflect the squeamishness of American legal elites about the death penalty, and their ability to frustrate the more retributivist impulses of the general public. According to this thesis, many LWOP sentences are indeed illegitimate—that is, they reflect the criminal law's failure to impose an appropriately stern sanction.

Of course, this thesis is faulty. The half dozen or so cases in this part have been selected as some of the more gruesome crimes to culminate in LWOP sentences. It would be improper to make inferences about the full sweep of the LWOP population from these heinous offenders. Similarly, inferences drawn from the nonviolent offenders considered in Part A of this section would be equally improper. What conclusions can fairly be drawn from the anecdotal data considered so far? How many LWOP sentences are truly “disproportionate”? To these questions, we now turn.

### *C. Culpability Bell Curves*

If a criminal sanction is “disproportionate,” then the severity of the punishment exceeds the requirements of its penological rationales. If the goal is deterrence, this would be true if the pain inflicted is greater than what is necessary to prevent the commission of the crime. As explained above, a plausible justification for imposing LWOP sentences for violent offenses more likely sounds in retribution than in deterrence.<sup>149</sup> “Retributivism,” according to Michael Moore, its more famous contemporary proponent, “is the view that punishment is justified by the moral culpability of those who receive it.”<sup>150</sup> What is intended by “culpability” defies precise resolution. Whether it factors in idiosyncratic aspects of the offender, such as his age, propensity to addiction, and psychopathic tendencies,<sup>151</sup> or the harm actually inflicted,<sup>152</sup> are debated questions. This Article acknowledges the

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149. See *supra* text accompanying notes 81–83.

150. Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179, 179 (Ferdinand Shoeman ed., 1987). For another formulation: “The retributivist dream . . . is to create a world in which impositions of criminal liability and punishment correspond to our considered judgments of blame and desert.” Douglas Husak, “*Broad*” *Culpability and the Retributivist Dream*, 9 *OHIO ST. J. CRIM. L.* 449, 449 (2012).

151. Husak, *supra* note 150, at 467.

152. LARRY ALEXANDER ET AL., *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 197 (2009).

importance of these questions, but nonetheless brackets them. One can debate whether a cocaine addict who commits attempted murder is more “culpable” than a nineteen-year-old who commits rape. But both are plainly more “culpable” than other criminals who commit simple assault or sell small quantities of methamphetamine. There is, in this sense, a broad consensus about what is intended by the word “culpability.”

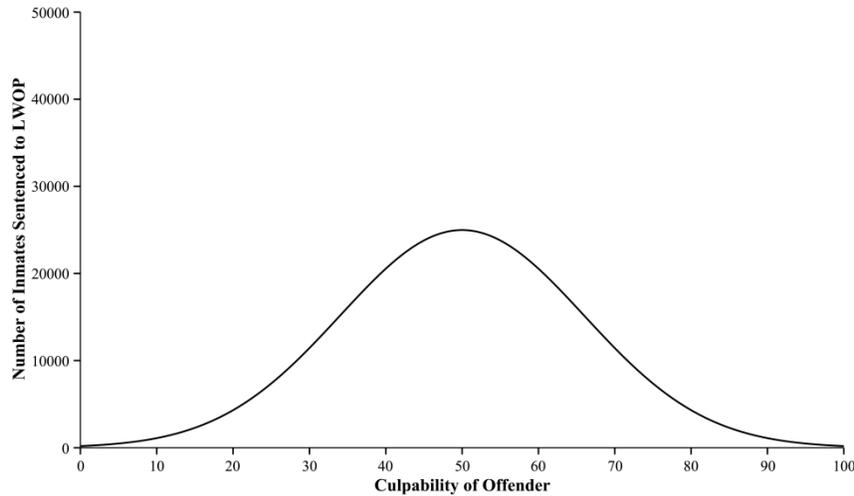
Consider, in this light, a 1983 Department of Justice survey of the general public as to the severity of various crimes. In that DOJ survey, 204 hypothetical offenses were described, and respondents were asked to rank the crimes according to their severity, from 0 to 100. To take a few examples: planting a bomb in a public building causing 20 deaths scored 72.1; intentionally injuring a victim, with the victim dying, 35.6; a forcible rape without other physical injuries, 25.8; being drunk in public, 0.8.<sup>153</sup> The remainder of this section engages in a similar thought experiment. Imagine that the crimes of all 50,000 inmates currently sentenced to LWOP were recounted to members of the general public, and the respondents were asked to assess the criminals’ “culpability” from 0 to 100. The works of neither Immanuel Kant nor Michael Moore would be entered into evidence to illuminate the deliberation: The respondents would be left to their own devices to fill in what is meant by “culpability.” The only guidance supplied would be a few benchmark examples of “0” culpability crimes. These could be cases, such as those profiled in the ACLU Report, of defendants sentenced to LWOP for minor crimes. An example might be Ricky Minor, who (according to the ACLU Report) had never served prison time before, but was sentenced to LWOP for the sale of a gram of methamphetamine.<sup>154</sup> A few examples of “100” would also be supplied, such as the aggravated murderers described in Part B of this section, or the kidnapper and rapist Ariel Castro.

At least as a first approximation, one might expect a culpability bell curve along the following lines:

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153. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE, at vi-x (1983).

154. ACLU, *supra* note 22, at 77-79.

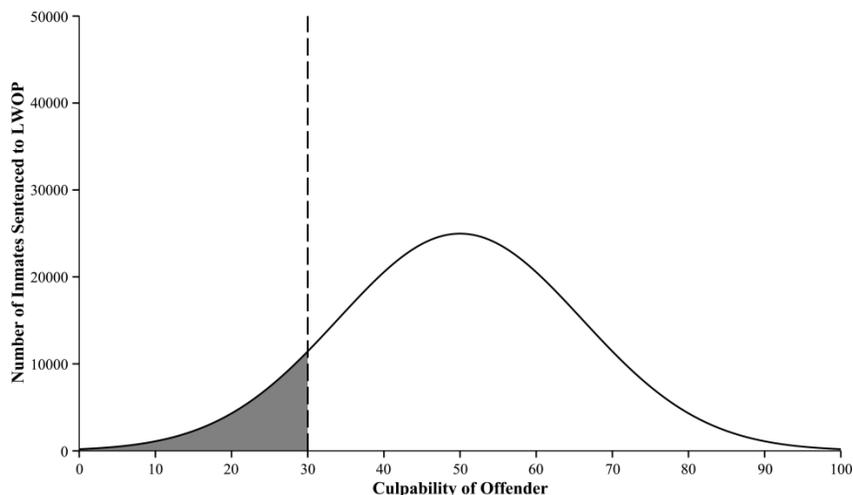
FIGURE 1

The defendants considered in Part A of this section occupy positions somewhere on the left tail, corresponding to very low culpability. Conversely, the defendants in Part B of this section can be found somewhere on the right tail, corresponding to very high culpability. The extreme cases can be used for partisan purposes, either to demonize criminals or to muster sympathy for them. But neither convenience sample faithfully reflects the central median tendency: the majority of inmates sentenced to LWOP are neither as culpable as Ariel Castro nor as sympathetic as Ricky Minor.

To complicate the thought experiment, imagine that the public is asked to assess not only the culpability of each offender, but also whether that offender's culpability merits an LWOP sentence. This secondary question will result in substantial disagreements, with some survey respondents drawing their vertical line at the distant right edge; this would reflect a "European" perspective that very few or no offenders, however great their crimes, deserve LWOP sentences.<sup>155</sup> Other respondents will draw their lines at the distant left edge, reflecting a greater receptivity to severe punishment. If we average these preferences, the result might resemble the following:

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155. See *supra* text accompanying notes 47–50.

FIGURE 1A

The offenders in the shaded portion of the graph reflect those LWOP sentences that are, in the public's opinion, disproportionately severe. The crucial question is the size of that shaded portion.

Figure 1 assumes a perfect distribution, which, even if true, leaves open the question of the size of the standard deviation. Perhaps the distribution is wide, with many inmates far from the median:

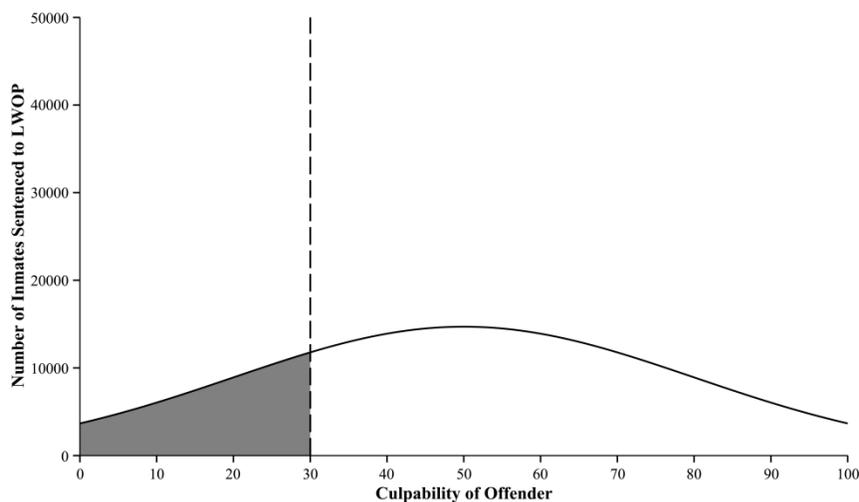
FIGURE 2

Figure 2 sketches the possibility that the offenders identified in Part A of this section (very low culpability offenders) and Part B (very

high culpability offenders) are only the tip of the proverbial iceberg: Many LWOP sentences have been imposed for crimes that depart substantially in culpability from the median. With respect to the left tail, this would raise the further possibility that there are many LWOP sentences that are disproportionately severe.

Conversely, it is possible that the culpability bell curve has a narrow distribution and all, or nearly all, of the inmates sentenced to LWOP fit within a narrow band of culpability. This could be sketched as follows:

FIGURE 3

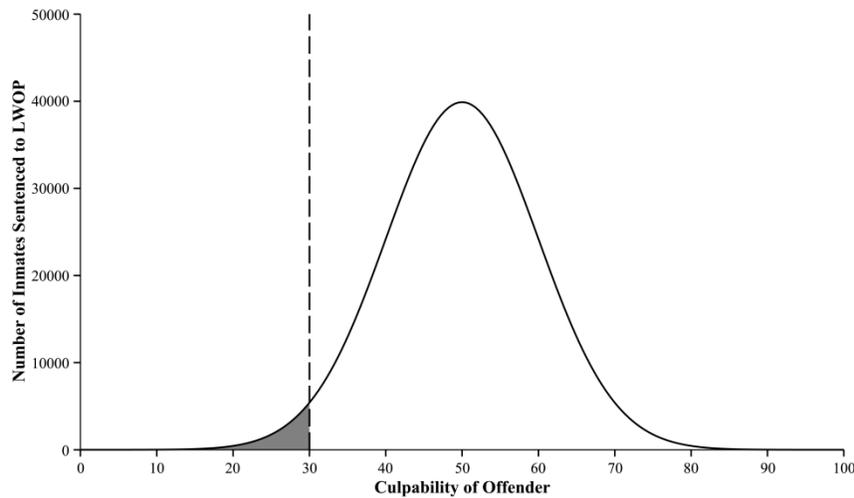
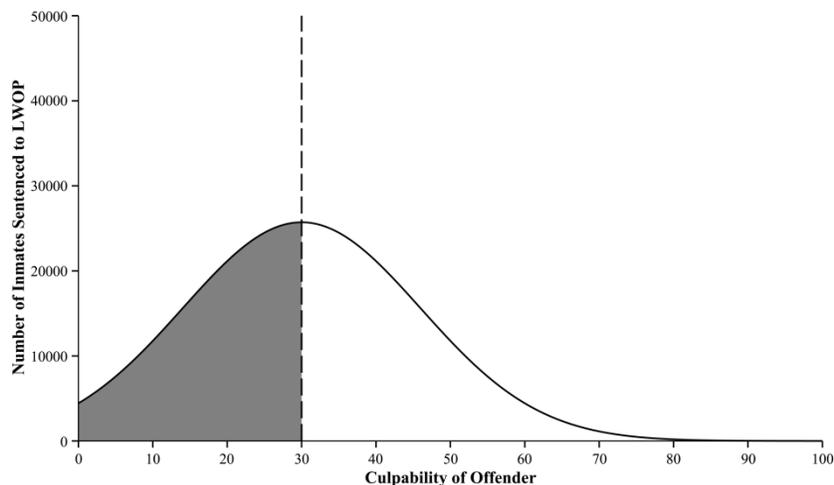


Figure 3 suggests that LWOP offenders cluster near the central median tendency: there are relatively few extremely low and extremely high culpability offenders. This would imply that Part A of this section comes close to exhausting the pool of offenders whose LWOP sentences are disproportionately severe.

