

3-1990

Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?

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Recommended Citation

Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 *Vanderbilt Law Review* 529 (1990)
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Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?

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“We die and we live, and nothing destroys us but time.”
The Koran, Chap. 45:24

“I have set before you life and death, blessing and curse: therefore choose life”
Deuteronomy 31:19

I. INTRODUCTION

In 1980 Harlin Philip Seritt, Jr. received a sentence of life-without-parole from the state of Alabama.¹ After serving less than two years of a sentence intended to incarcerate Seritt for the rest of his natural life, he commented that “I’m not going to sit in here twenty or thirty years. I’d just as soon be dead . . . I’d make them shoot me off the fence.”² As of March 1989 Seritt remained in Alabama’s Holman Prison, still serving time without having attempted an escape.³ For Seritt, life-without-parole means a life of drudgery behind bars, made both secure and dangerous by the knowledge that he has little left to lose.

In 1960 Raymond Eugene Brown killed three of his female relatives. At a time when the only penalty options for a murderer in Alabama were a regular life sentence and death, the jury sentenced the first-time, fourteen-year old offender to three life terms.⁴ Consistent with Alabama’s parole statutes, Brown became eligible for parole in 1971 and received it in 1973.⁵ Alabama revoked his parole between 1980

1. See *Seritt v. State*, 401 So. 2d 248 (Ala. Crim. App. 1981). Seritt was sentenced under Alabama’s Habitual Offender Act, ALA. CODE § 13A-5-9 (1975), and not as a capital murderer. While this Note will emphasize life-without-parole as a punishment for murder and not for habitual criminals, Seritt remains a good example of an inmate facing a “natural life” term behind bars.

2. Stewart & Lieberman, *What Is This New Sentence That Takes Away Parole?*, 11 STUDENT LAW. 14, 15 (1982).

3. Interview with Ed Carnes, Assistant Attorney General, State of Alabama (Mar. 7, 1989) [hereinafter Carnes Interview]. For additional information on Seritt, see *Seritt v. Alabama*, 731 F.2d 728 (11th Cir.) (upholding the constitutionality of Alabama’s habitual offender law mandating life-without-parole for a trigger offense), *cert. denied*, 469 U.S. 1062 (1984); Brown, *They’re Serving Life-Without-Parole: Is Punishment Too Cruel for Crimes?*, Birmingham News, Dec. 27, 1981, at 1, col. 1.

4. Foss, *Barfoot: Rules Should Prevent Another Brown*, Montgomery Advertiser, Apr. 4, 1988, at 1A, col. 1.

5. See ALA. CODE § 15-22-28(e) (1975). All Alabama inmates except those serving a life-without-parole term are eligible for parole by a majority vote of the Parole Board after serving one-third or 10 years of their sentences, whichever is less, or by a unanimous vote of the Board at any time. *Id.*

and 1986 because Brown assaulted his landlady, but this "walking time bomb," who had attacked four women without provocation and murdered three, was released again in 1986.⁶ In 1988 Alabama convicted Brown of the brutal stabbing murders of a woman and her nine-year old daughter and sentenced him to die.⁷ He joins Seritt at Holman Prison, but he is on Alabama's death row.⁸

In Brown's case the life-without-parole sanction might have saved three lives. If Brown had been sentenced to life-without-parole in 1960, his two 1988 victims likely would be alive, and Brown would not be facing death or the long, tedious, and expensive process of appealing his impending execution through the state and federal courts during his years on death row.⁹ Neither Seritt nor Brown have particularly attractive futures, but at least Seritt's punishment is sure and its cost is not measured in terms of others' lives. The two cases are not atypical of the present capital sentencing situation in the United States.

The 1972 Supreme Court in *Furman v. Georgia*¹⁰ inaugurated a new era of capital sentencing and punishment in the United States.¹¹ By determining that Georgia's imposition of the death penalty was cruel and unusual because of its capriciousness, the Court left the federal and state governments with three options for punishing especially heinous offenders, particularly murderers.¹² First, legislatures could revise capital sentencing statutes to eliminate capriciousness by enacting procedural safeguards that would enable the laws to pass constitutional muster.¹³ Second, criminal courts could fall back on standard life sentences, although the ready availability of parole made this alternative unattractive when perpetrators of especially diabolical crimes

6. Foss, *supra* note 4, at 2A, col. 1.

7. *Id.* at 1A, col. 1.

8. Carnes Interview, *supra* note 3.

9. For an understanding of the long judicial process that awaits new arrivals on any death row, see generally W. WHITE, *LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES* (1984); Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1672-79 (1986); Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1038-40 (1989).

10. 408 U.S. 238 (1972).

11. For a discussion of this modern era's parameters, see W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 5-18 (1987).

12. For an analysis of the precise finding in *Furman*, see Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 314-17.

13. Seventeen years after *Furman*, the federal government and 36 states have adopted this alternative. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CAPITAL PUNISHMENT 1988*, at 4 (1989). The Court sanctioned this approach with its rulings in *Gregg v. Georgia*, 428 U.S. 153 (1976) and its companions: *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). For an example of a statute that uses procedural safeguards such as a bifurcated trial and a specific listing of aggravating and mitigating circumstances, see TENN. CODE ANN. § 39-2-203 (1982).

needed punishment.¹⁴ Third, governments could devise another punishment alternative.

This Note will discuss the relatively recent development and current prevalence of one alternative: the life sentence without benefit of parole, commonly called life-without-parole (LWOP). Life-without-parole is the penultimate penalty, meaning in theory the incarceration of convicts for their natural lives without the possibility of release on parole. In practice, LWOP generally means what it says, although various states do retain some release mechanisms for LWOP inmates, like executive commutation or a set term of years. The idea of jailing individuals for the rest of their lives is at least as old in the Western legal tradition as the Tower of London or the Bastille. In the United States, however, such a penalty historically has not been particularly popular. The constitutional system of government in the United States never has allowed persons to be summarily locked away. The American concept of prisons traditionally has been that they exist for rehabilitation and release as much as for incarceration.¹⁵

In the post-*Furman* era, however, many states specifically have enacted life-without-parole punishments to address the problem of especially dangerous criminals. In many states repeatedly convicted habitual offenders ultimately receive LWOP sentences.¹⁶ A growing number of states and the federal government apply LWOP against drug kingpins and persons trafficking in large amounts of narcotics.¹⁷ The

14. See, e.g., H. BEDAU, *THE DEATH PENALTY IN AMERICA 173-74* (3d ed. 1982). For an especially pointed attack on the abuses of parole that champions life-without-parole, see Brill, *Throw Away the Key*, AM. LAW., July-Aug. 1987, at 3.

15. The idea that prisons exist to rehabilitate prisoners dates back to the Quakers and the first American prisons trying to restore "our fellow creatures to virtue and happiness." Alexis de Tocqueville also observed and recorded this trait of American prisons. See A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1st ed. 1835); Kroll, *The Prison Experiment: A Circular History*, S. EXPOSURE, Winter 1978, at 6. See generally Andersen, *What Are Prisons for?*, TIME, Sept. 13, 1982, at 38.

16. Cheatwood, *The Life-Without-Parole Sanction: Its Current Status and a Research Agenda*, 42 CRIME & DELINQ. 43, 45, 48 (1988). According to Professor Derral Cheatwood, 14 states currently have some sort of career criminal or habitual offender statute that uses life-without-parole as its most severe penalty. *Id.* at 48. Some of these states also use LWOP in capital offender statutes. Tennessee should be a fifteenth state on this list as its habitual offender statute potentially provides for LWOP, see TENN. CODE ANN. § 39-1-806 (1982), however, a federal court order to diminish overcrowding currently mandates that all Tennessee inmates are eligible for parole regardless of sentence.

17. See, e.g., ALA. CODE § 13A-12-231 (Supp. 1989). Alabama enforces the law. See Foss, *Drug Dealer Faces Life in Prison Without Parole*, Montgomery Advertiser, Sept. 1, 1988, at 1, col. 1. The federal government also uses life-without-parole in its drug enforcement laws. See, e.g., 21 U.S.C. § 848 (1982). Specifically, the statute calls for "continuing criminal enterprise" in narcotics to be punished with a term of imprisonment up to life and that "probation shall not be granted," and parole laws shall not be applied. *Id.* § 848(c); see *United States v. McCann*, 835 F.2d 1184 (6th Cir. 1987) (holding that a life sentence without possibility of parole imposed upon a defendant

largest number of states, however, utilize life-without-parole for capital or first degree murderers as an alternative to capital punishment within a sentencing scheme or as the death penalty's complete replacement.¹⁸

Even though capital punishment has recovered politically since *Furman*, life-without-parole continues to emerge as a legitimate alternative to capital punishment embraced by either end of the political spectrum. Even those who favor the death penalty may accept life-without-parole as a means to keep dangerous criminals behind bars.¹⁹ These proponents of the death penalty, incited by cases like Alabama's Raymond Brown, would favor LWOP over regular life sentences that provide parole eligibility. Those who oppose the death penalty, however, may perceive life-without-parole as harsh or as an invitation to turmoil by packing felons into crowded prisons without a ready release mechanism, but this view still may acknowledge the sentence as preferable to capital punishment.²⁰

Despite its popularity, much is unknown about LWOP's ultimate effects. What will happen when LWOP inmates age in America's prisons and need expensive health care? Will the sanction eventually produce "super inmates" who respect no authority in or out of prison? Alternatively, might the penalty merely fulfill its design to punish murderers and permanently protect society from further violence without a further taking of human life?

This Note begins to analyze these questions by examining the use of LWOP in capital offender or murder statutes in the United States.²¹ To display LWOP's growing prevalence in the post-*Furman* era, Part II traces LWOP's development through the federal and state courts since 1974. Part III presents the tremendously different approaches that states take in implementing LWOP. Part IV focuses on the specific approaches taken by Alabama and Kentucky. Part V discusses some specific advantages and disadvantages of LWOP and investigates LWOP's

convicted under federal law for conducting a continuing criminal enterprise in narcotics was not cruel or unusual); see also *Young v. Miller*, 883 F.2d 1276 (6th Cir. 1989) (holding that a life-without-parole sentence for a first offender of Michigan's stringent drug laws was not cruel or unusual).

18. As of March 1990, 30 states have some sort of life-without-parole as a possible punishment for murder. See *infra* notes 66-125 and accompanying text.

19. Stewart & Lieberman, *supra* note 2, at 16. Assistant Alabama Attorney General Ed Carnes reiterated in 1989 the views he expressed in this article. Carnes Interview, *supra* note 3.

