

Introduction

A DIAGNOSIS

Life imprisonment without the possibility of parole, a prison sentence precluding any reasonable opportunity of release during a person's natural life, began its rise in the United States in the mid-1970s. Since then the number of people sentenced to life without parole has increased dramatically, from a spattering in the early 1970s, to more than ten thousand in 1992, to in excess of fifty thousand in 2016 and upward.¹ Over the same time span, hundreds of laws were passed in the states and the federal system, extending life without parole sentences to a multitude of crimes and criminal statuses. The rapid growth of such a severe punishment is remarkable from a historical perspective. A century, even decades, ago, these developments would have been quite unexpected. As recently as the 1980s and 1990s, criminologists regarded what is referred to now as "LWOP" to be a fad, something that might be looked back on later, decades down the road and with a longer view, as a passing fashion: a punishment whose impact, they expected, would be muted by executive clemency.² But LWOP has long outlasted the distance of vogue. Life without parole sentencing is now firmly entrenched in American policymaking, judicial and prosecutorial decision-making, public discourse, and even the American vernacular.³ So much so that the sanction was not long ago labeled "America's new death penalty" and its practice said to "define[] the logic" of contemporary American punishment.⁴ Life without parole's embedding in US punishment—indeed, in US penalty—is an emergent phenomenon of the late twentieth century.⁵

If one permits collapsing fifty-one different criminal legal systems into a single entity, it might be said that LWOP is something the United States does. Life imprisonment has escalated worldwide of late, but to

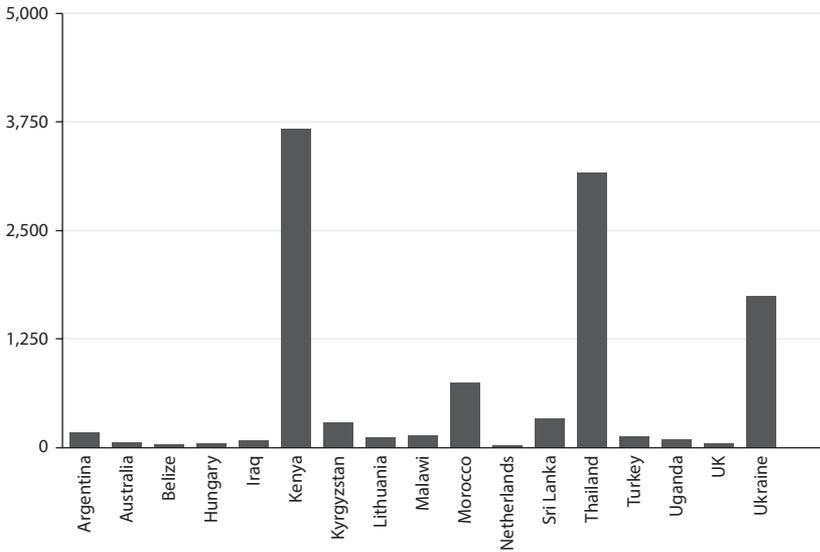


FIGURE 1. Prisoners serving whole life sentences worldwide (excluding United States), 2016. *Source:* Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Cambridge, MA: Harvard University Press, 2019).

compare lifetime sentencing in the United States to elsewhere in the world, one has to completely change the scale (figures 1 and 2).⁶ In contrast to Europe, where whole-life sentencing registers as a human rights concern and is scrutinized by international courts,⁷ the United States Supreme Court has never adjudicated the constitutionality of life without parole *per se*, and recent concern over life without parole sentencing for juveniles markedly stops with the unique frailties of youth.⁸ In contrast to nations in which perpetual imprisonment has been the subject of persistent and vigorous debate in political arenas and public forums,⁹ in the United States life without parole is less a point of dispute than a middle ground on which sides otherwise at odds find bipartisan agreement—as an alternative to a death sentence, for example, or as a complement to low-level sentencing reform.¹⁰ Further, people sentenced to life without parole—while classified among the condemned under many state laws and denied the medical care and programs available to prisoners with opportunities for release—only rarely if ever receive the constitutional protections afforded capital defendants, such as heightened due process, automatic proportionality review, and bifurcated individualized sentencing proceedings.¹¹ In the