Let us introduce another complication: there is no reason to assume a symmetrical distribution. It is possible that the bell curve has a distribution skewed to the left or low end of culpability. This could be depicted as follows:

FIGURE 4



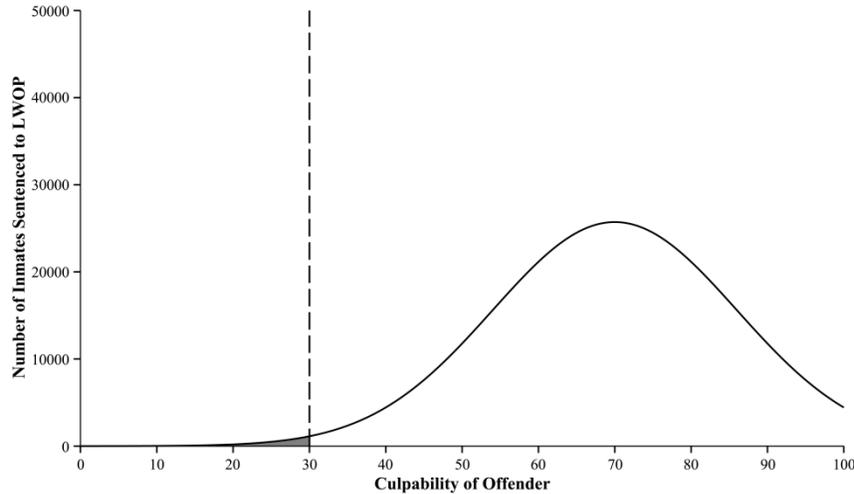
If Figure 4 best reflects the LWOP population, there are few inmates whose crimes are as heinous as those identified in Part B of this section. However, the cases presented in Part A of this section hint at a large pool of low culpability offenders, and therewith undeservedly severe LWOP sentences. The implication of Professors Stuntz’s and Weisberg’s critique of the American criminal justice system, as one rife with “ugly disproportionalities” and “brutal penalties on the undeserving,” is that Figure 4 depicts the overall culpability of inmates sentenced to LWOP.<sup>156</sup>

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156. See *supra* text accompanying note 3.

Conversely, there is the possibility of a distribution skewed to the right tail:

FIGURE 5



This graph suggests that there are few low culpability offenders sentenced to LWOP but many high culpability offenders. Almost every offense giving rise to an LWOP sentence was serious; indeed, the bulk of those sentenced to LWOP committed crimes that are truly heinous. If Figure 5 is an accurate depiction, the American criminal justice system is not nearly as defective as its critics claim, at least in this narrow respect: Nearly all defendants sentenced to LWOP committed crimes of sufficient culpability that—at least from the perspective of the general public, if not the legal professoriate—an LWOP sentence was merited.

From the anecdotal evidence presented in Parts A and B of this section, it is impossible to say which of these graphs most closely reflects reality. We have, alas, come to the limit of what can be learned from the anecdotal evidence.

#### IV. EMPIRICAL EVIDENCE

This section considers two studies that tried to identify the number of defendants sentenced to LWOP for nonviolent offenses in selected American jurisdictions. The verb “tried” should be emphasized. The data was collected from over a dozen departments of corrections, which vary in the precision with which the records are kept and the alacrity with which the records are shared. The ACLU Report’s study acquired partial data from thirteen jurisdictions (twelve states and the federal

government). My study relies on more detailed data from eight states, four of which overlap the ACLU Report. Both studies are helpful in resolving which of the culpability bell curves sketched in Section III, Part C most accurately depicts the full sweep of the LWOP inmate population. Nonetheless, important questions remain unresolved.

#### A. The ACLU Report

The ACLU Report states that it filed open records requests with federal agencies and twelve state departments of corrections concerning the number of nonviolent offenders sentenced to LWOP.<sup>157</sup> The data is presented in the following table<sup>158</sup>:

<b>Jurisdiction</b>	<b>Inmates serving LWOP for nonviolent offenses [2012]</b>	<b>Total LWOP inmates [2012]</b>	<b>Percent of total LWOP population serving for nonviolent offenses</b>
Federal system	2,074	4,058	51.1%
Alabama	244	1,507	16.2%
Delaware	Unknown	386	Unknown
Florida	270	7,992	3.4%
Georgia	20	813	2.5%
Illinois	10	1,600	0.6%
Louisiana	429	4,637	9.25%
Mississippi	93	1,518	6.1%
Missouri	1	1,063	0.09%
Nevada	Unknown	491	Unknown
Oklahoma	49	780	6.3%
S. Carolina	88	988	8.9%
Virginia	Unknown	774	Unknown
Total	3,278	26,607	12.3%

It is not altogether clear how this data was collected.<sup>159</sup> The authors state that they requested both the number of offenders sentenced to

157. ACLU, *supra* note 22, at 16.

158. *Id.* at 22 tbl.2.

159. Subsequent tables provide incomplete breakouts of the LWOP inmates according to the kinds of nonviolent crimes that they committed. *Id.* at 24 tbls.4 & 5, 25 tbl.6.

LWOP for nonviolent offenses and the actual offenses for which the inmates were charged.<sup>160</sup> It does not appear that all the jurisdictions provided both sets of information. The ACLU Report states that it made efforts to verify the Florida data.<sup>161</sup> But as set forth below in the context of Alabama, the Report may have relied on inaccurate or incomplete representations from departments of corrections.<sup>162</sup> More specifically, it does not appear that the ACLU Report verified the data it received by acquiring the names of all of the inmates sentenced to LWOP and then investigating each of these inmate's criminal histories.

Apart from data collection issues, there is a problem with eliding "nonviolent," especially as the ACLU Report has defined the term, with low culpability. In its list of violent offenses, the Report excludes burglary, despite the possibility that the burglary as committed may have been confrontational and violent;<sup>163</sup> the Report excludes crimes such as espionage, which can reflect great culpability;<sup>164</sup> the Report excludes habitual offenders, who may have a litany of preceding violent offenses;<sup>165</sup> and finally, it excludes all drug offenders, notwithstanding the costs these crimes can inflict on society.<sup>166</sup>

The omission of high-level drug offenders is particularly notable given the prominence of federal inmates in the ACLU Report's table. As detailed earlier, Rayful Edmond, one of the most notorious—and violent—drug dealers in American history, was presumably coded among the 2,074 nonviolent offenders in federal prison. Several other notorious drug dealers, convicted in federal prosecutions, were also likely lumped together with nonviolent offenders.<sup>167</sup> Prosecuting violent

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160. *Id.* at 16.

161. *Id.*

162. *See infra* text accompanying notes 271–273.

163. *See supra* Part II.A.

164. *See supra* text accompanying note 89.

165. *See supra* Part II.C.

166. *See supra* Part II.B.

167. Some examples include: Victor Gonzalez and Andres Fermin were convicted of distributing between ten and thirty kilograms of heroin in the city of Camden. They were likely responsible for the murder of a police informant. Geoff Mulvihill, *Two Camden City Drug Kingpins Sentenced to Life Without Parole*, PHILA. INQUIRER (Mar. 19, 1997), [http://articles.philly.com/1997-03-19/news/25572008\\_1\\_drug-kingpins-life-sentences-heroin](http://articles.philly.com/1997-03-19/news/25572008_1_drug-kingpins-life-sentences-heroin). Mark "Bigger" Brown, convicted of trafficking in crack cocaine, was the head of a violent Philadelphia drug gang. He was implicated in multiple murders relating to his role as the head of the drug gang. Jim Smith, *Drug Kingpin Gets Life Without Parole; 3rd Member of Gang to Draw Stiff Sentence*, PHILA. INQUIRER (July 21, 1995), [http://articles.philly.com/1995-07-21/news/25679488\\_1\\_drug-kingpin-drug-network-crack-cocaine](http://articles.philly.com/1995-07-21/news/25679488_1_drug-kingpin-drug-network-crack-cocaine). Elrader Browning, Jr., was convicted of running a vast cocaine and heroin drug ring. At its peak, Browning's gang was distributing eighty kilograms of cocaine per month, and Browning distributed narcotics with an estimated street value of over \$20 million. Browning was also implicated in

criminals using the pretext of federal drug law is problematic,<sup>168</sup> but for present purposes it is sufficient to note the difficulty with claiming that any of these violent drug dealers received a disproportionate sentence.

Yet another problem with the data in the ACLU Report is that the twelve states do not appear to have been randomly selected. (Or, in any event, the method of selection is not obvious.) With the exception of Illinois, all of the states the ACLU analyzed have retained the death penalty and imposed it in recent years with some regularity, at least compared with other American jurisdictions.<sup>169</sup> A jurisdiction's willingness to impose the death penalty may correspond to a greater inclination to impose harsh punishment; consequently, these states might be those most inclined to impose LWOP for nonviolent offenses.

Finally, nearly two-thirds (2,074 of 3,278) of the inmates identified as serving LWOP for nonviolent offenses are in the federal system. About these inmates, very few details are provided. How many were sentenced for "nonviolent" but very serious offenses? How many also committed violent offenses? And is the phenomenon of nonviolent offenders sentenced to LWOP peculiar to the federal system and a few states with aberrant sentencing schemes, or is this a more prevalent issue in the United States today?

### *B. Comprehensive State-by-State Data*

The following study is another empirical inquiry into the culpability of inmates serving LWOP in American prisons. This study has its flaws, most notably that only eight states were considered. Efforts were made to achieve geographical diversity, as well as to include states that retain, and have abolished, the death penalty. The author or his research assistants sent requests for the names of all inmates sentenced to LWOP to departments of corrections of over a dozen states. Several requests were ignored, while others were denied, with references made to privacy or law enforcement concerns.<sup>170</sup> The U.S. Department of Justice provided the most disappointing rejection,

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several violent crimes including the firebombing of a house and a double homicide. Kim Murphy, *L.A. Drug Kingpin and Associate Sentenced to Life Terms in Prison*, L.A. TIMES (Aug. 30, 1988), [http://articles.latimes.com/1988-08-30/local/me-1420\\_1\\_two-life-terms](http://articles.latimes.com/1988-08-30/local/me-1420_1_two-life-terms).

168. See *supra* note 110.

169. The twelve states surveyed in the ACLU Report include every state that has commonly imposed the death penalty over the past decade except one: Texas. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last updated Oct. 15, 2015).

170. See, e.g., e-mail from Larry Traylor, Va. Dep't of Corr., to author (Feb. 20, 2012, 11:58 EST) (on file with author).

and there is thus no analysis of the federal LWOP offenders.<sup>171</sup> The principal advantage of this study, compared with the ACLU Report, is that for every state except Alabama the author has identified every inmate sentenced to LWOP, as well as his crime of conviction.