20. See Lieberman & Stewart, *Life Without Parole Successful in 19 Other States*, Atlanta Const., Feb. 15, 1982, at 7A, col. 7 (quoting Mr. Laughlin McDonald, Director, Southeastern Regional Office, American Civil Liberties Union); see also Medland & Fischer, *Life Without Parole Offered As Alternative to Death Penalty*, CRIM. JUST. NEWSL., Jan. 16, 1990, at 4-5.

21. While discussion of the other uses of LWOP, such as for habitual offenders or drug traffickers, may enter tangentially into this Note especially in Part II, this Note's primary focus is LWOP in capital murder statutes.

future implications for American penal systems. Part VI weighs the positive and negative elements of LWOP and some of its specific applications. Additionally, Part VI attempts to provide guidance both to states that already use LWOP and wish to promote its continued success, and to states like Tennessee²² that do not have LWOP but may consider adopting the sanction.

II. THE DEVELOPMENT OF PRECEDENT FOR LIFE-WITHOUT-PAROLE

A. *Constitutionality in Federal Courts*

The idea of punishing certain murderers with imprisonment for their natural lives is hardly new. Prior to 1974, however, little evidence documented its widespread use.²³ With the apparent need to develop alternatives to the death penalty after *Furman*, life-without-parole received increased attention from lawmakers and judges. The Supreme Court sanctioned this interest in the 1974 case of *Schick v. Reed*.²⁴

1. *Schick v. Reed*

In *Schick* a former Army master sergeant originally had been sentenced to die for killing an eight-year old girl.²⁵ President Dwight D. Eisenhower commuted the sentence in 1960 to life imprisonment, attaching the condition that Schick would never be eligible for parole.²⁶ Schick brought suit in 1971 in the United States District Court for the District of Columbia to require the United States Board of Parole to consider him for parole despite President Eisenhower's attached condition to Schick's sentence. Schick argued that President Eisenhower had

22. The original impetus for this Note came from Professor Donald J. Hall of the Vanderbilt University School of Law, a member of the Tennessee Sentencing Commission. Professor Hall and several state legislators in Nashville have stated that Tennessee may consider adding LWOP to its capital offender statute in the future. See TENN. CODE ANN. § 39-2-203 (1982).

23. New York, for example, had a natural life sentencing provision prior to 1960, but in keeping with the national trend shifted to an indeterminate sentencing scheme in 1960 that provided regular life as the maximum penalty for murder. N.Y. DEP'T OF CORRECTIONAL SERVS., LIFE WITHOUT PAROLE STATUTES IN THE UNITED STATES 1-2 (1984) (available now from the NAACP Legal Defense Fund and on file with the Author). Currently, New York has neither life-without-parole nor the death penalty for murderers. N.Y. PENAL LAW § 70.00 (McKinney 1987). New York designates both first and second degree murder as class A-1 felonies and punishes them with mandatory indeterminate sentences ranging from 15 to 25 years to regular life. An inmate serving such an indeterminate sentence must serve the minimum sentence, up to 25 years, before being eligible for parole. *Id.* § 70.40(1)(a).

For examples of older cases involving life-without-parole as a punishment for murder, see *Green v. Teets*, 244 F.2d 401 (9th Cir. 1957); *United States v. Ragen*, 146 F.2d 349 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945); and *State v. Dehler*, 257 Minn. 549, 102 N.W.2d 696 (1960).

24. 419 U.S. 256 (1974).

25. *Id.* at 257.

26. *Id.* at 257-58. The President's constitutional authority to pardon persons for crimes includes the power to commute sentences. See U.S. CONST. art. II, § 2, cl. 1.

exceeded his article II commutation powers in attaching the stipulation, and in the alternative, that *Furman* rendered Schick's original sentence void and the harshest sentence that could have been applied to him was a life sentence that provided for the possibility of parole.²⁷

The majority rejected Schick's claims and affirmed the constitutional power of the Chief Executive to pardon criminals and commute sentences.²⁸ Determinative in the case was the Court's conclusion that the President's powers of pardoning and commutation are derived solely from the Constitution and cannot be diminished, modified, or abridged by statutes or the Court's holding in *Furman*. Schick's sentence of life imprisonment without benefit of parole was given only cursory mention.²⁹

The Court stated that the no-parole condition on the commutation of Schick's death sentence is similar to sanctions such as mandatory minimum sentences or statutes otherwise precluding parole. The Court also stated that this condition does not offend the Constitution.³⁰ With little analysis in a case actually dealing with the scope of the President's power, the Court effectively dismissed any notion that life-without-parole was unconstitutional. Less than two years earlier, all nine Justices had written opinions on whether the death penalty was in any way cruel or unusual, but none seemed to consider that those adjectives might apply to a sentence of life-without-parole.³¹

2. Subsequent Cases

Despite *Schick*'s lack of thorough analysis regarding LWOP, an imposing amount of precedent has developed based upon *Schick*. In 1977 the United States Court of Appeals for the Sixth Circuit quoted *Schick* in *Moore v. Cowan*.³² Relying on language from *Schick*, the Sixth Circuit rejected the argument that life-without-parole constituted cruel and unusual punishment and affirmed the sentence against a rapist, not

27. *Schick*, 419 U.S. at 259. *Furman* was decided during the course of *Schick*'s litigation. Inmates sentenced to death prior to *Furman* who were still alive had their sentences set aside after *Furman* in favor of life sentences that allowed for the possibility of parole. Under such a scheme, Schick would have been eligible for parole in 1969. *Id.* at 258.

28. *Id.* at 266-67.

29. *Id.* at 267.

30. *Id.* Justice Warren Burger did cite several "sanctions imposed by legislatures" that included specific mentions of life-without-parole, including 21 U.S.C. § 848(c) (1982); MASS. GEN. LAWS ANN. ch. 265, § 2 (West 1970); and NEV. REV. STAT. §200.030 (1973). *Id.* at n.7.

31. Even Justice Thurgood Marshall's spirited dissent concentrated only on the issues of whether *Furman* should be applied retroactively and whether the President overstepped his constitutional power in imposing any kind of sentencing condition. *See id.* at 268-80 (Marshall, J., dissenting).

32. 560 F.2d 1298 (6th Cir. 1977), *cert. denied*, 435 U.S. 929 (1978).

a murderer, in Kentucky.³³ The court claimed that it was bound to apply the rationale of *Schick*, but *Schick* hardly provided a deterministic rationale. It provided at best a boilerplate ruling, language easily quoted but supported by little substantive analysis.

In 1979 the Third Circuit again applied *Schick* in *Government of Virgin Islands v. Gereau*.³⁴ A murderer in St. Croix received eight consecutive life terms after conviction for eight separate murders and related crimes.³⁵ The defendant argued that the punishment was cruel and unusual because the sentence's sheer length precluded any opportunity for parole and thus eliminated any incentive for rehabilitation.³⁶ The court rejected this argument and held that *Schick* mandates that a legislature may authorize, and a court may impose, a term of imprisonment that precludes the possibility for parole.³⁷

In 1980 the Eighth Circuit held that Arkansas's imposition of life-without-parole on a convicted rapist was not cruel and unusual in *Britton v. Rogers*.³⁸ The court relied primarily on the Supreme Court's decision in *Rummel v. Estelle*,³⁹ which held that the length of prison sentences generally falls within the states' discretion.⁴⁰ The result remained the same, however, and life-without-parole stood as a permissible punishment for rape in an additional circuit.

Also in 1980 the Ninth Circuit in *United States v. Valenzuela*⁴¹ sanctioned the use of life-without-parole to punish individuals engaged in continuing criminal enterprises in narcotics. The court upheld the sentencing provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 that prohibited probation or parole for anyone sentenced under the Act.⁴² The court quoted from both *Rummel* and *Schick* in categorically rejecting the contention that life-without-parole in any way violated the eighth amendment.⁴³

33. *Id.* at 1303. The court even acknowledged that the precise question raised in *Moore*, whether LWOP is cruel and unusual in violation of the eighth amendment was not addressed in *Schick*, but applied the precedent anyway. *Id.*

34. 592 F.2d 192 (3d Cir. 1979).

35. *Id.* at 192-93.

36. *Id.* at 195.

37. *Id.*

38. 631 F.2d 572 (8th Cir. 1980).

39. 445 U.S. 263 (1980) (upholding a Texas recidivist statute calling for mandatory life imprisonment for all third felony convictions of a person even if the third felony had been obtaining \$120.75 by false pretenses). *Rummel* applied the *Furman* proportionality standard in holding that sentences like LWOP or regular life could not be disproportionate to the crimes being punished, but allowed for several factors to be figured into the proportionality equation. *Id.* at 271-75.

40. *Britton*, 631 F.2d at 578.

41. 646 F.2d 352 (9th Cir. 1980).

42. *Valenzuela*, 646 F.2d at 354; see 21 U.S.C. § 848(c) (1982).

43. *Valenzuela*, 646 F.2d at 354. In this case the defendant had been convicted of nine counts of conspiracy, narcotics, and continuing criminal enterprise. *Id.* at 353. The *Schick* "ration-

United States v. O'Driscoll,⁴⁴ a 1985 case involving a three hundred year sentence with no possibility of parole for ninety-nine years, provided the Tenth Circuit with the opportunity to state definitively the federal courts' support of the constitutionality of life-without-parole penalties. The court cited *Schick* and *Gereau* in upholding the sentence imposed on a notorious kidnapper, but went further in proclaiming that retribution and rehabilitation are equally permissible goals of incarceration.⁴⁵ While acknowledging that sentences could not be disproportionate to the severity of the crime, the court maintained that a severe penalty is permissible to account for the "vicious propensities of the defendant and his lack of . . . respect for human life."⁴⁶ By definition murderers show a lack of respect for human life, and the federal courts never seem to have questioned that life-without-parole penalties constitutionally may be imposed against them.

This acceptance of life-without-parole's fundamental constitutionality has spawned a variety of other constitutional issues, including proper jury instructions for sentencing murderers to life-without-parole⁴⁷ and how best to punish inmates who murder again while serving a

ale" emerged again in 1981 when a district court held that the imposition of five consecutive life sentences did not constitute cruel and unusual punishment. See *Dean v. Israel*, 516 F. Supp. 477 (E.D. Wis. 1981). *Dean* had been convicted of five counts of first degree murder, and on appeal, specifically argued that his sentence precluded him from parole eligibility for a period in excess of 50 years, almost certainly the extent of his natural life, and as such was cruel and unusual. *Id.* at 492-93. The court rejected the argument, again quoting the specific "does not offend the Constitution" language of *Schick* and offering no additional analysis. *Id.* at 493. In a string cite that included *Moore*, *Gereau*, and *Rummel* the court referred to *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), in which specific standards for proportionality were outlined, but the court did not explain how the test applied in the instant case. See *Dean*, 516 F. Supp. at 493; see also *Carmona*, 576 F.2d at 414.