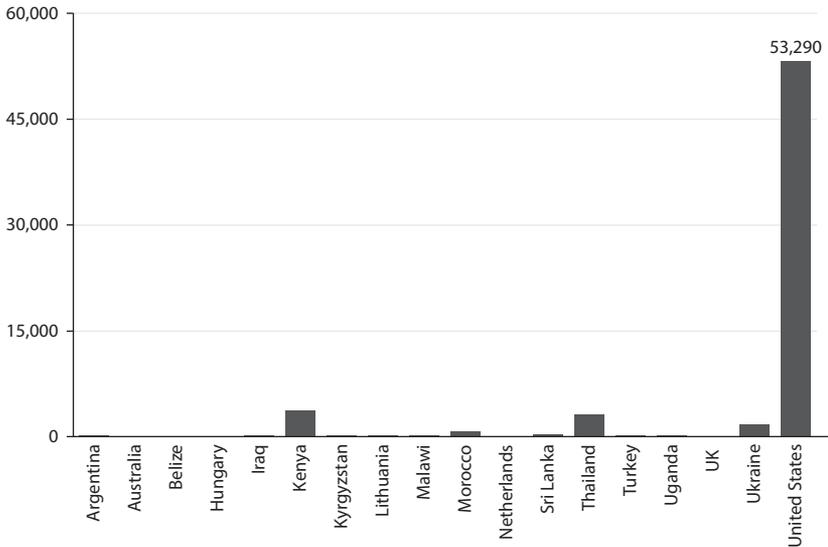


FIGURE 2. Prisoners serving whole life sentences worldwide (including United States), 2016. *Source:* Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Cambridge, MA: Harvard University Press, 2019).

contemporary United States, in sum, life without parole is a standard way of punishing people convicted of serious and violent crimes, as well as some who commit nonviolent crimes, and yet it takes place without the scrutiny one might expect for an extreme punishment. Life without parole in the United States is remarkable, in other words, not only for its cruelty but for the way in which it is exercised—that is, as a *matter of routine*.

Yet if life without parole is a standard element of contemporary American penal practice, even ingrained in the nation's cultural imagination, just how it came to be so has not been carefully articulated or explained. Knowledge of the processes that led to life without parole's emergence in the last quarter of the twentieth century, and of what fuels its continued expansion, remains general at best. To be sure, there are conventional wisdoms about LWOP's rise. For one, life without parole is often packaged within explanations of the late twentieth-century hardening of American punishment, among the laws and policies that produced mass incarceration.¹² The packaging is apt insofar as life without parole did spread amid a flow of tough-on-crime sentencing policy associated with the war on drugs, truth-in-sentencing initiatives, and three-strikes laws.¹³ Many people now graying and dying in prisons across

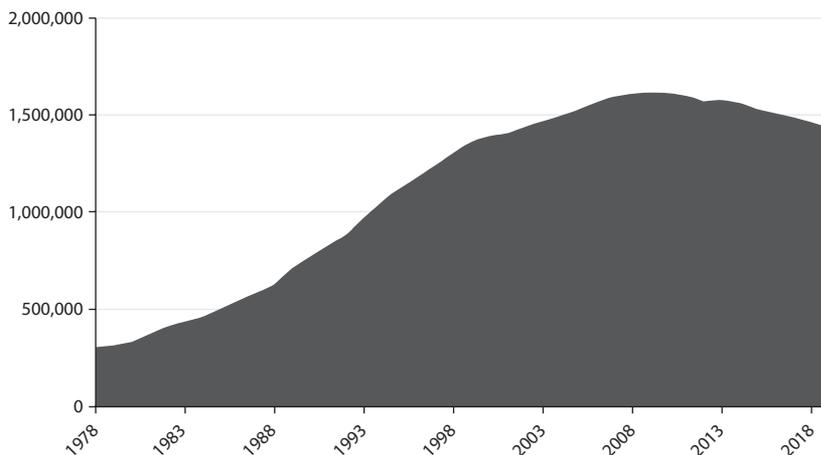


FIGURE 3. Total prisoners in US state and federal prisons, 1978–2019.
 Source: National Prisoner Statistics, [United States], 1978–2018 (ICPSR 37639);
 and E. Ann Carson, *Prisoners in 2019* (Washington, DC: Bureau of Justice
 Statistics, 2019).

the United States were placed there twenty to thirty years ago under what at the time were relatively new state or federal life without parole sentencing laws. When sentencing policy hardened, particularly in the 1990s, life without parole laws and populations multiplied (figures 3 and 4). From this perspective, the punitive turn is a plausible basis for the proliferation of this severe punishment.