#### 1. STATES WITHOUT THE DEATH PENALTY

We first consider three jurisdictions that have abandoned the death penalty.

##### a. *Wisconsin*

Wisconsin has a longer and more complicated history with LWOP than most states. Wisconsin abolished the death penalty in the mid-nineteenth century (the third state to do so);<sup>172</sup> and in its place, the state experimented with the purportedly more humane sentence of life without parole. The results were not deemed satisfactory. A late-nineteenth century official report of the directors of the state prison lamented the “indescribable horror and agony incident to imprisonment for life.”<sup>173</sup> The sentence of LWOP seems to have vanished in Wisconsin over the course of the twentieth century. In 1962, the Wisconsin Supreme Court wrote that even “one who is sentenced to life imprisonment becomes eligible for parole in a fraction more than eleven years.”<sup>174</sup> Sentencing laws and practices apparently became

171. Letter from D.M. Gottleib, Paralegal Specialist for William Baumgartel, FOIA Processor, U.S. Dep’t of Justice, to author (Sept. 5, 2014) (on file with author).

172. See Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty’s Uneasy History*, 56 STAN. L. REV. 1641, 1661 (2004) (reviewing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002)); James W. Stillman, *Abolish the Death Penalty*, 10 GREEN BAG 92, 94 (1898). There was only one execution in Wisconsin’s history: John McCaffery, convicted of murdering his wife, was hanged in Kenosha County in 1851 in front of a crowd of thousands. Disgust with the spectacle promptly stirred interest in abolition. *The Death Penalty in Wisconsin*, WIS. HIST. SOC’Y, <http://www.wisconsinhistory.org/Content.aspx?dsNav=N:4294963828-4294963805&dsRecordDetails=R:CS2816> (last visited Oct. 16, 2015).

173. See WILLIAM TALLACK, *PENOLOGICAL AND PREVENTIVE PRINCIPLES* 155 (London, Wertheimer, Lea & Co. 1889) (quoting REPORTS ON THE LAWS OF FOREIGN COUNTRIES RESPECTING HOMICIDAL CRIME 47 (1881) (quoting WIS. ST. PRISON, DIRECTOR’S REPORT 7 (1879))).

174. *State v. Esser*, 115 N.W.2d 505, 517 (Wis. 1962). For another example, consider the case of Peter Galowski, who was convicted of murder in 1978 and sentenced to two consecutive life terms. See *Galowski v. Murphy*, 891 F.2d 629, 630 (7th Cir. 1989). As explained by a court, “Were Galowski serving but one life sentence, he would have been eligible for parole . . . after serving 11.3 years. The second life sentence, however, extended his parole eligibility date by 9.9 years.” *State ex rel. Galowski v. Murphy*, 442 N.W.2d 605, 1989 WL 65346, at \*1 (Wis. Ct. App. 1989).

harsher over the next three decades, but parole remained an inexorable feature of any sentence: In 1992, serial murderer Jeffrey Dahmer, who was sentenced to 15 consecutive life terms, was eligible for parole after 936 years.<sup>175</sup>

In 1994, the Wisconsin legislature changed its law and revived LWOP as a possible sentence for habitual offenders.<sup>176</sup> The ACLU Report observes that Wisconsin law permits and even mandates LWOP for certain nonviolent offenses.<sup>177</sup> A student author, Caitlyn Hall, conducted an impressive nationwide survey of all laws that create the possibility of LWOP for nonviolent offenses. The Hall Study concluded that Wisconsin is the only state that mandates LWOP for a nonviolent first offense other than a drug crime.<sup>178</sup>

The theoretical possibility of LWOP for nonviolent offenses, which the Hall Study and the ACLU Report raise, has never been realized. The Wisconsin Department of Corrections provided a list of the names of every inmate serving LWOP as of December 2012.<sup>179</sup> Research assistants then accessed the easy-to-navigate Wisconsin inmate locator website and identified the crimes for which each inmate had been sentenced.<sup>180</sup> The chronologically first person on the list sentenced under the LWOP statute was Israel Gross, who in 1994, along with

175. *15 Life Terms and No Parole for Jeffrey Dahmer*, N.Y. TIMES (Feb. 18, 1992), <http://www.nytimes.com/1992/02/18/us/15-life-terms-and-no-parole-for-dahmer.html>.

176. JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, NAT'L INST. OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 12 (1997), <https://www.ncjrs.gov/pdffiles/165369.pdf>.

177. ACLU, *supra* note 22, at 39, 74. No citation is provided to the applicable Wisconsin laws.

178. Hall, *supra* note 56, at 1121 & n.84. The arcane offense she cites is "absconding"—that is, when a person is adjudicated guilty of what would be a Class A felony if committed by an adult but fails to return to court for a dispositional hearing. WIS. STAT. § 946.50 (2013–14). All Class A felonies in Wisconsin are violent offenses, with the possible exception of treason. § 946.01. For a complete list of Class A felonies, see CHRISTINA D. CARMICHAEL, WIS. LEGISLATIVE FISCAL BUREAU, FELONY SENTENCING AND PROBATION app. IV at 66 (2013), [http://legis.wisconsin.gov/lfb/publications/informational-papers/documents/2013/55\\_felony\\_sentencing\\_and\\_probation.pdf](http://legis.wisconsin.gov/lfb/publications/informational-papers/documents/2013/55_felony_sentencing_and_probation.pdf). Given that all, or essentially all, Class A felonies are violent, it is unclear why Hall classified absconding as nonviolent. Furthermore, to the extent that such a sentence is mandatorily imposed on a minor, it would violate *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

179. E-mail from Linda Eggert, Deputy Pub. Affairs Dir., Wis. Dep't of Corr., to author (Feb. 11, 2013, 12:19 CST) (on file with author).

180. WIS. DEP'T CORRECTIONS OFFENDER LOCATOR, <http://offender.doc.state.wi.us/lop/> (last visited Sept. 24, 2015). The data is collected in Craig S. Lerner, LWOP Research: Wisconsin (on file with author).

three accomplices, lured two men to an ambush site.<sup>181</sup> Gross performed the *coup de grace*: a shotgun blast to one victim's abdomen and the other's head.<sup>182</sup> Wisconsin's next LWOP sentence was Dion Patton.<sup>183</sup> His crime consisted of raping and strangling the seven-month-old daughter of his girlfriend. Gross and Patton are dismally typical of the 229 serving LWOP in Wisconsin:

Murder	192
Sexual Assault	32
Sexual Exploitation	3
Kidnapping	1
Assault and Battery	1
<b>Total</b>	<b>229</b>

With respect to the 32 inmates serving LWOP for sexual assaults, all but one were convicted of assaulting children. The sole exception was convicted of sexually assaulting a prison employee; that inmate had twice before been convicted of sexually assaulting a minor.<sup>184</sup> The three offenders convicted of sexual exploitation/child enticement had all previously been convicted of committing similar or worse crimes.<sup>185</sup>

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181. See David Doege, *Killer Gets No Chance of Parole*, MILWAUKEE J. SENTINEL, Jan. 26, 1996, at B5 (noting that Gross was the first person in the county to be sentenced under the new three-strikes statute). In the list provided by the Wisconsin Department of Corrections, see Eggert, *supra* note 179, two inmates are listed as having earlier prison admission dates than Israel Gross, but both were sentenced to LWOP *after* Gross. Damone Block was already in prison for murdering his grandmother when he assaulted a prison employee. See *State v. Block*, 587 N.W.2d 914, 916 (Wis. Ct. App. 1998); *State v. Block*, 489 N.W.2d 715, 716 (Wis. Ct. App. 1992). It was for this second crime that LWOP was imposed. David Hahn was already in prison for a 1994 conviction for sexual assault on a child when he was charged, in 1997, under the three-strikes law for yet another sexual assault on a child. *State v. Hahn*, 618 N.W.2d 528, 530 (Wis. 2000).

182. See Doege, *supra* note 181.

183. *State v. Patton*, 570 N.W.2d 62 (Wis. Ct. App. 1997).

184. *State v. Salters*, 762 N.W.2d 864, 2008 WL 4779094, at \*1, \*2 (Wis. Ct. App. 2008) (per curiam). Technically, another of these 32 inmates (John Ohlinger) was sentenced to LWOP for *attempted* first degree sexual assault of a child, along with sexual exploitation/child enticement. This inmate had other convictions for completed sexual assault on a child, as well as transportation in child pornography. *United States v. Ohlinger*, 141 F. App'x 470, 2005 WL 1621106 (7th Cir. July 12, 2005); *State v. Ohlinger*, 767 N.W.2d 336 (Wis. Ct. App. 2008).

185. The three are David Borst, James Erickson, and John Martin. Borst was sentenced to LWOP in 2003; in 1990, he had been sentenced to thirteen years for enticing a minor, which itself ran consecutively to another crime he had been convicted of. *State v. Borst*, 454 N.W.2d 808, 1990 WL 42599, at \*1 (Wis. Ct. App. 1990) (per curiam). Erickson, sentenced to LWOP in 1997, had twice before been convicted of second degree assault of a child. *State v. Erickson*, 596 N.W.2d 749, 752 (Wis. 1999).

The single inmate convicted of kidnapping was also found guilty of attempted first degree sexual assault with the use of a dangerous weapon.<sup>186</sup> Finally, the single inmate sentenced to LWOP for assault and battery was in prison at the time, having previously been convicted of murdering his seventy-three-year-old grandmother. The victim of the assault was a female prison worker, whom the inmate struck three times in the head with a padlock that was wrapped in a sock.<sup>187</sup> The search for “ugly disproportionalities” among Wisconsin’s LWOP population uncovers a null set.

*b. Iowa*

Iowa abolished the death penalty in 1965.<sup>188</sup> Although Governor Branstad recently indicated a willingness to reinstate capital punishment, there appears to be little legislative interest in reviving the sentence.<sup>189</sup>

The ACLU Report lists Iowa as a state that allows and even mandates LWOP for habitual nonviolent offenses.<sup>190</sup> The Hall Study identifies an Iowa statute that authorizes an LWOP sentence for a first nonviolent offense: the sale of any amount of methamphetamine by an adult to a minor.<sup>191</sup> In addition, the Sentencing Project found that Iowa sentences more inmates to LWOP, on a percentage basis, than almost all other American jurisdictions. As of 2012, there were 635 inmates serving LWOP in Iowa, out of a total incarcerated population of 8,244.<sup>192</sup> Thus, 7.7% of all inmates in Iowa are serving LWOP sentences, substantially higher than the figure in Wisconsin (1.0%) or the nation at large (3.2%).<sup>193</sup> In light of all this data, a question arises as to whether Iowa is sweeping up nonviolent offenders in its LWOP population.

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Martin was sentenced to LWOP for enticement of a child in 2009. He was convicted of several counts of sexually assaulting a minor and bail jumping in 1996.

186. *State v. Burroughs*, 640 N.W.2d 190, 192 (Wis. Ct. App. 2001).

187. *State v. Block*, 587 N.W.2d 914, 916 (Wis. Ct. App. 1998); *State v. Block*, 489 N.W.2d 715, 716 (Wis. Ct. App. 1992).

188. *Iowa*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/iowa-0> (last visited Sept. 25, 2015).

189. Mike Wiser, *Iowa’s Death Penalty Debate Heats up Again*, QUAD-CITY TIMES (Feb. 4, 2013), [http://qctimes.com/news/local/iowa-s-death-penalty-debate-heats-up-again/article\\_5c205ec6-6e70-11e2-bfc7-0019bb2963f4.html](http://qctimes.com/news/local/iowa-s-death-penalty-debate-heats-up-again/article_5c205ec6-6e70-11e2-bfc7-0019bb2963f4.html).