44. 761 F.2d 589 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

45. *Id.* at 599. The court considered O'Driscoll to be a particularly vile criminal based on his long record of violent crime and the heinousness of the instant offense. *Id.* at 591-94; see *Atiyeh v. Capps*, 449 U.S. 1312 (Relinquist, Circuit Justice 1981) (holding that incarceration can be used purely for reasons of retribution).

46. *O'Driscoll*, 761 F.2d at 600. But see *United States v. Fountain*, 840 F.2d 509 (7th Cir. 1988) (refusing to allow a district court to postpone eligibility for parole beyond the statutorily provided 10 years in a murder case).

47. See *California v. Ramos*, 463 U.S. 992 (1983) (holding that a trial judge may inform a jury that a sentence of life imprisonment without the possibility of parole may be commuted by the governor to a sentence that includes the possibility of parole; the so-called "Briggs Instruction" in California). For more on governors' abilities to commute life-without-parole sentences, see *infra* note 141 and accompanying text; and Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29 CRIME & DELINQ. 593 (1983).

The Illinois Supreme Court has ruled that the Illinois pattern instructions to a death qualified jury must state that in the alternative to the death penalty (1) a natural life sentence will be imposed, (2) natural life does not allow for parole except in cases of executive clemency, and (3) such clemency is possible. See *People v. Gacho*, 122 Ill. 2d 221, 262, 522 N.E.2d 1146, 1165-66 (1988).

The entire issue of how much death qualified jurors should be allowed or expected to know

life-without-parole sentence.⁴⁸ More precise understandings of proportionality also are being defined, but this issue applies more to habitual offender statutes than to capital murder statutes.⁴⁹ Underlying all of this judicial discussion, however, is the basic judgment reached so quickly in *Schick* that life-without-parole sentences are not unconstitutional. At the federal level, this issue may never have been argued thoroughly, but it has been decided definitively.

B. Application in State Courts

State courts readily apply life-without-parole sentences, particularly in murder cases, and often provide the kind of detailed analysis lacking in the federal cases. In 1977, for example, the Arkansas Supreme Court upheld a trial judge's reduction of a penalty of death to life imprisonment without parole in *Collins v. State*.⁵⁰ The Arkansas Supreme Court noted that the constitutional ban on cruel and unusual punishment applies against a punishment's character and not its duration.⁵¹

The New Hampshire Supreme Court provided an excellent analysis on the constitutionality and application of life-without-parole in *State v. Farrow*.⁵² The two defendants stabbed to death a mentally handicapped victim and were sentenced to life-without-parole.⁵³ On appeal the defendants argued that the punishment was cruel and unusual both as disproportionate to the crime and as not comporting with basic concepts of human dignity.⁵⁴ The court rejected both arguments, the first

about parole is unsettled. *See, e.g., King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988) (en banc), *rev'g* 828 F.2d 257 (5th Cir. 1987). This issue is of special concern to convicted murderers sitting before jurors whose uncertainty about a state's parole laws may lead them to impose death rather than run the risk that the murderer will one day be released from prison. *See Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987). This specific issue has been raised in Tennessee. *See State v. Johnson*, 698 S.W.2d 631 (Tenn. 1985) (holding that a trial court need not explain parole laws in response to a death qualified juror's question).

48. *See Sumner v. Shuman*, 483 U.S. 66 (1987) (holding that a mandatory death sentence for an inmate already serving life-without-parole who killed another inmate was unconstitutional).

49. *See, e.g., Solem v. Helm*, 463 U.S. 277 (1983) (holding unconstitutional as disproportionate a life-without-parole sentence for a habitual offender convicted of uttering a "no account" check for \$100). *But see State v. Davis*, 310 Md. 611, 530 A.2d 1223 (1987) (holding that a life-without-parole sentence for a habitual offender convicted of housebreaking was constitutionally proportionate).

50. 261 Ark. 195, 548 S.W.2d 106 (1977). In Arkansas a trial judge may reduce punishments to lower degrees of homicide in capital cases when evidence is insufficient to support a higher degree of homicide.

51. *Id.* at 213-14, 548 S.W.2d at 117. The court mentioned *Schick* only at the very end of the case. *Id.* at 222, 548 S.W.2d at 121.

52. 118 N.H. 296, 386 A.2d 808 (1978).

53. *Id.* at 299-300, 386 A.2d at 810.

54. *Id.* at 302-04, 386 A.2d at 812-13.

because LWOP met the "acceptable according to contemporary standards" standard of *Gregg v. Georgia*.⁵⁵

The second argument failed because the court did not accept the defendants' contentions that LWOP made the defendants "caged animals," subject to "ultimate degradation unsurpassed in enormity."⁵⁶ Rather, the court maintained that the penalty allowed the defendants to seek educational and vocational training within prison and held out the hope that good behavior ultimately would result in an executive pardon or commutation.⁵⁷ However bleak the future of an inmate sentenced to life-without-parole may be, it is arguably superior to that of an inmate on death row and may better comport with basic concepts of human dignity than capital punishment.

For the past eleven years, the arguments developed in *Farrow* generally have been accepted. In *Bangert v. State*,⁵⁸ for example, the Minnesota Supreme Court held that multiple consecutive life sentences could be no more harsh than a life-without-parole sentence and stated that because LWOP was constitutional, so was the defendant's specific sentence. The court stressed that such sentences serve the valid legislative purpose of protecting the public.⁵⁹

When applying the Illinois "natural life imprisonment" sentence, Illinois courts also have stressed the state's prerogative to consider an accused's rehabilitative potential.⁶⁰ Aggravating and mitigating circumstances such as the accused's criminal record, state of mental health, habits, demeanor, and age, as well as the specific details of the instant crime must be considered by a sentencing authority, but when these factors are weighed properly within the bounds of reason, life-without-parole sentences are routinely upheld.⁶¹ The Illinois courts also specifically consider that executive clemency may be invoked on behalf of an inmate serving a natural life sentence, but this possibility is never an adequate substitute for a sentencing judge's thoughtful consideration of

55. *Id.* at 302, 386 A.2d at 812; see *Gregg v. Georgia*, 428 U.S. 153, 182 (1976). The New Hampshire court also rejected the notion that parole was any sort of substantive due process right under the Constitution. See *Farrow*, 118 N.H. at 301-02, 386 A.2d at 811-12; see also Note, *Parole Rescission: Is Parole a Constitutionally Protectable Expectation of an Inmate?*, 5 GEO. MASON U.L. REV. 303 (1982).

56. *Farrow*, 118 N.H. at 303, 386 A.2d at 812-13.

57. *Id.* at 304, 386 A.2d at 813.

58. 282 N.W.2d 540, 546 (Minn. 1979).

59. *Id.*

60. See *People v. Smith*, 91 Ill. App. 3d 438, 449, 414 N.E.2d 1281, 1291-92 (1980), *rev'd*, 93 Ill. 2d 179, 442 N.E.2d 1325 (1982).

61. See *People v. Withers*, 115 Ill. App. 3d 1077, 1088-91, 450 N.E.2d 1323, 1331-33 (1983) (upholding a life-without-parole sentence). *But see People v. Taylor*, 115 Ill. App. 3d 621, 624-27, 630, 450 N.E.2d 1256, 1258-60, 1263 (1983) (remanding a case when a sentencing judge had not properly weighed factors), *modified*, 102 Ill. 2d 201, 464 N.E.2d 1059 (Ct. App. 1984).

a defendant's rehabilitative potential.⁶²

Missouri adopts the *Farrow* rationale in its entirety. In *State v. Olinghouse*⁶³ the Missouri Supreme Court rejected a defendant's argument that a life sentence without possibility of parole for fifty years was cruel and unusual punishment by quoting at length from *Farrow*.⁶⁴ The state's interest in protecting its citizens, the legislature's authority to determine that certain heinous crimes merit life-without-parole, and the opportunity for convicted murderers to reform themselves in prison and still be released through commutation or pardon swayed the court to enforce life-without-parole as a constitutional alternative to capital punishment.

While these cases do not exhaust the various findings of state courts on life-without-parole,⁶⁵ they are representative of state court approaches for judicially justifying and sanctioning life-without-parole sentences as an alternative to the death penalty. The cases discussed, however, do not suggest the multiple ways that states implement or use the life-without-parole alternative. For an understanding of this complex topic, a complete survey and categorization of the states' alternatives is necessary.

III. DIFFERING VERSIONS OF LIFE-WITHOUT-PAROLE AND THEIR USE BY THE STATES

At least thirty states use life-without-parole in some form as the actual or possible sentence for convictions of the type of murder that each state deems most serious.⁶⁶ None of these states, however, use life-without-parole in exactly the same form. For purposes of comparison, the different types of life-without-parole used by the states can be placed in six categories, each of which will be examined in turn: (1) a triple tiered approach in which a murderer may be sentenced to death, LWOP, or regular life;⁶⁷ (2) a triple tiered approach in which the op-

62. See *Withers*, 115 Ill. App. 3d at 1088-90, 450 N.E.2d at 1331-32; *Taylor*, 115 Ill. App. 3d at 627-28, 450 N.E.2d at 1261.

63. 605 S.W.2d 58 (Mo. 1980) (en banc) (upholding a sentence of life imprisonment without possibility of parole for a capital murderer).

64. See *id.* at 63-65.

65. For further examples of state cases dealing with life-without-parole, see *State v. Parle*, 110 Ariz. 517, 521 P.2d 604, cert. denied, 419 U.S. 1003 (1974); *Duhart v. State*, 237 Ga. 426, 228 S.E.2d 822 (1976); *People v. Hall*, 396 Mich. 650, 242 N.W.2d 377 (1976); and *State v. Forrester*, 21 Wash. App. 855, 587 P.2d 179 (1978).

66. For example, Maryland may impose LWOP for what it classifies as first degree murder. See MD. ANN. CODE art. 27, § 412 (1987). Washington can impose the penalty for aggravated first degree murder. See WASH. REV. CODE ANN. § 10.95.030 (Supp. 1989). Arkansas imposes the penalty for persons convicted of what it calls capital murder. See ARK. STAT. ANN. § 5-4-602 (1987). All are different names for essentially the same offense.