Another common perspective credits LWOP's rise to modern death penalty politics and related abolition efforts. Support for life without parole among members of the anti-death penalty movement and capital defense bar inspired greater use of the sentence while simultaneously curbing left-wing opposition.¹⁴ In the process, life without parole made possible a sort of capital net widening, expanding the range and number of people sentenced for capital crimes. Death sentences, after peaking in the United States in the mid- to late 1990s, have fallen markedly since the millennium, yet the number of life without parole sentences continues to grow (figures 4 and 5). Over the past decade, US states have abolished the death penalty at a regular clip, and in each instance life without parole has been inserted in its place. Estimates differ on just how much credit LWOP deserves for the death penalty's decline, but there is little question that the abolitionist strategy of touting it as an alternative to capital punishment has worked, at the level of policy and at the level of litigation, to a significant degree.¹⁵

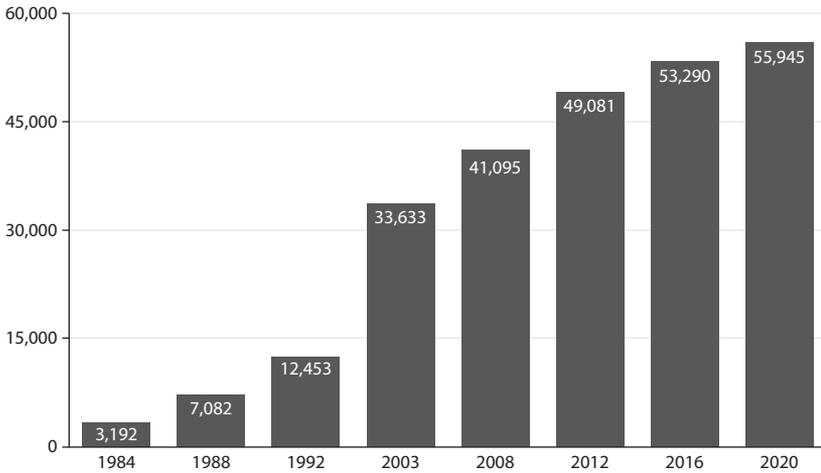


FIGURE 4. Prisoners serving LWOP in US state and federal prisons, 1984–2020. Sources: Donald Macdonald and Leonard Morgenbesser, *Life without Parole Statutes in the United States* (Albany: New York State Department of Correctional Services, Division of Program Planning Research and Evaluation, 1984); Emily Herrick, “Survey: Lifers, Part I,” *Corrections Compendium* (April 1988): 10–11; Kathleen Maguire, Ann L. Pastore, and Timothy J. Flanagan, *Sourcebook of Criminal Justice Statistics* (Washington, DC: Bureau of Justice Statistics, 1992); Marc Mauer and Malcolm Young, *The Meaning of Life: Long Prison Sentences in Context* (Washington, DC: The Sentencing Project, 2004); Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America* (Washington, DC: The Sentencing Project, 2009); Ashley Nellis, *Life Goes On: The Historic Rise of Life Sentences in America* (Washington, DC: The Sentencing Project, 2013); Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences* (Washington, DC: The Sentencing Project, 2017); and Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment* (Washington, DC: The Sentencing Project, 2021).

Flanked by mass incarceration on one side and the modern death penalty on the other, one might see life without parole from a distance as a confluence of these two streams, with punitive sentencing trends and opposition to capital punishment funneling together to drive its growth. Given the recent decline in death sentences and the resonance between death-in-prison sentencing and populist calls to “lock ‘em up and throw away the key,” each of the narratives may have a compelling ring and an intuitive appeal. With death penalty politics on the one hand and the policies that generated mass incarceration on the other, we seem to have the life without parole explosion of the late twentieth century covered.