190. ACLU, *supra* note 22, at 39.

191. Hall, *supra* note 56, at 1166 (citing IOWA CODE § 902.9(1) (2015)).

192. THE SENTENCING PROJECT, *supra* note 14, at 6.

193. *Id.* Only LWOP sentences, not life sentences *with* the possibility of parole, were used in making these calculations.

The answer, as set forth below, is negative. The commendably efficient Iowa Department of Corrections provided the names of each of the 649 inmates who were, as of 2013, sentenced to LWOP, along with the crimes for which they were sentenced and the date of incarceration.<sup>194</sup> Only three categories of crimes were listed: “Kidnapping-Life,” “Murder-Life,” and “Sex Crimes-Life.” For some inmates, more than one of the three columns was checked:

Murder	507
Kidnapping	99
Sex Crimes	19
Murder and Kidnapping	13
Murder and Sex Crimes	5
Kidnapping and Sex Crimes	4
Murder, Kidnapping, and Sex Crimes	2
<b>Total</b>	<b>649</b>

The prominence of first degree kidnapping requires an explanation. Iowa defines first degree kidnapping as a kidnapping in which the victim “suffers serious injury, or is intentionally subjected to torture or sexual abuse.”<sup>195</sup> It is a Class A felony and mandatorily results in LWOP. By contrast, the maximum punishment for second degree murder is a fifty-year sentence.<sup>196</sup> This wrinkle in Iowa law confused the U.S. Supreme Court in *Graham v. Florida*.<sup>197</sup> The Court relied on a study that claimed that six juveniles had been sentenced to LWOP for nonhomicides.<sup>198</sup> This was true only in the most technical of senses. At least one of these juveniles had been convicted of both kidnapping *and* second degree murder. He had been sentenced to LWOP for the first degree kidnapping and fifty years imprisonment for the second degree murder.<sup>199</sup>

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194. E-mail from Lettie Prell, Dir. of Research, Iowa Dep’t of Corr., to author (Mar. 5, 2014) (on file with author).

195. § 710.2 (designating first degree kidnapping a “class ‘A’ felony”). Class A felonies mandatorily result in LWOP sentences. § 902.1.

196. § 707.3.

197. 560 U.S. 48 (2010).

198. *Id.* at 62–63 (citing PAOLO G. ANNINO, DAVID W. RASMUSSEN & CHELSEA BOEHME RICE, JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2 (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1490079](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490079)).

199. The defendant is Jason Means. *See State v. Means*, 821 N.W.2d 777, 2012 WL 3195975, at \*1 (Iowa Ct. App. 2012). At least two other juvenile defendants, Blair Grieman and William Barbee, were convicted of second degree kidnapping *and* attempted murder. *See Greiman v. State*, 471 N.W.2d 811 (Iowa 1991); Molly Montag, *Sioux City Man Serving Life Sentence Now Eligible for Parole*, SIOUX CITY J. (Dec. 4,

My research assistants accessed the Iowa Department of Corrections inmate locator website, as well as Westlaw and other public sources, to gather more precise information about the ninety-nine LWOP inmates designated “Kidnapping.” We clarified that all but fourteen of these inmates had also been convicted of murder, sex crimes, burglary, or robbery. Even for those fourteen, recall that a conviction for first degree kidnapping implies that the victim suffered “serious injury” or was “intentionally subjected to torture or sexual abuse.”<sup>200</sup>

In actual practice, as opposed to the theoretical possibilities created by their codes, Wisconsin and Iowa only impose LWOP for the most serious and violent offenses. As to why Iowa has so many more inmates serving LWOP than Wisconsin, the answer may lie in the discretion vested in trial judges in imposing the sentence. In Wisconsin, even a first degree murder conviction allows the judge to impose life imprisonment with eligibility for release after twenty years.<sup>201</sup> (Prosecutorial discretion may also be a factor: the official policy of the prosecuting attorney’s office in Milwaukee is not even to seek LWOP except for first degree murders with aggravating circumstances or for offenders with a violent past.)<sup>202</sup> By contrast, Iowa law provides that anyone convicted of a Class A felony, such as first degree murder, kidnapping, or sexual abuse, is mandatorily sentenced to LWOP.<sup>203</sup>

*c. Washington*

Habitual offender statutes are widely reported to be a cause of the LWOP epidemic.<sup>204</sup> If this is true, the state of Washington can be

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2010), [http://siouxcityjournal.com/news/local/crime-and-courts/sioux-city-man-serving-life-sentence-now-eligible-for-parole/article\\_dc96531f-13b7-537f-8e2d-afa7a4bc1b7e.html](http://siouxcityjournal.com/news/local/crime-and-courts/sioux-city-man-serving-life-sentence-now-eligible-for-parole/article_dc96531f-13b7-537f-8e2d-afa7a4bc1b7e.html). Iowa courts, applying *Graham*, vacated their LWOP sentences, but *Graham* arguably permits LWOP sentences in cases of attempted murder. *See Graham*, 560 U.S. at 69 (“[D]efendants who do not kill, *intend to kill*, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” (emphasis added)).

200. § 710.2. The data is collected in Craig S. Lerner, LWOP Research: Iowa (on file with author).

201. First degree “intentional homicide” is a Class A felony. WIS. STAT. § 940.01 (2013–14). For a first-time Class A felony, the law requires a life sentence, but the judge can provide that the defendant is eligible for release after only twenty years. § 973.014(1g)(a)(1); *see also* § 939.62(2m)(c) (penalty for persistent offender convicted of Class A felony is mandatorily LWOP).

202. Telephone Interview with Mark Williams, Head of Milwaukee Homicide Unit, Milwaukee Cnty. Dist. Attorney’s Office (Mar. 7, 2014).

203. IOWA CODE §§ 770.2, 709.2, 710.2, 902.1 (2015).

204. *See, e.g.*, ACLU, *supra* note 22, at 35–36; THE SENTENCING PROJECT, *supra* note 14, at 15–16.

regarded as Patient Zero: In 1993, Washington originated the “3-strikes” law.<sup>205</sup> The law came into being not through an act of the legislature, but as the result of a lopsided voter referendum.<sup>206</sup> By 1996, twenty-four state legislatures across the country had enacted their own habitual offender laws.<sup>207</sup> Virtually every American jurisdiction has since followed suit.<sup>208</sup>

Although LWOP entered the Washington criminal code in 1993, capital punishment has remained a legal possibility for the crime of aggravated murder.<sup>209</sup> Nine people languish on death row, but the Governor commuted all of these sentences in 2014.<sup>210</sup> The Death Penalty Information Center no longer categorizes Washington as a state that has retained capital punishment; instead, Washington is bracketed as one of four “States with a Governor-imposed moratorium.”<sup>211</sup> Washington law provides that any inmate convicted of aggravated murder who is not sentenced to death is mandatorily sentenced to LWOP.<sup>212</sup> Conviction for a Class A felony can also, at the judge’s discretion, give rise to a life sentence.<sup>213</sup> The only alternative route to an LWOP sentence is through the state’s persistent offender statute. So a closer analysis of that law is in order.

According to the ACLU Report, Washington law provides that “LWOP is mandatory under so-called ‘habitual offender’ laws that apply upon a felony conviction if the person has previously been convicted of certain prior felonies, *which need not be serious or even violent* in many of these states.”<sup>214</sup> It is difficult to judge what the authors of the Report regard as “serious.” The list of predicate felonies

205. See, e.g., Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?*, HUM. RTS., Spring 2002, at 3, 3.

206. See *Ewing v. California*, 538 U.S. 11, 15 (2003) (the vote was three-to-one in favor); *Initiative 593 – “Three Strikes” Equals Life In Prison*, SEATTLE TIMES (Oct. 28, 1993), <http://community.seattletimes.nwsourc.com/archive/?date=19931028&slug=1728480>.

207. See *Ewing*, 538 U.S. at 15.

208. See MELISSA T. CANTRELL ET AL., BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 1998, at 289–94 (2010), <http://www.bjs.gov/content/pub/pdf/sco9807.pdf>; GENNARO F. VITO & JEFFREY R. MAAHS, CRIMINOLOGY: THEORY, RESEARCH, AND POLICY 244 (3d ed. 2012) (“Only two states (Maine and New Hampshire) do not have some form of habitual offender law.”).

209. WASH. REV. CODE ANN. § 10.95.030(2) (West 2012).

210. See Ian Lovett, *Executions Are Suspended by Governor in Washington*, N.Y. TIMES, Feb. 11, 2014, at A12.

211. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER (2015), <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>. The other states are Colorado, Oregon, and Pennsylvania.

212. § 10.95.030(1).

213. § 9a.20.021(1).

214. ACLU, *supra* note 22, at 20 (emphasis added).

is long and overwhelmingly serious (treason, murder, rape, etc.); it does, however, also include crimes of a possibly nonviolent character (such as burglary, providing drugs to a minor, and forging a request for medication).<sup>215</sup>

A list provided by the Washington Department of Corrections made it possible to analyze the crimes of all 626 inmates serving LWOP sentences.<sup>216</sup> That list included not only each inmate's name, but the crime for which an LWOP sentence was imposed. Those crimes are divided below into three categories: murder; violent nonhomicides; and nonviolent felonies:

**A. Murder**

Aggravated Murder	234
Murder 1	87
Murder 2	14
<b>Total</b>	<b>335</b>

**B. Violent Nonhomicides**

Robbery	112
Rape	69
Assault	66
Child Molestation	29
Indecent Liberties	3
Manslaughter	3
Failure Register Sex Offender	2
Arson	1
<b>Total</b>	<b>285</b>

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215. A complete list of the predicate felonies is: murder; manslaughter; negligent or reckless homicide; arson; assault; rape and sexual assault; sexual exploitation of a minor; burglary; robbery; kidnapping; extortion; possession of prohibited explosive devices; providing prohibited drugs to a minor; promoting prostitution of a minor; drug trafficking; treason; coercing a patient to request life-ending medication; forging a request for medication; escape of a violent sexual predator; use of a machine gun in commission of a felony; leading organized crime; criminal solicitation or conspiracy to commit a Class A felony; an attempt to commit any of the above felonies; any class B felony committed with a sexual motivation; and any felony in effect prior to December 2, 1993, comparable to one of the above offenses or any federal or state conviction comparable to the above offenses. *See* WASH. STATE CASELOAD FORECAST COUNCIL, 2012 WASHINGTON STATE ADULT SENTENCING GUIDELINES MANUAL 57-71 (2012), [http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult\\_Sentencing\\_Manual\\_2012\\_20130815.pdf](http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2012_20130815.pdf).

216. E-mail from Teri Herold-Prayer, Wash. Dep't of Corr., to author (June 20, 2013) (on file with author).

**C. Nonviolent Offenses**

Burglary	4
Drug Possession	1
Unlawful Possession Firearm	1
<b>Total</b>	<b>6</b>

Washington’s habitual offender law may be responsible for many of the state’s LWOP population, but overwhelmingly the triggering offense was violent. The one well-represented violent offense in the list above that may provoke questions is assault. In the criminal law, assault is a capacious term, stretching from an inoffensive touching to a malicious wounding. It is thus possible that certain defendants who were guilty of little more than barroom fights have been sentenced to LWOP. My research assistants reviewed the names of all sixty-six inmates sentenced to LWOP for assault; in most of the cases for which we were able to obtain information, the facts are suggestive of attempted murder. (It is possible that the prosecutors did not bother to bring attempted murder charges, as LWOP would be achieved by proving the less exacting elements of assault.) Here is a pair of illustrative examples:

- Ellis then grabbed a nearby clothes iron and began to strike Gilmore on the head. . . . At some point during the assault, Gilmore’s small finger was severed. . . . [T]he blows Ellis administered were powerful enough to cause a three-inch cut to Gilmore’s head, fracture her frontal sinus, and sever a small portion of the small finger on Gilmore’s left hand.<sup>217</sup>
- In January 2012, Dukes assaulted his girlfriend, Wanda Wilson. During an argument, Dukes pushed Wilson down, punched and kicked her, doused her in rubbing alcohol, and set her on fire. Wilson was badly burned across her head, face, and torso, resulting in permanent scarring and nerve damage.<sup>218</sup>

There are also six “nonviolent” offenders sentenced under the habitual offender statute. Of the four burglars, one participated in an armed invasion of a trailer in which the occupant was present; thus, the burglary, as committed, was a violent crime and not merely a

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217. *State v. Ellis*, 114 Wash. App. 1049, 2002 WL 31677181, at \*1 (2002).