67. See *infra* notes 73-81 and accompanying text.

tions are death, LWOP for a set minimum of years, or regular life;⁶⁸ (3) a double tiered approach in which the options are death or LWOP;⁶⁹ (4) a double tiered approach in which the options are death or LWOP for a term of years;⁷⁰ (5) a double tiered approach in which the sentencer may choose only between LWOP or regular life;⁷¹ and (6) a single tiered approach in which LWOP is the only available sentence.⁷²

A. Triple Tiered Approach

Only five states utilize the triple tiered approach in any form, and most of these only recently have adopted life-without-parole statutes for murderers. Maryland provides perhaps the best example of this approach, specifying that a person convicted of murder in the first degree "shall be sentenced to death, imprisonment for life, or imprisonment for life without the possibility of parole."⁷³ Depending upon the circumstances of the trial, a jury or a judge determines the sentence in the second stage of a bifurcated proceeding.⁷⁴ The sentencer weighs aggravating and mitigating circumstances, considers the notice the prosecution gave about the sentence being sought, and sentences the defendant.⁷⁵ The current Maryland system has been in place only since 1987.

The Oklahoma statute mirrors Maryland's in intent and practice, but has been in effect only since 1988.⁷⁶ Montana effectively uses a triple tiered approach because of a provision that allows a sentencing court to deny a defendant eligibility for parole while serving any sentence for a term of more than one year.⁷⁷ This denial applies to all sentences for murder if the court does not choose the death penalty. Nevada's approach is similar to Montana's in that a sentencing body may impose life imprisonment or capital punishment for first degree murder, and can specify whether imprisonment is with or without the possibility of parole.⁷⁸

The State of Washington also uses a type of triple tiered sentencing scheme. First degree murder in Washington is punishable by a regu-

68. See *infra* notes 82-84 and accompanying text.

69. See *infra* notes 85-105 and accompanying text.

70. See *infra* notes 106-16 and accompanying text.

71. See *infra* notes 117-20 and accompanying text.

72. See *infra* notes 121-25 and accompanying text.

73. MD. ANN. CODE art. 27, § 412(b) (1987).

74. *Id.* § 413(b).

75. *Id.* § 413(h), (k).

76. See OKLA. STAT. tit. 21, § 701.9(A) (Supp. 1988). *But see* *Costa v. State*, 753 P.2d 393 (Okla. Crim. App. 1988).

77. MONT. CODE ANN. § 46-18-202(2) (1989); *see also id.* § 46-23-201(1).

78. NEV. REV. STAT. § 175.554(4) (1984).

lar life sentence,⁷⁹ but the presence of aggravating circumstances will enable a jury to impose life imprisonment without possibility of parole.⁸⁰ Further, a defendant may face a third type of sentence if the prosecution files a timely motion for a special sentencing proceeding. This special proceeding may warrant the imposition of the death penalty if sufficient aggravating circumstances exist.⁸¹ In all five states the possibility exists that a person accused of murder may go to trial and still receive any one of three possible sentences.

B. Triple Tiered Approach with a Set Minimum of Years

A life-without-parole sentence that provides for a set minimum of years seems to be a contradiction in terms. The sentence is designed, however, to ensure that a defendant will remain in prison for a lengthy term of years (usually at least twenty), during which time the defendant is not eligible for parole. After completing the minimum term of years, normal parole eligibility resumes. Unlike a regular life sentence, the sentence provides incarceration for murder for a guaranteed amount of time that is generally much longer than what the criminal would serve under a regular life sentence with the state's normal parole scheme. A variety of states use this alternative in sentencing murderers,⁸² but only Kentucky uses it in a triple tiered approach.

In Kentucky if a jury finds a defendant guilty of a capital offense, the jury after a presentencing hearing may recommend a sentence of death, or imprisonment for life without benefit of probation or parole until the defendant has served a minimum of twenty-five years (LWOP-25), or a sentence of life.⁸³ The sentence imposed again is determined by weighing aggravating and mitigating circumstances, but

79. See WASH. REV. CODE ANN. § 9A.32.040 (1988).

80. *Id.* § 10.95.030 (Supp. 1989); see also *State v. Hughes*, 106 Wash. 2d 176, 721 P.2d 902 (1986) (en banc) (upholding constitutionality of the mandatory imposition of LWOP when the defendant had killed a police officer).

81. See WASH. REV. CODE ANN. §§ 10.95.030(2), .050 (Supp. 1989).

82. See *infra* notes 106-16 and accompanying text.

83. KY. REV. STAT. ANN. § 532.030(4) (Michie/Bobbs-Merrill 1985). Actually Kentucky provides for a fourth alternative, a term of not less than twenty years in a "quadruple tiered" approach. *Id.* §§ 532.030(1), (4). This last alternative, however, apparently is not used often in capital cases. Telephone Interview with Oleh Tustaniwsky, Esq., Department of Public Advocacy, Commonwealth of Kentucky (Sept. 29, 1988) [hereinafter Tustaniwsky Interview]. The passage of Kentucky's Truth in Sentencing Act in 1986 eventually may make a term of years alternative more popular with jurors than even LWOP-25. See KY. REV. STAT. ANN. § 439.3401 (Michie/Bobbs-Merrill Supp. 1988). The legislation mandates that murderers and other violent offenders serve at least 50% of the terms of years imposed against them before becoming eligible for parole. *Id.* § 439.3401(3). Thus, a murderer sentenced to a term of 100 years must serve 50 years (not just 25) before being considered for release by the Parole Board. For more on the development of this sanction in Kentucky, see *infra* notes 144-45 and accompanying text.

whatever the jury's recommendation, the judge makes the ultimate sentencing decision.⁸⁴

C. Double Tiered Approach

Most states that use life-without-parole in capital offender statutes utilize a double tiered approach in which sentencers decide only between imposing the death penalty or LWOP in the severest murder cases. Among the sixteen states that use the double tiered approach, twelve expressly authorize the penalty in the criminal, penal, or sentencing portions of their state statutes,⁸⁵ while four acknowledge the sentence in parole statutes that bar from parole eligibility either all persons serving life sentences or those serving life sentences for murder.⁸⁶

Alabama illustrates the approach taken by the twelve states that clearly identify life-without-parole as an option in their sentencing statutes. At the capital sentencing stage of an Alabama trial, the jury recommends an advisory sentence of death or life imprisonment without parole based on a weighing of aggravating and mitigating circumstances.⁸⁷ If aggravating circumstances predominate, the jury recommends death; if not, the jury recommends LWOP. No other alternative is available.⁸⁸

Arkansas follows the same system, stipulating that as an alternative to the death penalty, capital murder shall be punishable by life imprisonment without parole.⁸⁹ Other states using very similar systems include California,⁹⁰ Delaware,⁹¹ Louisiana,⁹² Missouri,⁹³ Nebraska,⁹⁴

84. See KY. REV. STAT. ANN. § 532.025(1)(b) (Michie/Bobbs-Merrill Supp. 1988). For additional information on Kentucky's use of life-without-parole for 25 years, see *infra* notes 143-62 and accompanying text.

85. See, e.g., DEL. CODE ANN. tit. 11, § 4209(a) (1987). The statute states that "[a]ny person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation or parole or any other reduction . . ." *Id.*

86. See, e.g., S.D. CODIFIED LAWS ANN. § 24-15-4 (1988). This statute merely states that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." *Id.*

87. ALA. CODE § 13A-5-46(e) (1975).

88. The judge actually determines and pronounces the sentence, and the jury's advisory verdict of LWOP must be reached by a majority of jurors. *Id.* §§ 13A-5-46(f), -47(a); see also *infra* notes 126-41 and accompanying text.

89. ARK. STAT. ANN. § 5-4-601(b)(1) (1981).

90. CAL. PENAL CODE § 190.3 (West 1978) (providing a more general list of aggravating and mitigating circumstances).

91. DEL. CODE ANN. tit 11, § 4209(a) (1987).

92. LA. CODE CRIM. PROC. ANN. art. 905.6 (West 1988) (stating that if a jury unanimously finds a death penalty inappropriate, it must recommend a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence).

93. Mo. REV. STAT. § 565.020.2 (Supp. 1988) (specifically designating only death and LWOP as the punishment alternatives for first degree murder); see also *State v. Eggers*, 675 S.W.2d 923

and New Hampshire.⁹⁶

Four other states employ a substantially modified double tiered approach codified in their sentencing statutes. Illinois allows for a sentence of natural life imprisonment in the alternative to capital punishment in cases in which the murder was accompanied by "exceptionally brutal or heinous behavior," or other aggravating circumstances, or in which the defendant already had been convicted of first degree murder in any jurisdiction.⁹⁶ In Connecticut life-without-parole is used only in capital cases in which the death penalty is not imposed.⁹⁷ Idaho punishes murder in the first degree with death or life imprisonment, but stipulates that with a life sentence the court must establish a minimum time to be served without eligibility for parole. That minimum may be the prisoner's natural life.⁹⁸ Vermont uses a system very similar to Idaho's.⁹⁹

Four states effectively use a double tiered approach, although jurors may or may not know that they are choosing between the death penalty and LWOP or death and a regular life sentence. This uncertainty stems from a lack of express provision for LWOP in the states' criminal, penal, or sentencing statutes, and the unsettled state of the law concerning the permissible breadth of knowledge or information concerning parole to be given to death qualified jurors.¹⁰⁰ In Wyoming, for example, a person convicted of murder in the first degree is punishable by death or life imprisonment.¹⁰¹ Wyoming parole law then provides that the parole board may not grant parole to a person imprisoned under a life sentence.¹⁰² The other states using this or a similar scheme include South Dakota,¹⁰³ Virginia,¹⁰⁴ and

(Mo. Ct. App. 1984).

94. See NEB. REV. STAT. §§ 28-105, -303, 29-2520 to -2524 (1977) (outlining the procedure, categories, and penalties for murder in the first degree).

95. N.H. REV. STAT. ANN. § 630:5(V) (1982) (stating that a judge may impose LWOP when a jury cannot agree on a punishment within a reasonable time).

96. See ILL. REV. STAT. ch. 38, ¶ 1005-8-1 (Supp. 1988). In a normal first degree murder trial in Illinois the jury may choose between a term of 20 to 60 years or natural life. *Id.*; see also *supra* notes 60-62 and accompanying text.

97. See CONN. GEN. STAT. §§ 53a-35b, -46a(f) (1985). Generally life imprisonment in Connecticut means a definite sentence of 60 years except when applied in a capital case, when it means natural life or life-without-parole. *Id.* § 53a-35b.