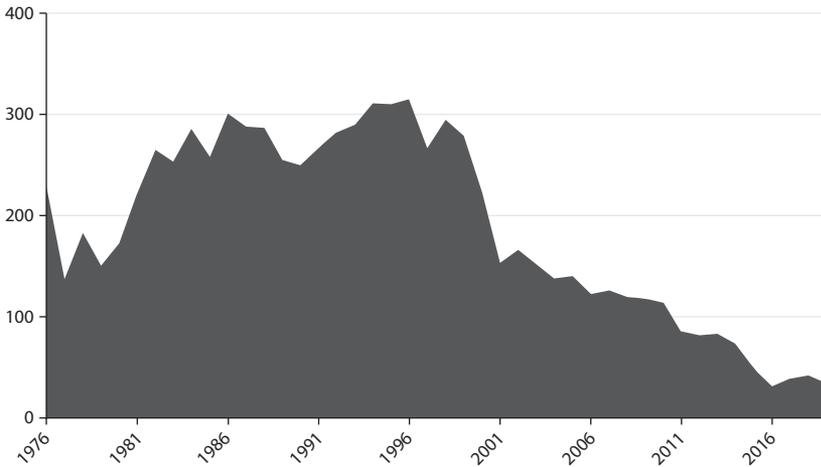


FIGURE 5. New death sentences in the United States, 1976–2019. *Source:* Death Penalty Information Center, 2020, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report>.

There is, however, more to say. This book argues that the rise of life without parole in the last quarter of the twentieth century is not simply a matter of growth; it is also a phenomenon of change—in definition, in practice, and in meaning. As existing literature concentrates on LWOP’s increased use in recent decades, change in the punishment itself has been underplayed, if not overlooked. LWOP is usually seen as a punishment that long existed and was simply revived. Yet for most of the twentieth century, as early chapters of this book emphasize, life without parole sentences carried with them a reasonable possibility of release. The way in which LWOP is practiced and commonly understood today—that is, as a perpetual prison term—is a result of processes that occurred over years and were produced by many lines of descent. Accordingly, when we focus on LWOP’s expansion in tough-on-crime policy, which swelled in the mid-1990s, or point to LWOP’s advance as a death penalty alternative, which occurred principally from the early 1990s onward, we are witnessing a variety of actors picking up and putting to use what was then a newfangled punishment, only just readily at hand.

This shift of frame—to see that life without parole is an old punishment with new practices and new meanings—is important because it reveals life without parole to be a penal form that, more than proliferating, has transformed. Shifting the frame is also important because, with such a

transformation in mind, one can better recognize that the rise of life without parole relates to something broader: an increase in, or better, a routinization of, imprisonment until death. With LWOP as a pallbearer, the enterprise of imprisoning until death has become a standard and widely accepted way of dealing with people who are convicted of serious and violent crimes. This too is quite remarkable from a historical perspective. The following statement, made in the 1860s by sentencing reformers Enoch Wines and Theodore Dwight, may appear to a reader in the contemporary United States both curious and foreign: "It is always tacitly assumed that imprisonment must not be perpetual, but whether that assumption is founded on any reason supposed to arise out of the nature of things, or whether it only rests on the present state of public feeling, I know not."¹⁶

As the opening chapters of this book discuss, putting people in prison forever was once a practice and an idea that met with hesitance, if not resistance, in the penal field. Today, however, vast numbers of people in the United States are imprisoned until they die without any reasonable opportunity for review. Alongside life without parole are other forms of imprisonment until death: extremely long sentences that outlast life spans and parole-eligible sentences under which prisoners are consistently denied release.¹⁷ Driven in part by the growth of *all* of these forms, the number of people imprisoned until death in US penal systems has dramatically increased, as has the number of elderly dying in US state and federal prisons.¹⁸ So the phenomenon in question is not simply LWOP; it begins with LWOP but encompasses new ways of thinking about and practicing death in prison in many forms.

There is an affinity between mass imprisonment and death by prison, to be sure. But the latter is also distinct, as it concerns a specific disregard for the indignity of dying in confinement. This insight is important. It helps us understand, indeed it is essential for understanding, why, even as political will and public opinion unite in efforts to dismantle the infrastructure of mass incarceration, LWOP sentencing nevertheless continues to grow. Putting many people in prison is one thing; putting many people in prison until death is yet another. As this book sets out, the rise of perpetual confinement has corresponded with mass incarceration, but it has its own trajectory, its own specific conditions of possibility—and recognizing this matters when it comes to understanding why much of the hard-end penal philosophy and infrastructure of the late twentieth century remains, even as low-level reform and downsizing take place.¹⁹