218. *State v. Dukes*, No. 44892-1-II, 2014 WL 6790334, at \*1 (Wash. Ct. App. Dec. 2, 2014). For an analysis of all 66 defendants sentenced to LWOP for assault, see Craig S. Lerner, LWOP Research: Washington (on file with author).

nonviolent property offense.<sup>219</sup> One of the others had six prior felony convictions, including for the violent offenses of robbery and assault; yet another convicted burglar had two previous convictions for violent offenses (assault).<sup>220</sup> No information was available about the fourth defendant convicted of burglary.<sup>221</sup> The sole drug offender had previously been convicted of two violent offenses (robbery in both instances).<sup>222</sup> The only defendant convicted of being a felon in possession was seen making threats about killing a police officer while waving a gun; he in fact shot a police dog in the head.<sup>223</sup> In other words, of the six “nonviolent” offenders, at least five were previously or contemporaneously guilty of violent offenses.

*d. Summing Up*

In Wisconsin, Iowa, and Washington, there is at most one nonviolent offender serving an LWOP sentence. More precisely, records reflect that one man was sentenced to LWOP for burglary, but there is no information as to whether that burglary was violent or whether that defendant had previously committed violent offenses.

## 2. STATES WITH THE DEATH PENALTY

We now consider five states that have preserved the death penalty.

*a. Arkansas*

Although Arkansas still authorizes capital punishment, and there are thirty-four inmates on death row,<sup>224</sup> the last execution occurred in 2005.<sup>225</sup> In 2012, the Arkansas Supreme Court struck down the state’s

219. Brief of Appellant at 1–3, *State v. Smith*, 177 Wash. App. 1031 (2013) (No. 42509-2-II), 2012 WL 9139606.

220. See *State v. Hoggatt*, 30 P.3d 488, 489 (Wash. Ct. App. 2001); Tom Sowa, ‘Three Strikes’ Law Hits Home in Trial, SPOKESMAN-REVIEW, Aug. 26, 1988, at B3.

221. David James is listed in the e-mail received from the Department of Corrections, but no information about him can be found on Westlaw or on the Washington inmate locator website.

222. *State v. Reesman*, 151 Wash. App. 1044, 2009 WL 2469271, at \*3 (2009).

223. *State v. Chenette*, 158 Wash. App. 1019, 2010 WL 4216553, at \*1 (2010).

224. *Death Row*, ARK. DEP’T CORRECTIONS, <http://adc.arkansas.gov/inmates/Pages/deathRow.aspx> (last updated Aug. 5, 2015).

225. Robbie Brown, *Arkansas Court Upends Death Penalty*, N.Y. TIMES, June 22, 2012, at A11.

Method of Execution Act.<sup>226</sup> Nonetheless, the Arkansas Governor has not, unlike his counterpart in Washington, commuted all death sentences, so Arkansas is included here among the states that preserve capital punishment.

LWOP has existed for several decades in Arkansas. Although the ACLU Report states that Arkansas permits LWOP for nonviolent offenses,<sup>227</sup> it is unclear which offenses are contemplated. Arkansas' criminal code is emblematically modern: it is a maze, which the uninitiated enter only at their peril. The Hall Study identifies the possibility of an LWOP sentence when the offender committed a mix of major drug distribution and other serious nonviolent crimes.<sup>228</sup> This author's foray into Arkansas law suggests that it is also theoretically possible that a habitual offender guilty of "aggravated residential burglary" could receive an LWOP sentence.<sup>229</sup> Because "aggravated residential burglary" includes the possibility that the criminal entered the dwelling armed, but never confronted the occupant,<sup>230</sup> Arkansas could have sentenced a habitual nonviolent "aggravated residential burglar" to LWOP. There is a more straightforward path to LWOP: Arkansas law provides that this sentence can be imposed for capital murder (mandatorily) and first degree murder (at the judge's discretion).<sup>231</sup> Which of the manifold paths to LWOP predominate?

Information provided by the Arkansas Department of Corrections supplies an answer.<sup>232</sup> The agency shared a list of all 593 inmates serving LWOP, along with each inmate's "offense":

Capital Murder	583
Murder-1	6
Rape	3
Robbery/Kidnapping/3 Strikes	1
<b>Total</b>	<b>593</b>

My research assistants verified this data by searching for each inmate's name in the Arkansas inmate locator website and creating our own

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226. *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012).

227. ACLU, *supra* note 22, at 39, 98.

228. Hall, *supra* note 56, at 1187 (citing ARK. CODE ANN. § 5-4-501(a)(1)(A) (2013 & Supp. 2015)).

229. § 5-39-204(b) (2013) (designating aggravated residential burglary a Class Y Felony); § 5-4-401(a)(1) (Class Y felony can give rise to LWOP, at the judge's discretion).

230. § 5-39-204(a)(1).

231. § 5-4-602(3)(B)(ii); § 5-10-502 (defining murder in the first degree and designating it a Class Y felony); § 5-4-401.

232. E-mail from Shea Wilson, Ark. Dep't of Corr., to author (Jan. 13, 2014) (on file with author).

spreadsheet; in addition to the offense listed above, many inmates were convicted of other serious crimes.<sup>233</sup> In short, one hundred percent of Arkansas LWOP inmates were convicted of violent crimes, and 99.3% were convicted of murder.

All three rape convictions were notable: Anthony Craig was convicted of raping a fourteen-year-old boy, and he had previously been convicted of sexually assaulting a four-year-old girl.<sup>234</sup> Joseph Rounsaville raped two women.<sup>235</sup> Dennis Sublett was convicted of raping both of his daughters over the course of several years, starting when the girls were twelve years old.<sup>236</sup> The only inmate serving LWOP for a crime other than murder or rape is Donale Nahlen, whose crime involved kidnapping, a violent robbery, and a cascade of gunfire.<sup>237</sup>

*b. Georgia*

Georgia's experience with the death penalty and embrace of mass incarceration suggests a disposition to impose severe punishment. Perhaps here we will find inmates serving disproportionate LWOP sentences.

It was a Georgia case that resulted in the death penalty's temporary moratorium in 1972.<sup>238</sup> Since 1976, Georgia has executed fifty-seven people, or tied for sixth among American states.<sup>239</sup> In 2015, Georgia's death penalty statute came under scrutiny again, when the state executed a man who claimed to be intellectually disabled.<sup>240</sup> In addition, an American Law Institute 2011 report designated Georgia as one of the top five "carceral powerhouses" in the United States, behind Louisiana, Texas, and Oklahoma, as measured by their incarceration rates.<sup>241</sup>

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233. See Craig S. Lerner, LWOP Research: Arkansas (on file with author).

234. *Craig v. State*, 424 S.W.3d 264, 265–67 (Ark. 2012).

235. *Rounsaville v. State*, 346 S.W.3d 289, 290 (Ark. 2012).

236. *Sublett v. State*, 989 S.W.2d 910, 911–12 (Ark. 1999).

237. *Nahlen v. State*, 953 S.W.2d 877, 877–78 (Ark. 1997). To prove Nahlen was a recidivist, the state proffered three previous aggravated robbery convictions in Arkansas and another in Montana.

238. *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

239. *Number of Executions by State and Region Since 1976*, *supra* note 169.

240. Ed Pilkington, *Georgia Executes Warren Hill After Supreme Court Denies Stay*, *GUARDIAN* (Jan. 27, 2015), <http://www.theguardian.com/world/2015/jan/27/supreme-court-georgia-execution-warren-hill>.

241. MODEL PENAL CODE: SENTENCING app. B, at 147 (Tentative Draft No. 2, 2011).

Georgia's experience with LWOP dates back to 1993, when the legislature enacted a life-without-parole statute.<sup>242</sup> As several commentators have observed, and lamented, Georgia law permits the imposition of LWOP on habitual offenders all of whose crimes may be categorized as nonviolent.<sup>243</sup> The Hall Study found that Georgia provides for a mandatory LWOP sentence for at least one nonviolent first offense (perjury in a capital case), and for mandatory or discretionary LWOP for a congeries of nonviolent and violent offenses.<sup>244</sup> These statutes raise the possibility of an LWOP population cluttered with nonviolent offenders.

Such fears prove to be almost wholly unfounded. Georgia was one of the states analyzed in the ACLU Report. It found that of the 813 inmates serving LWOP sentences in 2012, only 20 inmates were convicted of nonviolent offenses.<sup>245</sup> The Georgia Department of Corrections inmate locator website proved commendably easy to navigate, and my research assistants conducted an independent check.<sup>246</sup> As of December 2013, we identified 943 LWOP inmates. For each inmate, the website provides what is called the "major offense," and the breakdown is as follows:

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242. Note, *supra* note 28, at 1850.

243. ACLU, *supra* note 22, at 214 n.151; Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in *LIFE WITHOUT PAROLE*, *supra* note 18, at 83.

244. Georgia law provides for mandatory LWOP for a fourth felony conviction of almost any type and for a second felony conviction for "legislatively violent" crimes, that is, crimes deemed serious but that do not necessarily entail the use or threat of force against another person. In addition, a judge has the discretion to impose LWOP for a second drug offense conviction. Hall, *supra* note 56, at 1164, 1186, 1200, 1191 (citing GA. CODE ANN. §§ 16-10-70, 16-11-133(c), 16-11-160, 16-13-30(d), 17-10-7(c) (West 2012)).

245. ACLU, *supra* note 22, at 22.

246. In December 2013, my research assistants accessed the Georgia Department of Corrections inmate locator website, GA. DEP'T CORRECTIONS, <http://www.dcor.state.ga.us/GDC/OffenderQuery/jsp/OffQryForm.jsp> (last visited Oct. 7, 2015). They entered "Do not have GDC ID number," and conducted an "advanced search." In the last name box they entered "A," and then in the drop down menu for "sentence status" they entered "Life, No Parole." They then repeated for last name "B," "C," "D," etc. The data is collected in Craig S. Lerner, LWOP Research: Georgia (on file with author).

Murder	599
Robbery	132
Sex Crimes <sup>247</sup>	120
Kidnapping	73
Drug Offenses	16
Burglary	2
Carjacking	1
<b>Total</b>	<b>943</b>

In addition to their “major offense,” the majority of inmates were convicted of other violent and serious felonies. The two burglary offenders had long rap sheets, but in neither case would any of their offenses fall under the header of “violent,” as the ACLU Report defines the term.<sup>248</sup> One of the sixteen drug offenders succeeded in a legal appeal in February 2015 and has since been released.<sup>249</sup> At least one other drug offender had many previous violent convictions.<sup>250</sup> Subtracting these two offenders, we are left with a total of fourteen nonviolent drug offenders currently serving LWOP; adding the two nonviolent burglars, we count a total of sixteen nonviolent offenders serving LWOP in the state of Georgia.

*c. South Carolina*

According to the ACLU Report, there are 988 inmates serving LWOP sentences in South Carolina, of whom 88 are said to be nonviolent felons.<sup>251</sup> Of these 88, 10 are said to have committed drug offenses, and the remaining 78, property crimes.<sup>252</sup> The ACLU Report attributes the large number of nonviolent LWOP offenders to the state’s habitual offender law.<sup>253</sup> This law mandates the imposition of LWOP for a third so-called “serious” offense, which includes larceny and drug

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247. “Sex Crimes” is a collection of offenses, including rape, sexual battery, and child molestation.