98. IDAHO CODE § 18-4004 (1987) (requiring that the minimum term must be at least 10 years and may be life).

99. See VT. STAT. ANN. tit. 13, § 2303(a) (1988) (requiring that Vermont's minimum term must be at least 35 years and may include life-without-parole).

100. See *supra* note 47.

101. WYO. STAT. § 6-2-101(b) (1988).

102. *Id.* § 7-13-402(a).

103. See *supra* note 86.

104. VA. CODE ANN. § 53.1-151(B1) (1987) (stating that only if the defendant has two other

Pennsylvania.¹⁰⁵

D. Double Tiered Approach with Varying Terms of Years

A large number of states use a double tiered approach that actually does not involve a true life-without-parole sanction. Rather, as in Kentucky, murderers convicted and sentenced under the states' capital sentencing schemes may receive the death penalty or a life sentence for which a minimum term of years must be served before parole eligibility begins. For example, in Arizona a person guilty of first degree murder will suffer death or imprisonment for life without the possibility of parole until the prisoner has served twenty-five calendar years.¹⁰⁶ Other states using a very similar approach include Colorado,¹⁰⁷ Florida,¹⁰⁸ New Jersey,¹⁰⁹ North Carolina,¹¹⁰ Ohio,¹¹¹ and Oregon.¹¹² Tennessee also falls within this category, although its severe prison overcrowding problem causes the term of years to be served under a Tennessee life sentence to fluctuate.¹¹³

felony convictions of any sort will the defendant be ineligible for parole).

105. 61 PA. CONS. STAT. ANN. § 331.21 (Purdon 1984). Recent Pennsylvania laws against first degree murder in conjunction with arson specifically have set up a sentence of life imprisonment without right to parole despite the fact that all persons serving a life sentence in Pennsylvania are ineligible for parole anyway. See 18 *id.* § 3301(b).

106. ARIZ. REV. STAT. ANN. § 13-703(A) (1987).

107. COLO. REV. STAT. § 16-11-103(1) (1986) (allowing death or LWOP for 20 years for offenses committed before July 1, 1985, and death or LWOP for 40 years for offenses committed after July 1, 1985).

108. FLA. STAT. § 775.082(1) (1978) (allowing death or LWOP for 25 years). The Florida Legislature passed a triple tiered sentencing scheme that included life-without-parole in the summer of 1989, but Governor Bob Martinez vetoed the measure.

109. N.J. REV. STAT. § 2C:11-3(b) (1981) (allowing death or LWOP for 30 years).

110. N.C. GEN. STAT. § 15A-1371(a1) (1984) (allowing death or LWOP for 20 years).

111. OHIO REV. CODE ANN. § 2929.03(A) (Anderson 1986) (allowing death or LWOP for 20 years).

112. OR. REV. STAT. § 163.105 (1987) (allowing death or LWOP for up to 30 years).

113. In Tennessee first degree murder is punished by "death or imprisonment for life." TENN. CODE ANN. § 39-2-202(b) (1982 & Supp. 1988). Tennessee's life sentence statutes provide that an inmate serving a life sentence may become eligible for parole after 30 calendar years. *Id.* § 40-28-116(a)(2). This 30-year term can be reduced by no more than 35% for inmates sentenced to crimes committed before 1988 and no more than 30% for crimes committed during and after 1988. *Id.* § 41-21-236(i) (Supp. 1988). In addition, the Parole Board in its discretion could consider an inmate for early release of up to 35% of the inmate's term (as of Nov. 1, 1989) prior to the regularly scheduled release eligibility date under the current emergency measures authorized by TENN. CODE ANN. §§ 41-1-504 to -510 (mandated by federal court order and implemented by ever changing Governor's directives) to reduce prison overcrowding. Not taking into consideration possible emergency release and assuming that the inmate maximized the credits available by exemplary behavior, the time to be served on a life sentence in Tennessee is either 19 ½ years or 21 years before parole eligibility, depending upon when the offense was committed. Furthermore, that an inmate has accrued enough prison time to be eligible for regular parole release, of course, does not mean that the inmate actually will be released. Release is discretionary within the Parole Board's authority. In addition, according to the last Governor's directive of Sept. 29, 1989, no persons con-

At least two other states use a similar scheme but with a modification that merits special attention. In Indiana a person who commits murder may be put to death, but in the alternative that person may be imprisoned for a fixed term of forty years, with up to twenty years added because of aggravating circumstances, and up to ten years deducted for mitigating circumstances.¹¹⁴ Thus, the LWOP fixed term alternative may range between thirty and sixty years.

In South Carolina murderers may be punished by death or by imprisonment for life-without-parole for twenty years or thirty years if special circumstances exist.¹¹⁵ More importantly the South Carolina statute specifically provides that if the Governor commutes a death sentence, as allowed under the South Carolina Constitution, the commuttee must serve the life sentence without being eligible for parole.¹¹⁶ A murderer sentenced to die in South Carolina never legally should be released again. For purposes of counting which states employ a form of true or natural life-without-parole as an alternative to capital punishment, only South Carolina was counted from the states discussed in this section.

E. Double Tiered Approach Without a Death Penalty

Fourteen states currently do not have capital punishment, and among these, only three provide for a double tiered approach that gives sentencers a choice in punishing first degree murderers. In effect, Rhode Island and West Virginia provide for sentencers to determine whether life sentences should be imposed with or without the possibility of parole. Rhode Island authorizes a regular life sentence, but allows

victed of first degree murder (or second degree murder, voluntary manslaughter, aggravated assault, assault with intent to commit murder, or escape when the sentence is more than one year) can be given the benefit of the emergency measures. A death qualified juror sentencing a murderer in Tennessee may or may not be aware of the factors affecting Tennessee's "regular" life sentence, or that Tennessee has executed no murderers since 1962. See *supra* note 47 and accompanying text.

For a background view of Tennessee's prison overcrowding problems, see *Grubbs v. Bradley*, 552 F. Supp. 1052 (M.D. Tenn. 1982); see also *Groseclose v. Dutton*, 788 F.2d 356 (6th Cir. 1986) (applying the *Grubbs* decision to the conditions of Tennessee's death row inmates).

114. IND. CODE ANN. § 35-50-2-3(a) (Burns 1982). This law came into effect in 1977. Prior to that time Indiana courts did not necessarily recognize any difference between a "life" sentence and a "natural life" sentence for murder, even though the old statute called for only a "life" sentence and allowed for parole eligibility. See *Lock v. State*, 273 Ind. 315, 329, 403 N.E.2d 1360, 1370 (1980) (holding that the two terms could not be construed to mean different things). Fortunately this case appears to be only an aberration under prior law.

115. S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. 1983). LWOP for 30 years is allowed when the state seeks the death penalty in a case and aggravating circumstances are found to exist, but the jury still does not recommend the death penalty. *Id.*

116. *Id.*; see also S.C. CONST. art. IV, § 14.

the court to designate that the inmate will not be eligible for parole.¹¹⁷ West Virginia gives a presumption to an automatic life-without-parole sentence, but allows that the jury may recommend that the convicted person be eligible for parole.¹¹⁸ Maine punishes murderers with either life or a term of years not to be less than twenty-five.¹¹⁹ The state's parole laws specifically remove from eligibility for parole or unconditional discharge any person serving a life sentence for murder.¹²⁰

F. Single Tiered Approach

By various means, four states imprison their most serious murderers with only life-without-parole, whatever the circumstances. Hawaii's statute clearly provides that persons convicted of first degree murder or first degree attempted murder shall receive life imprisonment without possibility of parole.¹²¹ Iowa punishes first degree murder as a "Class A" felony with incarceration "for the rest of the defendant's life."¹²² The law further states that no person convicted of such a felony may be released on parole from the mandatory life sentence without commutation by the governor.¹²³

Massachusetts previously employed a double tiered system, but with the repeal of the state's death penalty mechanisms in 1982, it now punishes first degree murderers with only life imprisonment. Massachusetts provides that no person shall be eligible for parole while serving a life sentence for first degree murder.¹²⁴ Michigan also exempts from parole eligibility prisoners sentenced to life for first degree murder.¹²⁵ Whether in sentencing statutes or parole provisions, these states effectively require convicted murderers literally to face life behind bars.

IV. SPECIFIC APPLICATION AND EXPERIENCE IN TWO STATES

Merely to catalog the various state approaches in implementing life-without-parole in capital offender statutes does not explain adequately the several issues associated with LWOP. Why did states im-

117. R.I. GEN. LAWS § 11-23-2 (1978).

118. W. VA. CODE § 62-3-15 (1984).

119. ME. REV. STAT. ANN. tit. 17-A, § 1251 (1978).

120. *Id.* § 1201(A).

121. HAW. REV. STAT. § 706-656(1) (1980).

122. IOWA CODE ANN. § 902.1 (West 1979).

123. *Id.*

124. MASS. GEN. LAWS ANN. ch. 265, § 2 (West Supp. 1989). Executive clemency remains a possibility in Massachusetts. *Id.*

125. MICH. COMP. LAWS ANN. § 791.234(4) (West 1979). Formerly Michigan courts also considered the "natural" in natural life to be "mere surplusage." *People v. Rows*, 28 Mich. App. 190, 184 N.W.2d 332 (1970). *But see* *People v. Cohens*, 111 Mich. App. 788, 314 N.W.2d 756 (1981) (holding that a life sentence rendered a defendant ineligible for parole).

plement life-without-parole? How has LWOP affected the criminal justice and corrections systems in these states? What are the intended effects and actual ends of the legislatures and courts that have passed and imposed LWOP? No definitive answers exist to these questions, but qualified observations can be made based on the experiences of the various states. Parts IV and V of this Note address these questions respectively by examining two states' experiences with life-without-parole, and the general effects and problems that seem to be associated with the sentence.

A. *Alabama's Double Tiered Approach*

In Alabama life-without-parole originated as an option in capital cases in the early 1970s, resulting from general public dissatisfaction with murderers serving "life" terms and leaving prison early on parole.¹²⁶ No specific, egregious incident sparked the Alabama legislature's adoption of life-without-parole. Rather, a general attitude of frustration toward a "revolving door" parole system worsened in the aftermath of *Furman* with an increased fear of the paroling of violent murderers, and prompted legislative response. Alabama was a harbinger of the current national mood and moved quickly to legislate LWOP in the post-*Furman* era.¹²⁷ Alabama's present capital sentencing scheme went into effect in 1975, and as of March 1987, 109 inmates were serving life-without-parole sentences for capital murder convictions.¹²⁸ In March 1989 the estimated total was 133 inmates out of a total prison population of nearly 13,000.¹²⁹

According to Assistant Alabama Attorney General Ed Carnes, life-without-parole works well in Alabama and is viewed as a beneficial sentencing alternative by professionals in virtually all segments of the

126. Carnes Interview, *supra* note 3; see also *supra* note 5 (describing parole procedures in Alabama).

127. National opinion polls generally reflect a steady increase in the percentage of Americans who feel that the courts do not deal harshly enough with criminals. See Cheatwood, *supra* note 16, at 43. This feeling certainly is evident in Tennessee. See, e.g., Loggins, *Victims Call for Tougher Punishment*, *Tennessean*, Feb. 23, 1989, at A1, col. 1. For Alabama's specific legislative action, see ALA. CODE § 13A-5-46 (1975).