Fewer than fifty years ago, imprisonment until death (i.e., perpetual confinement) was an exceptional outcome; today, it accounts for an increasing number of prison sentences in the United States. As life without parole has

become perpetual confinement, perpetual confinement has become accepted as an ordinary thing to do; the contemporary transformation of LWOP is simultaneously the history of the rise of a penal system and a penalty that uncritically accepts imprisonment until death. The question must be asked: *What accounts for the shifts in penal practices and the social imagination whereby the United States has become accustomed to imprisoning individuals until death, without reevaluation, and without any reasonable expectation of release?*

THE EMERGENCE OF LWOP

This book offers a critical inspection of contemporary American punishment by focusing on one of its singular features: the routine use of life imprisonment without the possibility of parole as a form of perpetual confinement. Drawing on extensive archival research, an original national survey of legislation authorizing life without parole, and a comprehensive review of primary and secondary historical source material on US punishment, the study spans US history with life sentencing from past to present but concentrates on a period of years from the early 1970s through the mid-1990s. This period precedes the prime era of mass incarceration policy and, as the book shows, it also predates the national death penalty abolition movement's full turn to LWOP as an alternative to capital punishment. Yet the period comprises formative years, during which the current sanction, practice, and concept of LWOP took shape.

The book's long historical perspective and detailed inspection of state-level and institutional-level processes break new ground in several ways important for making sense of life without parole sentencing. Taking a long historical view helps to reveal that a life without parole sentence now means something different than it once did: it is no longer a punishment, as it was for the first two-thirds of the twentieth century, from which release is reasonably possible. To mark this distinction throughout the book, I refer to the life without parole sentence as we know it today as "LWOP" and use the acronym only for that purpose. Historical perspective also helps show that with LWOP has come a new orientation toward perpetual confinement: the stance that imprisoning people until they die is generally appropriate for those who have committed violent and serious crimes was not entrenched in US penalty in earlier decades, but it is today. Relatedly, the book articulates an affinity *as well as* a distinction between a tough-on-crime ethos and the practice of perpetual confinement. The distinction is significant because in contemporary US penal policy, even as states seek to cut back on mass

incarceration's excesses by reducing prison time for low-level offenses, death-in-prison sentences are nevertheless increasingly used.

This study also has broader implications. For one, it holds importance for understanding processes of institutionalization and, more specifically, change and continuity in penal forms. As we will see, to appreciate the variety with which states use LWOP, one must look to proximate causes. But in addition, to grasp the unique attachment of the United States to LWOP one must also look beneath proximate causes to the frameworks of practice and understanding that serve as a background. The idea that much of what people do is organized and framed by background-level matters that they take for granted is now customary in the social sciences. The basic point—that much of what we do is habitual, and that habits and beliefs may not be questioned until the correspondence between experience and the “background” falls away or out of synch—has been understood and re-understood, stated and restated, for generations.²⁰ The point may seem rather abstract for a study about sentencing. Yet one of this book's arguments is that understanding how US society has come to accept life without parole as perpetual confinement, and perpetual confinement as routine, requires it. A lesson from the history of life without parole, for studies of law and punishment in particular, is to give attention to the background and to how ways of doing things and thinking about things, practices and understandings, are enabled and disabled. Beyond the greater empirical foundation this history provides, it highlights processes by which new ways of practice and of thinking arise from (and solidify in) their contexts.

A second theme is spun from the first. The processes of gradual institutional change that led to the routinization of perpetual confinement have ramifications for understanding LWOP's character as well as the character of punitive laws, policies, and practices more generally. In this investigation, punitiveness, now such a clear characteristic of acts and practices associated with LWOP, is not always a predominant trait. Rather, one often finds a lack of attention, an acceptance, a sidestepping of responsibility. In confronting the emergence of perpetual confinement in American punishment, one must confront not only punitiveness but disregard.

Disregard, a lack of attention or care, is no stranger to discussions of punishment or the prison and is central to analyses of racism and the intersections between race and punishment in the United States; indeed, the natural life sentence has been said to exemplify a disrespect for human dignity that defines American punishment.²¹ But more than a way of describing an attitude or an aspect of a societal common sense underlying American punishment, and more than a general strategy of denial or ignorance,²²