248. The offenders are Andre Mims and Aaron Tuff.

249. The former inmate is Wilmart Martin, Jr. His case is described in Atteyah Hollie, *SCHR Secures Release of Client Serving LWOP for Cocaine; Advocates for Parole Eligibility for Nonviolent Offenders*, HUM. RTS. REP. (S. Ctr. for Human Rights, Atlanta, Ga.) 2015, at 11, 11, [https://www.schr.org/files/post/2015 Human Rights Report.pdf](https://www.schr.org/files/post/2015%20Human%20Rights%20Report.pdf).

250. The inmate is Samuel Smart, who has previous convictions for making terrorist threats or committing terrorist acts, criminal trespassing, armed robbery, and aggravated assault. *Smart v. State*, 560 S.E.2d 92, 96 (Ga. Ct. App. 2002).

251. ACLU, *supra* note 22, at 22.

252. *Id.* at 23.

253. *Id.* at 2.

trafficking; the law also mandates LWOP for a second so-called “most serious” offense, which includes first degree burglary.<sup>254</sup>

The South Carolina Department of Corrections allowed us to independently verify the data presented in the ACLU Report.<sup>255</sup> The agency provided a list, updated as of July 1, 2014, with the names of all 1,071 inmates then serving LWOP, as well as each inmate’s “most serious offense.” Those crimes are divided below into three categories: murder; violent nonhomicides; and nonviolent felonies:

<b>A. Murder</b>	<b>693</b> <sup>256</sup>
<b>B. Violent Nonhomicides</b>	
Kidnapping	86
Armed Robbery	84
1st Degree Criminal Sexual Conduct	48
Assault and Battery with Intent to Kill	18
1st Degree Sexual Conduct with a Minor	17
2nd Degree Sexual Conduct with a Minor	10
Voluntary Manslaughter <sup>257</sup>	7
Attempted Armed Robbery	4
Attempted Murder <sup>258</sup>	3
2nd Degree Criminal Sexual Conduct	2
Taking a Hostage by an Inmate	2
Lewd Act with a Child Under 14	1
Arson	1
Carjacking with Bodily Injury	1
Aggravated Assault	1
<b>Total</b>	<b>285</b>

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254. *Id.* at 100 (citing S.C. CODE ANN. § 17-25-45 (2014)).

255. E-mail from Charles Bradberry, Dir. of Research and Statistics, S.C. Dep’t of Corr., to author (Aug. 11, 2014, 13:59:59) (on file with author).

256. The 693 includes 672 who were convicted of murder and 21 who were convicted of “homicide by child abuse,” defined to mean causing the death of someone under the age of 11 in “circumstances manifesting an extreme indifference to human life.” S.C. CODE ANN. § 16-3-85 (2003).

257. Manslaughter is, of course, a form of homicide, but it is included here with crimes other than murder.

258. The data provided by the South Carolina Department of Corrections separates murder and attempted murder, a distinction preserved in state law and reflected in the breakdown presented here. *Compare* § 16-3-10 (defining murder), *with* § 16-3-29 (Supp. 2014) (defining attempted murder).

**C. “Nonviolent” offenses**

1st Degree Burglary	70
Drug Offenses	13
2nd Degree Burglary	10
<b>Total</b>	<b>93</b>

Category A (murder) accounts for nearly two-thirds of all LWOP inmates. Category B (violent nonhomicides) accounts for another 27%.<sup>259</sup> Category C, which accounts for 8.7% of all LWOP inmates, raises the most serious questions about disproportionate punishment. Resolving this issue turns, predominantly, on the status of “burglary,” which is the crime that resulted in LWOP for eighty of the ninety-three nonviolent offenders. Both first and second degree burglary, as committed, can be either violent or “nonviolent”; the latter possibility can arise when an offender enters a dwelling armed, but never confronts an occupant.<sup>260</sup> My research assistants were able to acquire more detailed information about seventy-two of the eighty burglars. Of these, thirty-two had prior or contemporaneous convictions for violent offenses.<sup>261</sup> Indeed, in several cases, listing “burglary” as the “major crime” is deceptive; the defendant was also contemporaneously convicted of attempted murder,<sup>262</sup> aggravated assault,<sup>263</sup> and armed

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259. Several inmates in Category B test the absolutist ALI position, *see supra* text accompanying notes 63–68, that LWOP is never justified in such cases. For example, John Brannon was sentenced to LWOP under South Carolina’s habitual offender statute. His final crime was aggravated assault (hitting his cousin in the head with a brick). *Man Hits Cousin in the Head with Brick, Sent to Prison*, WYFF4.COM (Dec. 15, 2011), <http://www.wyff4.com/Man-Hits-Cousin-In-The-Head-With-Brick-Sent-To-Prison/6130774>. Brannon had been convicted of armed robbery in 1991 and was sentenced to twenty-one years in prison. *Brannon v. State*, 548 S.E.2d 866, 867 (S.C. 2001). His record also includes another armed robbery conviction and five other convictions for aggravated assault. *Man Hits Cousin in the Head with Brick, Sent to Prison, supra*.

260. §§ 16-11-311(A)(1), 16-11-312(B)(1)(a) (2003).

261. *See* Craig S. Lerner, LWOP Research: South Carolina (on file with author). In five more cases, not included in this list, the offender was convicted of resisting arrest, which could also be considered a violent offense but we declined to do so.

262. The inmates are: Hubert Brown and Tyrone Jenkins.

263. The inmates are: James Dator, Calvin Shedrick, Chris Brown, John Burdette, Dennis Elliot, Demetrius Price, Lonnie Geter, and Lucius Simuel. For example, Lonnie Geter was convicted of first degree burglary and sentenced to LWOP in connection with an incident in which he struck a seventy-seven-year-old woman in the head with pliers. *Spartanburg Man Sentenced to Life in Prison for Brutal Attack on Elderly Woman*, SPARTANBURG COUNTY GOV’T (2002), <http://www.spartanburgcounty.org/govt/depts/sol/geter.htm>.

robbery.<sup>264</sup> These cases put in bold relief the difficulty with categorically classifying burglary as a nonviolent offense. For each of these defendants, the burglary, as committed, was violent.

With respect to the thirteen drug offenders, my research assistants were able to obtain more information with respect to ten. Two of these had prior convictions for armed robbery.<sup>265</sup> In sum, of the ninety-three inmates categorized above as “nonviolent,” only fifty-nine were never convicted of a violent offense.

#### *d. Alabama*

Alabama has pride—or shame—of place in the ACLU Report as the state with the highest percentage (16.2%) of LWOP inmates convicted of nonviolent offenses.<sup>266</sup> This percentage, if correct, is nearly twice that of the second highest state.<sup>267</sup> According to the ACLU Report, Alabama’s position arises “largely due to three-strikes and other kinds of habitual offender laws that mandate an LWOP sentence for the commission of a nonviolent crime.”<sup>268</sup>

Alabama’s habitual offender law<sup>269</sup> is fairly typical, so it is puzzling that its LWOP population should include so many more nonviolent offenders on a percentage basis than its geographical and cultural peer, South Carolina (8.9%).<sup>270</sup> In gathering its information, the ACLU Report apparently relied on a Monthly Statistical Report produced by the Alabama Department of Corrections.<sup>271</sup> The October

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264. The inmates are: Wayne Knight, Harold Bradley, Tyrone Whatley, Johnny Frazier, William Jones, Travis Bellamy, and Emith Williams.

265. The inmates are: Brian Posey and Onrae Williams.

266. ACLU, *supra* note 22, at 22.

267. *Id.* (reporting that 9.25% of Louisiana’s LWOP inmates were sentenced for nonviolent offenses).

268. *Id.* at 2.

269. ALA. CODE § 13A-5-9 (LexisNexis 2005).

270. ACLU, *supra* note 22, at 22.

271. The ACLU Report may have relied on the Monthly Statistical Report from either April 2012, *Monthly Statistical Report for April 2012*, ALA. DEP’T CORRECTIONS, available at <http://www.doc.state.al.us/StatReports.aspx> (last visited Oct. 19, 2015), or October 2012, *Monthly Statistical Report for October 2012*, ALA. DEP’T CORRECTIONS, available at <http://www.doc.state.al.us/StatReports.aspx> (last visited Oct. 19, 2015). The latter lists 1,507 LWOP inmates, which exactly matches the ACLU Report. But there is a slight discrepancy in the breakout of habitual nonviolent offenders. The ACLU Report breakout for property/drugs/other is: 114/31/13, while the breakout in the October Report is 112/31/14. The ACLU may have relied instead on the April 2012 Monthly Statistical Report, which lists 1,493 LWOP inmates, but another 14 as “Life/Barred Parole.” Adding 1,493 and 14, we arrive at the ACLU Report count of 1,507. In addition, the breakout for nonviolent habitual offenders in the April 2012 Report matches the breakout in the ACLU Report, at least if we add the single drug offender sentenced to “LWOP/Barred Parole.” Very little turns on whether the ACLU

2012 Monthly Statistical Report breaks out inmates sentenced to LWOP according to the “type of crime”: 1,263 defendants were sentenced for personal crimes; 169, property crimes; 50, drug crimes; and 25, “other.”<sup>272</sup> Adding up the numbers for the last three categories (property, drugs, and “other”), the October Report suggests that 244 of Alabama’s 1,507 LWOP inmates were sentenced for nonviolent offenses.

The authors of the ACLU Report reasonably relied on data published by the Alabama Department of Corrections. However, the Alabama Sentencing Commission provided this author with different information.<sup>273</sup> According to the Sentencing Commission, there were 1,493 LWOP inmates as of September 2012, differentiated by crime as follows:

<b>A. Murder</b>	
Capital Murder	698
Murder	237
Conspiracy Murder	1
<b>Total</b>	<b>936</b>
<b>B. Violent Nonhomicides</b>	
Robbery 1st	286
Rape 1st	112
Kidnapping 1st	35
Attempted Murder	18
Sodomy 1st	27
Arson 1st	2
Porn Parents/Sex Minors	1
<b>Total</b>	<b>481</b>
<b>C. Nonviolent Offenses</b>	
Burglary 1st	54
Trafficking-Cocaine	14
Trafficking-Marijuana	4
Manufacture Controlled Sub.	3
Trafficking-Hydromorphone	1
<b>Total</b>	<b>76</b>

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Report relied on the April or the October or another 2012 Monthly Statistical Report. This Article assumes that the ACLU Report drew from the October 2012 Report.

272. *Monthly Statistical Report for October 2012*, *supra* note 271, at 9.

273. E-mail from Andrew Brasher, Solicitor Gen. of Ala., to author (Sept. 4, 2014), with attachment, “ADOC Active Inmates as of 9.20.2012 Life Without Parole Offenders” (on file with author).

Alabama should be faulted for producing inconsistent data. However, this author has been persuaded that the Sentencing Commission data is more accurate.<sup>274</sup> Assuming this is true, the Department of Corrections Monthly Statistical Reports are, at least with respect to the crimes committed by the state's LWOP population, grossly misleading. However, it would also mean that the total number of nonviolent offenders (76) is substantially lower than the number in the ACLU Report (244).