128. Carnes Interview, *supra* note 3. In 1987 the Alabama Attorney General's Office conducted an extensive survey to determine that of the 408 inmates serving LWOP in Alabama, 109 (27%) were incarcerated for capital murder convictions while 299 (73%) were imprisoned as habitual offenders. See Memorandum from Reginald Aguilar to Ed Carnes (Mar. 2, 1987) (on file with the Alabama Attorney General's Office and the Author).

129. Carnes Interview, *supra* note 3. This figure was obtained by applying the 27% figure from above to the latest available population totals from Alabama's Department of Corrections. See DEP'T OF CORRECTIONS, STATE OF ALA., MONTHLY STATISTICAL REPORT Jan. 1989, at 6 (available from the State of Alabama).

criminal justice system.¹³⁰ Prosecutors favor it as a meaningful and appropriate punishment alternative for violent criminals that society does not want released. LWOP also provides district attorneys with an additional prosecutorial weapon in Alabama, and lengthy trials may be avoided if a murderer plea bargains for life-without-parole instead of risking the death penalty at trial.¹³¹ Even defense attorneys acknowledge the penalty's usefulness in restoring the public's faith in the efficacy of the criminal justice system and generally view LWOP as a means to reduce the number of individuals sentenced to death.¹³² Because Alabama adopted life-without-parole for capital murderers to isolate them from society, any consideration of moving to a triple tiered scheme that also offers regular life as a sentencing alternative appears precluded.¹³³

To critics¹³⁴ who assert that life-without-parole contributes to prison overcrowding and strains discipline, supporters of LWOP respond with common sense and facts. A penalty that has resulted in less than 150 incarcerations in a system that routinely incarcerates nearly 13,000 hardly appears to be a leading cause of prison overpopulation.¹³⁵ Additionally, if prisons are to be filled to capacity, murderers are exactly the kind of violent offenders who ought to fill prisons.¹³⁶ Some prison officials maintain that LWOP inmates are inevitable discipline problems because the "carrot" of parole cannot be used as an incentive for good behavior.¹³⁷ Others disagree. In Alabama LWOP inmates commit fifty percent *fewer* reported disciplinary offenses per capita than all other types of inmates combined.¹³⁸ Prison privileges and in-house pun-

130. Carnes Interview, *supra* note 3.

131. Telephone Interview with Robert Field, District Attorney for the Seventh Judicial District of Alabama (Feb. 8, 1989) [hereinafter Field Interview]. Mr. Field recounted several cases arising in Anniston, Alabama in which defendants in effect had pled to LWOP, including a brutal case in which two defendants were charged with capital murder, and one pled to LWOP while the other took his chances at trial and was sentenced to death despite a jury's recommendation of LWOP. *Id.*

132. Carnes Interview, *supra* note 3. Mr. Field, however, would dispute this opinion and maintains that many criminals are sentenced to death anyway and that LWOP does not make that much of a difference. See Field Interview, *supra* note 131.

133. Carnes Interview, *supra* note 3 (stating that "if it's not broken, don't fix it").

134. Generally, critics of LWOP in Alabama make complaints based on the numbers of habitual offender inmates serving life-without-parole (73% of the LWOP population) and not capital murderers. See, e.g., Hamburg & Hodges, *Life-Without-Parole Law Strains Prison Costs, Hurts Discipline*, Birmingham Post-Herald, Jan. 21, 1983, at A1, col. 1.

135. See *supra* note 129 and accompanying text.

136. As Assistant Alabama Attorney General Carnes puts it, why moan about filling prisons with violent murderers when "that's who your prisons ought to be filled with." Stewart & Lieberman, *supra* note 2, at 16. Mr. Carnes reiterated this view in 1989. Carnes Interview, *supra* note 3.

137. See, e.g., Hamburg & Hodges, *supra* note 134, at A1, col. 2, A6, col 1 (comments of Mr. Fred Smith, former Alabama Department of Corrections commissioner).

138. Telephone Interview with Dr. Miriam Schinbaum, Director of Classification. Alabama

ishments seem to discipline LWOP inmates adequately in Alabama.

Opponents of life-without-parole in Alabama primarily are the inmates serving it.¹³⁹ Convicted murderer and LWOP inmate Ted McGinnis decries the harshness of his sentence, but still hopes that one day he will be released.¹⁴⁰ Any chance of release from a life-without-parole sentence in Alabama is slim, however, and the courts ensure that the state's prosecutors stress this fact during sentencing proceedings. LWOP's definiteness is its greatest strength in Alabama. A murderer incarcerated for life-without-parole will spend the rest of his natural life in an Alabama prison.

Unlike most states' chief executives, the Governor of Alabama may not commute life-without-parole sentences or pardon any criminal offenders.¹⁴¹ The Alabama Supreme Court requires jurors to be instructed that life-without-parole means precisely what it says, nothing more and nothing less.¹⁴² Life-without-parole for capital murderers in Alabama is a popular, effective penalty option that appears to have formidable sup-

Department of Corrections (Mar. 7, 1989) [hereinafter Schinbaum Interview]. Dr. Schinbaum acknowledges that LWOP inmates tend to commit more serious infractions, assaults as opposed to insubordination, but stresses that they commit half the discipline violations in general of other inmates, and as a whole are not a discipline problem. *Id.* In-house punishments for LWOP inmates do tend to be more strict than those for ordinary inmates.

139. Carnes Interview, *supra* note 3. Carnes states that "they hate it with a passion." *Id.*

140. *Inmate Keeps His Store of Hope Alive*, Birmingham Post-Herald, Jan. 21, 1983, at 1B, col. 4. McGinnis, at Holman after being convicted of a stabbing murder committed during a robbery, commented: "All I see every day is [sic] hate, confusion, people banging themselves, lying in bed with one another, raping one another . . . You have to adjust to keep from going crazy. You just have to accept things." *Id.*; see also McGinnis v. State, 443 So. 2d 1289 (Ala. Crim. App. 1983).

141. Carnes Interview, *supra* note 3; see Brown v. State, 288 Ala. 680, 264 So. 2d 549 (1971); ALA. CONST. amend. XXXVIII § 124 (governor may only commute death sentences); see also Martin, *supra* note 50, at 597. The federal government and 46 states allow the chief executive to commute life-without-parole sentences to provide potentially for inmates to be released on parole. *Id.* at 595. South Carolina provides the same limited power as Alabama, and Vermont and Rhode Island have no constitutional provision at all for commutation. *Id.*; see also Cheatwood, *supra* note 16, at 48-50; *supra* notes 115-16 and accompanying text. Normally, commutation is an option that always can be held out to LWOP inmates and provides a release mechanism in crises or special circumstances, and some states mention this possibility specifically in their LWOP statutes. See, e.g., IOWA CODE ANN. § 902.1 (West 1979) (stating that "no [LWOP inmate] shall be released on parole unless the governor commutes the sentence to a term of years"). Some states painstakingly eliminate any possibility of release on any other grounds except commutation. See, e.g., WASH. REV. CODE ANN. § 10.95.030(1) (Supp. 1989); see also Cheatwood, *supra* note 16, at 49. Hence only in a very few jurisdictions—Alabama, Rhode Island, perhaps Vermont, and more infrequently South Carolina—can a murderer be put behind bars with no potential release mechanisms of any kind under a life-without-parole sentence.

142. *Ex parte Rutledge*, 482 So. 2d 1262, 1264-65 (Ala. 1984). Specifically, a prosecutor had argued that "as long as there are parole boards, as long as there are Federal courts in the state of Alabama, and as long as the legislature of the State of Alabama still exists, there is a chance that this defendant will get out. . . ." *Id.* at 1264. The court held that this argument "exceeds the permissible boundaries" of Alabama law and remanded the case for a new sentencing hearing. *Id.* at 1264-65.

port into the foreseeable future.

B. Kentucky's Triple or Quadruple Tiered Approach

The Commonwealth of Kentucky employs a unique capital sentencing scheme that borrows from a variety of approaches. Upon conviction of a capital offense in Kentucky, punishment may take one of four forms: (1) a death sentence; (2) a term of imprisonment for life without probation or parole until the service of a minimum of twenty-five years; (3) a sentence for life; or (4) a term of years for at least twenty years.¹⁴³ Prior to 1986, this system functioned in practice as a triple tiered system with very few capital murderers receiving a sentence for a term of years.¹⁴⁴ In 1986 the Kentucky legislature passed a Truth in Sentencing Act specifically to increase the amounts of time that violent offenders would spend in Kentucky prisons. The Act requires that a violent offender convicted of a "Class A" felony and sentenced to a term of years serve at least one half of the imposed sentence.¹⁴⁵

The Truth in Sentencing Act raises the possibility that sentencers who want to incarcerate violent murderers for long periods of time simply can impose sentences of lengthy terms of years and bypass Kentucky's life-without-parole for twenty-five years sanction. A sentence for a term of sixty years, for example, would guarantee incarceration for at least thirty years and be more severe than LWOP-25. As of March 1989, the Kentucky Corrections Cabinet housed fifty-eight inmates convicted of murder who were serving sentences under the Truth in Sentencing Act ranging from twenty years to regular life to 180 years.¹⁴⁶ Since Kentucky's passage of life-without-parole for twenty-five years as a capital sentencing option in 1984, only thirty inmates have been in-

143. KY. REV. STAT. ANN. § 532.030(1) (Michie/Bobbs-Merrill 1985); see *Commonwealth v. Tiryung*, 709 S.W.2d 454 (Ky. 1986).

144. Tustaniwsky Interview, *supra* note 83. This reluctance to sentence violent murderers to terms of years probably stemmed directly from the knowledge that under Kentucky's parole statutes before 1986, all inmates serving terms of years were to be considered for parole after a maximum of eight years. Interview with William Clark, Kentucky Corrections Cabinet (Apr. 4, 1989) [hereinafter Clark Interview]. The reality of Kentucky's practice arguably warrants designating Kentucky's system as "triple tiered," despite its four alternative sentences.

145. See KY. REV. STAT. ANN. § 439.3401(3) (Michie/Bobbs-Merrill Supp. 1988). The Act provides that inmates serving regular life sentences for capital offenses must serve at least 12 years in a penitentiary. *Id.* § 439.3401(2).

146. Clark Interview, *supra* note 144 (statistics obtained from the Kentucky Corrections Cabinet for Dec. 16, 1988, and on file with the Author). The inmate sentenced in 1987 to serve 180 years for murder will not be eligible for parole until Feb. 2, 2078. *Id.* Another inmate sentenced to 150 years for murder in 1988 is not eligible for parole until Sept. 30, 2062. *Id.* They are in prison for the rest of their natural lives without benefit of probation or parole whatever the specific name of the sentence.

carcerated under the sentence.¹⁴⁷ These statistics indicate that since 1986 Kentucky has moved from effectively a triple tiered scheme to implementation of a very real quadruple tiered approach that allows for lengthy prison sentences without parole in two different ways.

This unique approach did not result from any type of legislative plan. Rather, the Kentucky legislature has adapted its capital sentencing scheme—starting with death, regular life, and terms of years alternatives and adding LWOP-25 and tougher parole laws—as circumstances have deemed necessary.¹⁴⁸ The result is a catalog of sentencing alternatives that is advantageously flexible, politically sound, and pleasing to several constituency groups.¹⁴⁹

Prior to the adoption of life-without-parole for twenty-five years, uncertainty regarding what a life sentence actually meant caused dissatisfaction in Kentucky. The rape and murder of a student in 1983 by a convicted murderer who was out of prison on parole after serving only eight years of his term highlighted the frustration.¹⁵⁰ A twenty-five year cap on life-without-parole was proposed in 1984 because this length of time would incarcerate most violent murderers during the range of ages in which they are considered most dangerous.¹⁵¹ The cap also provides a release mechanism to prevent a continual backlog of life-without-parole inmates. In addition, Kentucky's Governor may commute any sentence, including LWOP-25 and lengthy terms of years, to a shorter term of years to provide for parole eligibility.¹⁵² In certain situations Kentucky's executive also can attach specific conditions to a commuted sentence to require completion of the sentence without eligibility for parole.¹⁵³

Most professionals in Kentucky's criminal justice system favor the multitiered capital sentencing scheme and the flexibility it provides. Both life-without-parole for twenty-five years and a long Truth in Sentencing term of years provide a sanction that is tougher than a regular

147. *Id.*

148. Interview with Dr. Deborah Wilson, Policy Advisor, Office of the Attorney General, Commonwealth of Kentucky (Apr. 7, 1989) [hereinafter Wilson Interview].

149. *Id.*

150. *Id.*

151. According to Dr. Wilson, most violent murderers in Kentucky are between the ages of 19 and 34. A mandatory 25-year sentence would incarcerate these persons until they were between 44 and 59, a statistically much safer range of ages. *Id.*

152. KY. CONST. § 77 (providing the executive with the power to commute any sentence except in cases of impeachment or treason); *see, e.g.,* *Wooden v. Goheen*, 255 S.W.2d 1000 (Ky. Ct. App. 1953) (recognizing power of executive to commute, reprieve, and pardon); *see also* *Martin*, *supra* note 47, at 597 (containing a state by state comparison of commutation provisions).

153. *See* *Hamilton v. Ford*, 362 F. Supp. 739 (E.D. Ky. 1973) (holding that the executive could commute a death sentence to a life term without parole even though the only capital sentencing options at the time were death or regular life).

life sentence, yet not as final or as irreversible as the death penalty.¹⁵⁴ Prosecutors favor Kentucky's version of life-without-parole because it allows for a tailoring of punishment to fit each crime. A case with fewer aggravating circumstances or more mitigating circumstances can be concluded with an LWOP-25 sentence that will not risk reversal on appeal.¹⁵⁵ The different alternatives also provide for a variety of plea-bargaining opportunities.¹⁵⁶

Defense counsel in Kentucky generally favor life-without-parole as a means of keeping defendants off death row.¹⁵⁷ Some defense attorneys, however, maintain that LWOP-25 does not prevent death row convictions but only expands the possibilities for longer prison sentences. A capital murderer with several mitigating factors in his or her case who before 1984 would have received a regular life sentence now may receive life-without-parole for twenty-five years.¹⁵⁸ Instead of saving lives, the sanction toughens the sentences of criminals who would not have received the death penalty under the sentencing structure prior to 1984.

As a group, however, only prison officials in Kentucky seem unopposed to life-without-parole. While Corrections Cabinet officials maintain that inmates become greater security risks the longer they are in prison, no specific examples exist of LWOP inmates posing any more of a security threat than any other type of inmate.¹⁵⁹ Out of a prison population of over seven thousand, only thirty currently are serving life-without-parole for twenty-five years and another fifty-eight have been sentenced under lengthy Truth in Sentencing terms.¹⁶⁰ The numbers alone do not indicate a massive overcrowding problem.

From the corrections perspective, the greater threat is the unknown effects of LWOP. With an average of six new inmates each year serving LWOP-25, a set of approximately 150 inmates eventually will occupy bedspace in Kentucky's crowded prisons for 365 days a year. Even this number restricts what the Corrections Cabinet can do in relieving overcrowding and planning for future prison populations. The medical and

154. Wilson Interview, *supra* note 148.

155. *Id.*

156. *Id.*

157. *Id.* This view is shared by defense counsel working in capital litigation in Kentucky. Telephone Interview with Kathleen Kallaher, Assistant Director, Kentucky Capital Litigation Resource Center (Apr. 11, 1989) [hereinafter Kallaher Interview]. Kallaher also points out that LWOP-25 is "an extra thing to argue for in a plea bargain, especially for an older defendant." *Id.* She adds that often the hardest aspect of settlement negotiations is "talking [the defendant] into accepting a guaranteed 25 year sentence." *Id.*

158. Kallaher Interview, *supra* note 157.

159. Clark Interview, *supra* note 144.

160. KY. CORRECTIONS CABINET, WEEKLY POPULATION SUMMARY (Mar. 31, 1989) (obtained during Clark Interview, *supra* note 144 and on file with the Author).

psychological needs of the LWOP inmates prior to their releases are also unknown.¹⁶¹ Additionally, the possibility of a larger influx of long-term and natural life inmates from the Commonwealth's Truth in Sentencing provisions could create unprecedented overcrowding problems for which Kentucky has not adequately planned or prepared.¹⁶²

Despite its uncertainty, life-without-parole in whatever form generally is considered a success in Kentucky. The prosecutorial advantages and the public's perception of a meaningful alternative to death in capital cases outweigh the fears concerning the sanction's eventual effect on the Commonwealth's correctional facilities. Because of the prevailing political conditions and the variety of sentencing alternatives in place, little chance exists that Kentucky's capital sentencing scheme will be altered in the foreseeable future.

V. BENEFITS, PROBLEMS, AND FUTURE IMPLICATIONS OF LIFE-WITHOUT-PAROLE

Most Americans favor use of the death penalty to punish violent murderers and protect society.¹⁶³ At least one retired Supreme Court Justice and the Ad Hoc Committee he chaired, however, acknowledge that the current system of applying capital punishment prevents the sanction from accomplishing its intended purposes of punishment, retribution, and deterrence.¹⁶⁴ The idealized concept of swiftly eliminating those who do not respect human life and sending a clear message of absolute punishment to deter potential murderers simply is not manifested in any present American capital sentencing scheme.¹⁶⁵

161. Wilson Interview, *supra* note 148.

162. *Id.* Long-range planning may start in the aftermath of the Truth in Sentencing Act to deal with an ever growing, ever aging prison population. *Id.* Interestingly, Kentucky still incarcerates eight men under life-without-parole for convictions under an old child rape statute. Clark Interview, *supra* note 144. That statute was repealed in the early 1970s, but no study has been attempted to determine the effects of LWOP incarceration on this group at the Kentucky State Penitentiary at Eddyville. Wilson Interview, *supra* note 148.

163. According to the Gallup Poll, as many as 80% of Americans favor capital punishment for murderers. See Malcolm, *Capital Punishment Is Popular, but So Are Its Alternatives*, N.Y. Times, Sept. 10, 1989, at E4, col. 1; see also *American Survey: Capital Punishment*, ECONOMIST, Mar. 19, 1988, at 23, 26 (citing a 1986 Gallup Poll indicating that approximately 70% of Americans favor capital punishment).

164. See Powell, *supra* note 9, at 1035, 1041-42; see also JUDICIAL CONFERENCE OF THE U.S., AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 2-5 (1989) [hereinafter POWELL COMMITTEE], reprinted in *Report on Habeas Corpus in Capital Cases*, 45 Crim. L. Rep. (BNA) 3239, 3239-40 (Sept. 27, 1989) [hereinafter *Report on Habeas Corpus*].

165. Columbia Law School Professor Jack Greenberg probably best describes the American system of capital punishment:

Since at least 1967, the death penalty has been inflicted only rarely, erratically, and often upon the least odious killers, while many of the most heinous criminals have escaped execution. Moreover, it has been employed almost exclusively in a few formerly slaveholding states,

Although most Americans cling to a favorable view of capital punishment, some polls indicate that the realities of "only" 121 executions since 1973 and of 2210 inmates crowding death rows with numerous and costly appeals and stays of execution at various judicial stages have opened American minds to the possibilities of alternatives to capital punishment.¹⁶⁶ A Gallup poll demonstrates that nationwide support for the death penalty dropped from seventy-two percent to fifty-five percent when respondents were told of the alternative of life-without-parole.¹⁶⁷

In Georgia, which has the fourth highest total of executions since *Furman*,¹⁶⁸ a Georgia State University poll indicated that fifty-three percent of Georgians surveyed would vote to abolish the death penalty if state law provided for a murder sentence of life-without-parole for at least twenty-five years, combined with some type of restitution program.¹⁶⁹ Even in Florida, the state described as showing that it can execute almost any death row inmate that it wants,¹⁷⁰ fifty-four percent of persons surveyed by Amnesty International said that they would be less likely to support capital punishment if assured that dangerous murderers would be imprisoned for life with no chance for parole.¹⁷¹ Similar results are seen in a survey in Nebraska. Fifty-eight percent of Nebraskans polled favor the abolition of capital punishment if the alternatives of LWOP-25 and a restitution program are offered.¹⁷²

As Americans attempt to control violent crime, life-without-parole offers an additional weapon for criminal justice systems' arsenals, whose big gun of capital punishment shows a marked tendency to misfire or shoot blanks. Americans are recognizing that alternatives to capital punishment are needed to control the increasing number of violent murders. Life-without-parole is an alternative that seems capable of ac-

and there it has been used almost exclusively against killers of whites, not blacks, and never against white killers of blacks.