Alabama did not provide the names of all LWOP inmates, so it is impossible to probe into the exact nature of the offenses they committed or to resolve the inconsistencies between the data provided by the Department of Corrections and the Sentencing Commission. If we accept the accuracy of the Sentencing Commission data, fifty-four of the seventy-six nonviolent offenders, or 71%, committed first degree burglary. First degree burglary in Alabama means the unlawful entry into another's dwelling when the offender (1) possesses an explosive, (2) causes physical injury to a nonparticipant in the crime, or (3) is armed with a "deadly weapon or dangerous instrument" or uses or threatens to use said weapon against a nonparticipant.<sup>275</sup> As we parse the elements of the offense, burglary emerges as sometimes violent and sometimes nonviolent (i.e., if one carries an explosive, deadly weapon, or dangerous weapon into a home, but never threatens anyone with it). Whether such an offense, especially as a second, third, or fourth

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274. How can the data from the Alabama Department of Corrections and the data from the Alabama Sentencing Commission be reconciled? One hypothesis is that the agencies employ different methodologies in coding inmates sentenced to LWOP for multiple offenses. For example, according to the Alabama Department of Corrections website, <http://www.doc.state.al.us/InmateSearch.aspx>, James Bailey was sentenced to "999Y 99M 99D" (or LWOP) for each of three separate crimes: "Manufacturing Controlled Substance," "Murder," and "Trafficking in Methamphetamines." Because of the happenstance of alphabetical priority, it is possible that the Department of Corrections records Bailey as a "drug" crime, rather than as a "personal" crime (murder) on page 9 of the Monthly Statistical Report. By contrast, according to this hypothesis, the Sentencing Commission records Bailey under his most major offense: murder. However, an official from the Alabama Sentencing Commission rejected this hypothesis and instead explained that the Department of Corrections records each defendant (when categorizing offenders by "type of crime" in the Monthly Statistical Report) according to the chronologically first offense for which the defendant was incarcerated. Telephone Conversations with Bennet Wright, Exec. Dir., Ala. Sentencing Comm'n (Nov. 21, 2014 & Dec. 2, 2014); e-mail from Bennet Wright, Exec. Dir., Ala. Sentencing Comm'n, to author (Dec. 24, 2014) (on file with author). Even if he is later re-incarcerated for another offense, his designation for this purpose is unchanged. In other words, consider a defendant who is convicted of a drug crime and is then incarcerated and released. If he is subsequently sentenced to LWOP for murder, that defendant would still appear on page 9 of the Monthly Statistical Report as a "drug crime."

275. ALA. CODE § 13A-7-5(a)(1)-(3) (LexisNexis 2005).

felony,<sup>276</sup> qualifies as sufficiently serious to merit LWOP is a question on which reasonable people might be thought to differ. The legislature of Alabama, presumably reflecting the moral judgments of the people of Alabama, has concluded that an LWOP sentence in such circumstances is not disproportionate.

*e. Florida*

Florida figures prominently in the ACLU Report and in exposés of American criminal justice.<sup>277</sup> These criticisms may be attributed to Florida's prominent role in continuing the American tradition of capital punishment.<sup>278</sup>

LWOP entered Florida's criminal code in 1984, but with elaborate and not always intelligible distinctions.<sup>279</sup> From 1984 to 1994, certain defendants sentenced to "life" were in fact eligible for parole.<sup>280</sup> In 1995, the Florida legislature formally abolished parole for all offenses, and a "life" sentence thereafter always meant LWOP.<sup>281</sup> Florida has emerged as the jurisdiction most populated with inmates serving LWOP sentences. As of 2012, two studies concluded that there were 7,992 LWOP inmates in Florida, or nearly twice the number in the federal

276. First degree burglary is classified as a Class A felony. § 13A-7-5(b). If the defendant had previously been convicted of any felony, the sentence is fifteen years to life, at the judge's discretion. If the defendant had previously been convicted of any two felonies, the sentence is life or up to ninety-nine years, at the judge's discretion. If the defendant had previously been convicted of any three felonies, the sentence is life or LWOP, at the judge's discretion. § 13A-5-9(a)(3), (b)(3), (c)(3). If the defendant had previously been convicted of any Class A felony, the sentence for the second Class A felony is mandatorily LWOP. § 13A-5-9(c)(4).

277. See, e.g., Andrew Cohen, *Florida Accelerates Its Broken System of Criminal Justice*, ATLANTIC (June 3, 2013), <http://www.theatlantic.com/national/archive/2013/06/florida-accelerates-its-broken-system-of-criminal-justice/276457/>.

278. In 1984, Florida claimed eight of the nation's thirty-two executions; in 2014, Florida claimed seven of the nation's thirty-nine executions. *Execution List 1984*, DEATHPENALTYUSA, <http://deathpenaltyusa.org/usa/date/1984.htm> (last visited Oct. 7, 2015); *Execution List 2014*, DEATHPENALTYUSA, <http://deathpenaltyusa.org/usa/date/2014.htm> (last visited Oct. 7, 2015).

279. See *Release Types: Parole*, FLA. COMMISSION ON OFFENDER REV., <https://www.fc.or.state.fl.us/release-types.shtml> (last visited Sept. 28, 2015).

280. In an odd twist, those convicted of capital crimes *would* be eligible for parole (if not sentenced to death); by contrast, many defendants convicted of noncapital crimes would not be eligible for parole if sentenced to life. See *id.* In other words, a defendant was in a better position with respect to parole eligibility if he received a life sentence for capital murder than for armed robbery. The former would be eligible for parole, the latter not. The author thanks Lee Adams of the Florida Department of Corrections for his assistance in understanding Florida sentencing practices.

281. See *Doing Time: Most Florida Inmates Serving 85% of Their Sentences*, FLA. DEP'T CORRECTIONS (Jan. 2014), <http://www.dc.state.fl.us/pub/timeserv/doing/>.

system or in any other state.<sup>282</sup> According to the ACLU Report, 270 of Florida's LWOP inmates were convicted of nonviolent offenses, which ranks Florida second in this respect among all states (after Louisiana).<sup>283</sup> To explain the large number of nonviolent offenders sentenced to LWOP, the ACLU Report speculates that Florida's habitual offender law is responsible.<sup>284</sup>

There are, in fact, many paths to LWOP under Florida's sentencing laws. My research assistants counted twenty criminal offenses that could result in an LWOP sentence, and all but possibly three—burglary, being an habitual offender, and directing the activities of a criminal gang—entail acts or threats of violence.<sup>285</sup> Even these three offenses are not necessarily nonviolent. For example, burglary in the first degree can be satisfied if the defendant assaults an occupant *or* enters the dwelling while armed.<sup>286</sup> Likewise, Florida's three-strike statute can be satisfied if all of the predicate felonies were violent or nonviolent, or some mix thereof.<sup>287</sup>

The Florida Department of Corrections refused requests to produce a list of the names of all inmates sentenced to LWOP. Over the course of a year, my research assistants took advantage of an idiosyncratic feature of the state's inmate locator website to construct a list of all

282. ACLU, *supra* note 22, at 22; THE SENTENCING PROJECT, *supra* note 14, at 6.

283. ACLU, *supra* note 22, at 22 (identifying 429 nonviolent LWOP inmates in Louisiana).

284. *Id.* at 35. The ACLU Report also observes that Florida law permits LWOP for a first-time nonviolent offender; however, it does not specify the offense. *Id.* at 39. The Hall Study apparently identifies the offense: the distribution of 150 kilograms of cocaine or 30 kilograms of morphine. Hall, *supra* note 56, at 1159 (citing FLA. STAT. ANN. § 893.153(1)(b)(2), (1)(c)(2) (West 2013 & Supp. 2015)).

285. The offenses that can give rise to life imprisonment are: offenses against persons on the grounds of religious institution, § 775.0861 (West 2010); sexual offenses against students by authority figures, § 775.0862 (West Supp. 2015); unlawful taking, possession, or use of law enforcement officer's firearm, § 775.0875 (West 2010); habitual offender statute, § 775.084 (West 2010 & Supp. 2015); facilitating or furthering terrorism, § 775.31 (West 2010); murder, § 782.04 (West 2007 & Supp. 2015); attempted felony murder, § 782.051; kidnapping, § 787.01; false imprisonment when the victim is under 13 years old, § 787.02; human trafficking, § 787.06; discharging machine guns when great bodily harm or serious disruption to government operations result, § 790.16 (West 2007); making, possessing, throwing, projecting, placing, or discharging any destructive device or attempt so to do, § 790.161; sexual battery, § 794.011 (West 2007 & Supp. 2015); sexual battery by multiple perpetrators, § 794.023 (West 2007); lewd or lascivious molestation committed against a person less than 12 years of age, § 800.04 (West 2007 & Supp. 2015); burglary, § 810.02; robbery, § 812.13 (West 2006); directing the activities of a criminal gang, § 874.10; carjacking, § 812.133; and home-invasion robbery, § 812.135.

286. § 810.02 (West 2007 & Supp. 2015).

287. § 775.084 (West 2010 & Supp. 2015).

inmates sentenced to LWOP from 1994 to the present.<sup>288</sup> We identified 7,351 inmates and then further analyzed these defendants by their crimes. Our task was complicated by the fact that many inmates were convicted of more than one offense.<sup>289</sup> We compiled a list identifying each inmate according to the most serious offense for which an LWOP sentence resulted. The following hierarchy of “seriousness” was used: (1) murder; (2) attempted murder; (3) sex crimes; (4) robbery; (5) burglary; (6) kidnapping; (7) carjacking; (8) aggravated battery/assault; (9) violent career criminal in possession of a gun; (10) violent other; (11) drug trafficking; and (12) nonviolent other.<sup>290</sup> The results are as follows:

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288. The list of Florida inmates sentenced to LWOP was compiled between August 2012 and November 2013. My research assistants compiled the list by accessing data provided on the Florida Department of Corrections website, *Inmate Population Information Search*, FLA. DEP'T CORRECTIONS, <http://www.dc.state.fl.us/ActiveInmates/search.asp> (last visited Sept. 23, 2015). They began by typing in a single age in the age range search field (for example, from 30 years to 30 years), leaving all other search fields blank. The search resulted in a list of all inmates of a specific age currently sentenced to a Florida correctional facility. My research assistants then scrolled through the list clicking on each inmate with a release date listed as ‘Sentenced to Life.’ Our list omits those sentenced to life without parole from 1984 to 1994.

289. For example, the youngest offender identified, Jonathan Hartley, was convicted of murder and two counts of robbery. He received an LWOP sentence for the former and fifteen- and twenty-year sentences for the latter. We recorded him as “1(4),” with the “1” denoting murder, the “4” denoting robbery, and the parenthesis denoting that the robbery conviction did not result in a life sentence. A nineteen-year-old offender named Markel Bass was convicted of murder and robbery and was sentenced to LWOP for both. He was coded as 14.

290. Our original coding methodology had nine categories: (1) murder, (2) attempted murder, (3) sex crimes, (4) robbery, (5) burglary, (6) kidnapping, (7) carjacking, (8) violent other, and (9) nonviolent other. What was category (8), or “violent other,” was then broken out as “aggravated assault/battery,” “violent career criminal,” and “violent other.” And what was category (9), or “nonviolent other,” was broken out as “drug trafficking” and “nonviolent other.” The data is collected in Craig S. Lerner, LWOP Research: Florida (on file with author).

Murder <sup>291</sup>	3513
Attempted Murder	416
Sex Crimes	1462
Robbery	1179
Burglary	520
Kidnapping	118
Carjacking	57
Aggravated Battery/Assault	33
Violent Career Criminal	14
Violent Other	9
Drug Trafficking	22
Nonviolent Other	8
<b>Total</b>	<b>7351<sup>292</sup></b>

Three categories above—burglary, drug trafficking, and nonviolent other—arguably fall under the category of “nonviolent offenses,” and necessitate closer analysis. With respect to the large number of burglary offenders (520), how many of these were guilty of “nonviolent” burglary, that is, a burglary in which there was no confrontation with an occupant? In addition, how many offenders were convicted of “nonviolent” burglary but had previously been convicted of violent offenses? My research assistants conducted a laborious study of all 520 burglars sentenced to LWOP. We divided these inmates into four categories, according to whether they had ever been, or were contemporaneously, guilty of a violent offense:

1. No prior or contemporaneous violent felony convictions	49 (9%)
2. Prior violent felony conviction	39 (8%)
3. Contemporaneous violent felony conviction	212 (41%)
4. Both prior and contemporaneous violent felony convictions	220 (42%)

Only 9% of the burglary convictions (category 1) involved completely nonviolent offenders. Eight percent were convicted of a prior violent felony (category 2). For 432 of the 520 defendants (categories 3 and 4), the burglary, as committed, entailed an act of

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291. This includes twenty-two cases of negligent homicide. All but four of this group (Phillip Williams, Joshua Hamilton, Waymon Jenkins, and John Dale) had a previous or contemporaneous violent conviction, were guilty of multiple negligent homicides, or had multiple DUI manslaughter convictions.

292. The discrepancy between the 7,351 LWOP inmates my study identified and the 7,992 inmates identified in the ACLU Report may be explained by the fact that my study did not capture the offenders sentenced to LWOP in the decade 1984 to 1994.

violence. And over half of these defendants (category 4) were convicted of a prior violent felony in addition to the violent burglary.<sup>293</sup>

An additional word is in order about the forty-nine altogether “nonviolent” burglary offenders. Collectively, these defendants were convicted of 542 felonies. Several had extraordinarily numerous, albeit “nonviolent,” felony convictions to their credit; in one instance, the offender had accumulated a remarkable forty-five felony convictions.<sup>294</sup> Others had committed extremely dangerous acts, such as eluding police in a high speed chase, among many other convictions.<sup>295</sup>

We turn next to the twenty-two defendants sentenced to LWOP for drug offenses. Of these, eleven were also, or had previously been, convicted of violent offenses, such as robbery, aggravated battery, carjacking, and attempted murder.<sup>296</sup> Thus, only the other eleven could plausibly be regarded as nonviolent drug offenders.

Finally, there are eight offenders designated “nonviolent other.” In each instance, the offense for which they received an LWOP sentence was arguably “nonviolent.” However, a detailed analysis revealed that all of these offenders had several convictions to their credit. The list below identifies a few highlights for each:

- Offender 1: fleeing law enforcement, negligent homicide, and cocaine distribution.
- Offender 2: continuing criminal enterprise, drug trafficking, forgery, grand theft, and burglary.
- Offender 3: racketeering, cocaine trafficking, burglary, assault, and aggravated battery.
- Offender 4: false imprisonment of a victim under the age of thirteen; lewd and lascivious molestation of a minor.
- Offender 5: racketeering and drug distribution.

293. This data is collected in Florida Burglary Analysis Memo (on file with author).

294. The offender is Jason Hardman.

295. The offender is Toni Ball, who had a total of twenty-four felony convictions.

296. The eleven are: Demarious Caldwell (aggravated battery); Dennis Labrie (aggravated assault on law enforcement officer); Isaac Sutton (two robberies with gun and a felony battery); Michael Smith (two attempted robberies with gun); Keith Campbell (robbery and carjacking with deadly weapon); Glenn Jackson (robbery with gun, attempted felony murder, aggravated assault, and negligent homicide); Terry Anderson (attempted robbery, attempted second degree murder); Alethia Jones (aggravated assault); Alfred Cunningham (battery on law enforcement officer, resisting arrest with violence, and aggravated battery with deadly weapon); Alexander Walker (three counts of robbery); and Christopher Creed (aggravated assault with weapon).

Offender 6: forgery, grand theft auto, burglary unoccupied dwelling, and robbery.

Offender 7: continuing criminal enterprise and drug trafficking.

Offender 8: racketeering, attempted murder, and much more.<sup>297</sup>

Five of the eight “nonviolent other” offenders—numbers 1 (negligent homicide), 3 (aggravated battery), 4 (sexual molestation of a minor), 6 (robbery), and 8 (attempted murder)—have rap sheets that include violent offenses.<sup>298</sup> So of the eight inmates identified as “nonviolent other,” at most three were convicted of only nonviolent crimes.

As to the seriousness of the offenses committed by these eight offenders, readers can draw their own conclusions. To assist in this deliberation, the criminal history of Offender 8 may be illuminating.<sup>299</sup> Along with racketeering, for which he received an LWOP sentence in 2004, he was also convicted in his last trial of six counts of burglary on an unoccupied dwelling; eleven counts of grand theft; six counts of uttering forged bills; three counts of fraudulent use of personal identification; eight counts of fraudulent use of credit cards; and seven counts of forgery. He also had convictions in 1981 for robbery, grand theft, burglary on an unoccupied dwelling, and burglary on an occupied dwelling; in 1983 for attempted murder and armed robbery; in 1999 for grand theft auto; and in 2000 for failure to appear at a bail hearing.

Florida proved to be our most difficult case study. Given the large number of LWOP offenders and the complicated statutory schemes that give rise to LWOP, it is impossible to know precisely the number of “nonviolent” offenders. However, of the 7,351 inmates sentenced to LWOP since 1994, my estimate is that sixty-three offenders (forty-nine burglars, eleven drug offenders, and three “nonviolent other”) were truly nonviolent, in the sense that they were never convicted of a violent offense.

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297. The eight are: (1) Terrance Peterson; (2) Jeffrey Ware; (3) Tavarence Wiggins; (4) Carl Moore; (5) Jose Rivera; (6) Loren Spaulding (who has since died); (7) James Morrell; and (8) Andre McGirt.

298. Offender 4 was sentenced to LWOP for false imprisonment of a minor and so could have been designated a violent offender. However, the inmate was presumably acquitted of, or not charged with, the more serious offense of kidnapping, so he is designated nonviolent. That said, he was also convicted of molesting a minor, for which he received a fifteen-year prison sentence.

299. *Inmate Population Information Search*, *supra* note 288 (Enter inmate name “Andre McGirt.”).

*f. Summing Up*

The five states in this subsection (which have retained the death penalty) have somewhat more heterogeneous LWOP populations than the three states in the first subsection (which have abolished capital punishment). In one state, Arkansas, every LWOP inmate was convicted of a violent offense; indeed, 99% were guilty of murder. In another state, Georgia, 16 of 943 LWOP inmates, or 1.6%, were sentenced to life for nonviolent offenses. In South Carolina, Alabama, and Florida, a slightly greater number of LWOP inmates were sentenced for nonviolent offenses; yet it should be noted that several of these so-called nonviolent offenders were also convicted of violent felonies. In addition, several “nonviolent” offenders had accumulated criminal histories sufficiently long and intimidating that designating the offenders as “nonviolent” belies the seriousness of their crimes.

Let us, finally, consider all eight states explored in this study: which of the “culpability bell curves” described in Section III, Part C is most apposite? Recall that these bell curves plot the culpability of all of the offenses committed by each inmate sentenced to LWOP. In three states (Wisconsin, Iowa, and Arkansas), what we have designated “Figure 5” best conveys the profile of the LWOP population. In these states, the crimes that resulted in all of the LWOP sentences were of the greatest seriousness and would fall far along the right tail of the bell curve of culpability. In Washington and Georgia, there are a few inmates whose crimes, on their face, are not of the greatest seriousness; consequently, the culpability bell curves might not be quite as skewed to the right tail as those depicting offenders in Wisconsin, Iowa, and Arkansas. Nonetheless, even in Washington and Georgia it is difficult to identify more than a handful of defendants on the left tail. In short, then, in five of the eight states studied, there are few, if any, disproportionate LWOP sentences, at least if one adopts the view that LWOP is proportionate to the most serious criminal offenses.

Three states—South Carolina, Alabama, and Florida—present a more complicated picture. Here there are somewhat more offenders whose crimes might be designated as “nonviolent.” Consequently, the “culpability bell curves” are perhaps less skewed to the right tail; and there is at least the possibility of several inmates receiving LWOP sentences that are disproportionate to the severity of their offenses. This study has tried to probe into the nature of the offenses committed by these inmates. For example, were the burglaries truly nonviolent? Were defendants sentenced to LWOP as “habitual offenders” or for drug crimes truly guilty of only minor offenses? We have not been able to obtain data on all inmates, but in most of the cases for which data is available the answer that emerges is that the offenses were more

serious, and often more violent, than the designation “nonviolent” suggests. This study has not excluded the possibility of disproportionate sentences. However, even in South Carolina, Alabama, and Florida, the criminal justice systems seldom impose LWOP for nonviolent offenses; and when they do, aggravating factors are often present. All eight states this study considered would seem to be judicious in their imposition of the second-most severe sentence permitted by the U.S. Constitution.

#### CONCLUSION

Who’s really sentenced to life without parole? The answer, at least in the eight states studied in this Article, is overwhelmingly murderers and other violent criminals. As to whether the American criminal justice system broadly understood is rife with “brutal disproportionalities,” the Article draws only cautious conclusions. It is possible that other jurisdictions, particularly the federal government, regularly sentence nonviolent and low culpability offenders to LWOP. It is also possible that all fifty-two jurisdictions regularly impose harsh sentences other than LWOP for minor offenses. It is, finally, possible that the fifty jurisdictions that impose LWOP do so for violent offenders whose crimes do not indicate great culpability.<sup>300</sup> At its narrowest, the Article questions what has emerged as the consensus wisdom among many academics—that is, that the American judicial system is regularly dispatching defendants to prisons for life for little more than drug or other nonviolent crimes. The evidence presented here contradicts this assumption.

The major qualification arises from the absence of data from the federal government. The refusal of the Bureau of Prisons and other departments of corrections to collect data on LWOP sentences, and share it with the general public, is ripe for legal challenge under Freedom of Information Act statutes. State and federal agencies have argued that sharing such data undermines “law enforcement” or invades an inmate’s privacy; such claims are risible. All LWOP sentences were imposed at public trials; sentencing hearings or trial transcripts are

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300. For example, Ryan Holle was found guilty of being an accomplice to a felony murder; his only contribution to the crime was lending a car to his roommates, who used the car to drive to the scene of the burglary. The burglary spiraled out of control, resulting in a death, and hence a felony murder prosecution. Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES (Dec. 4, 2007), <http://www.nytimes.com/2007/12/04/us/04felony.html>. Another example is Robert Lee Hines, who accidentally shot his friend while turkey hunting. He was convicted of felony murder, with a predicate felony of being a felon in possession of a firearm. *Hines v. State*, 578 S.E.2d 868, 871 (Ga. 2003).

available on Westlaw, Lexis, or other websites. Furthermore, Arkansas, Iowa, Wisconsin, and Washington all collect and share detailed LWOP inmate information without any impairment of law enforcement interests. States that preserve the death penalty all have easily accessible websites that catalog every inmate on death row. A similar degree of transparency would be useful in recording LWOP sentences. In particular, the federal government, given its large number of LWOP inmates and the suspiciously large number of nonviolent offenders who have received this sentence, should be prepared to provide more information.

It is possible that such sharing could inspire more, rather than less, confidence in the legitimacy of the fifty-two American criminal justice systems. What might emerge from the study of these lists is the judiciousness with which the legal systems impose this grave sentence. One hypothesis that arises from the empirical study conducted in this Article is that actual sentencing practices are far more reserved in the imposition of LWOP than what is contemplated in the law books. The proliferation of LWOP statutes over the past decade suggests that legislatures have been promulgating laws to signal intense public disapproval of certain crimes; meanwhile, actual sentencing practices suggest that many of these laws, involving nonviolent offenses, have been deployed rarely, if at all.

LWOP is an extraordinary punishment, and it should be reserved for extraordinary crimes. The eight states studied in this Article have not lost sight of this elementary proposition. Inevitably, criminals sentenced to LWOP will vary in culpability, and some will appear not to merit this punishment. Drawing attention to their plight can spur executive clemency in individual cases. But accusations that the American legal system is rife with “gross disproportionalities,” at least insofar as this claim is applied to LWOP sentences, appear to have little merit.