Greenberg, *supra* note 9, at 1670; see also Greenberg, *Capital Punishment As a System*, 91 *YALE L.J.* 908 (1982).

166. NAACP LEGAL DEFENSE & EDUC. FUND, INC., *DEATH ROW, U.S.A.* 1 (July 1989 & Execution Update Jan. 18, 1990) [hereinafter *DEATH ROW, U.S.A.*].

167. Gallup Reports 244 & 255, Jan./Feb. 1986, at 10-16.

168. *DEATH ROW, U.S.A.*, *supra* note 166, at 3 (stating that 14 executions have occurred since 1973 and that there are 102 persons on death row in Georgia).

169. R. THOMAS & J. HUTCHESON, CENTER FOR PUBLIC & URBAN RESEARCH, COLLEGE OF PUBLIC & URBAN AFFAIRS, GA. STATE UNIV., *GEORGIA RESIDENTS' ATTITUDES TOWARD THE DEATH PENALTY, THE DISPOSITION OF JUVENILE OFFENDERS, AND RELATED ISSUES* (Dec. 1986) (prepared for the Clearinghouse on Georgia Prisons and Jails).

170. Greenberg, *supra* note 9, at 1674.

171. CAMBRIDGE SURVEY RESEARCH, *AN ANALYSIS OF ATTITUDES TOWARD CAPITAL PUNISHMENT IN FLORIDA* 18 (June 1985) (a public opinion survey prepared for Amnesty International).

172. BUREAU OF SOCIOLOGICAL RESEARCH AT THE UNIV. OF NEB.-Lincoln, *THE NEBRASKA ANNUAL SOCIAL INDICATORS SURVEY* (Jan. 1988) (prepared by David R. Johnson and Alan Booth).

cruing several important philosophical and practical advantages.

A. *Potential Benefits of Life-Without-Parole*

1. A Surer Penalty in Many Cases

Since 1973, 121 people have been executed legally in the United States, but nearly 4000 have been sentenced to die during that time.¹⁷³ During the lengthy interim between issuance of a death sentence and the fulfillment of the penalty, statistics show that a number of incidents may affect a defendant. Since 1973, twenty-seven death row inmates have committed suicide, and forty-four have died, not from execution, but from natural causes, in escape attempts, or murder.¹⁷⁴ Fifty-one death sentences have been commuted, while 559 sentences have been vacated because of unconstitutional statutes.¹⁷⁵ Another 935 sentences or convictions were reversed on other grounds.¹⁷⁶ Over 2000 inmates still await death, but the odds actually favor that the inmates will not die in a legal execution.

Justice Powell, the Ad Hoc Committee, and proponents of capital punishment in general attribute the lengthy delays and low number of executions to the United States' unique system of dual collateral review of criminal convictions.¹⁷⁷ Automatic state reviews of death sentences and lengthy habeas corpus proceedings in federal courts increase the span between the imposition and execution of a death sentence, thus increasing the chances that a murderer will not be executed. In Powell's opinion, the dual system invites abuse and undermines public confidence in the criminal justice system.¹⁷⁸ This elaborate, lengthy, and expensive system exists, however, because of the unique finality of the death penalty and the need to eliminate as much error or hint of injustice as possible before taking a human life.

The current system effects a death penalty that is frequently imposed but rarely carried out—a punishment that is hardly swift and certainly not sure. Life-without-parole for violent murderers often would eliminate both of these problems. Imposition of life-without-parole avoids costly appeals routinely invoked in death sentences. A life-without-parole sentence means exactly what it says in the charge to a

173. DEATH ROW, U.S.A., *supra* note 166, at 1 (3941 persons sentenced to die).

174. *Id.*

175. *Id.*

176. *Id.*

177. See Powell, *supra* note 9, at 1038; POWELL COMMITTEE, *supra* note 164, at 2-3, reprinted in *Report on Habeas Corpus*, *supra* note 164, at 3239. Justice Powell personally opposes the concept of capital punishment, but believes it to be constitutionally permissible. See Powell, *supra* note 9, at 1045.

178. Powell, *supra* note 9, at 1041.

jury, and except in the very unusual instance of an executive commutation, a criminal justice system can guarantee that LWOP will protect society from a violent murderer for the rest of that murderer's life.

All too often, at least in the public's perception, federal courts and lawyers manipulate death statutes and frustrate attempts to impose capital punishment. Appeals and stays of execution undermine public faith in the criminal justice system.¹⁷⁹ Because life-without-parole does not invoke the finality of capital punishment, repeated appeal opportunities are not as imperative. Further, because life-without-parole has been sanctioned constitutionally,¹⁸⁰ and because the states retain the prerogative to determine the lengths of sentences, numerous constitutional issues that might be appealed are eliminated. Life-without-parole offers an alternative to capital punishment that would punish murderers exactly as jurors and the general public expect them to be punished, a much surer sanction actually than the death penalty.

2. The Preservation of Human Life?

Society contends that it is wrong to take another human life in a premeditated fashion. Yet, in a very premeditated fashion, society takes the lives of some of those who kill. At best, capital punishment sends mixed signals. George Bernard Shaw said of the death penalty: "It is the worst form of assassination because it is invested with the approval of society. Murder and capital punishment are not opposites which cancel one another—but similar."¹⁸¹

179. See POWELL COMMITTEE, *supra* note 164, at 1, reprinted in *Report on Habeas Corpus*, *supra* note 164, at 3239. To understand the public's perception of the federal judiciary's role in thwarting capital punishment, consider Justice William Brennan's remarks: "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance." *Furman v. Georgia*, 408 U.S. 238, 287 n.34 (1972) (Brennan, J., concurring) (quoting *Stein v. New York*, 346 U.S. 156, 196 (1953)).

180. See *supra* notes 23-49 and accompanying text.

181. E. BLOCK, AND MAY GOD HAVE MERCY: THE CASE AGAINST CAPITAL PUNISHMENT 165 (1962). This Note does not attempt to develop an argument that capital punishment "brutalizes" society. Commentators far more experienced have already made the argument. See, e.g., W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 271-336 (1984). Fundamentally, however, it appears illogical to use capital punishment to preserve the sanctity of human life when the punishment actually destroys the end being sought. The faith of the Quakers and the logic of Thomas Jefferson best respond to critics who would maintain that criminals who murder have surrendered their right to life. The Religious Society of Friends maintains:

[I]t is as much forbidden to society organized as government to deprive a human creature of life, as it is forbidden the individual to do so. We hold that life, given to us by our [Creator], to be sacred and hence not to be taken from any of us by the judgment of [humans]
E. BLOCK, *supra*, at 161-62. Jefferson opposed capital punishment and said that he would do so "until I have the infallibility of human judgment demonstrated to me." *Id.* at 1. The quote also has been attributed to the Marquis de Lafayette.

To critics who claim that capital punishment is necessary to deter murderers, protect society, and provide retribution, life-without-parole offers an alternative that accomplishes these tasks without the moral cost of taking more lives. Capital punishment is disrespectful of the sanctity of human life, but so is paroling the murderers who have shown the ultimate disrespect for human life.¹⁸² Life-without-parole offers an alternative that clearly demonstrates commitment both to nonviolence and the basic sanctity of human life. Alabama's case of Raymond Eugene Brown demonstrates that life-without-parole can save the lives of both guilty murderers and innocent members of society.¹⁸³

Additionally, life-without-parole inherently preserves the innocent lives of those who have been convicted unjustly for murder. Opponents of the death penalty frequently argue that innocent persons may be killed however elaborate the appeals process. Indeed, the unjust deaths of innocents that society has condemned are well chronicled.¹⁸⁴ With life-without-parole, even though years spent behind bars cannot be returned, an error is not made at such a high cost. Life is preserved for the unjustly incarcerated inmate through life-without-parole.

Critics may argue that although life-without-parole could save a handful of lives, the costs of supporting prisoners for life would be too great. Yet, in addition to saving lives, life-without-parole is shown to save money. Experts conservatively estimate that millions of dollars are required to process and appeal a death penalty to its conclusion, but inmates generally can be housed for life at an average cost of less than one million dollars.¹⁸⁵ In Florida alone, court costs, attorney's fees, and incarceration of a death row inmate cost approximately 3.2 million dollars, while the state currently can incarcerate a criminal for life for 700,000 dollars.¹⁸⁶

182. See Brill, *supra* note 14, at 3. Brill further states:

A society that paroles a slasher-rapist after serving eight years, or writes a law that makes it conceivable that one morning I could bump into Sirhan Sirhan in an elevator on his way to work ("Good morning, Mr. Sirhan how are you today?" "Fine, thanks. And you?") is a society that's spitting on the sanctity of human life and writing a suicide pact in the process.

Id.

183. See *supra* notes 4-9 and accompanying text.

184. See Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (painstakingly outlining 350 examples of innocent persons sentenced in potentially capital cases in the United States, including 27 since 1976); see also Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

185. See Spangenberg & Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A.L. REV. 45, 47-57 (1989); Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1245-66 (1985).

186. See Von Drehle, *Bottom Line: Life in Prison One-Sixth As Expensive*, Miami Herald, July 10, 1988, at 12A, col. 1. Although one cannot put a price on any human life, it is doubtful that the grim satisfaction of so relatively few executions is worth the staggering financial costs it imposes on America's legal system. Furthermore, it must be recognized that tremendous costs can be

3. An Additional Prosecutorial Tool in Murder Trials

Life-without-parole provides prosecutors with an additional option in their task of protecting society from violent criminals. The sanction adds another variable to a judge's or jury's considerations and can alter the negotiation and litigation between prosecution and defense.¹⁸⁷ Life-without-parole can provide needed leverage for prosecutors to convince sentencers and the public that just and meaningful penalties for murder other than capital punishment exist. LWOP also increases the possibility of a plea-bargaining arrangement that eliminates the need for a lengthy capital trial.¹⁸⁸ A clearly guilty defendant may be amenable to a guilty plea when offered an option other than the electric chair or the gas chamber. Even life-without-parole inmates seem to decide ultimately that life in some form is superior to the alternative.¹⁸⁹ Regardless of defendants' opinions, life-without-parole is an additional tool for prosecuting murderers and ensures that the murderers are removed from society for significant lengths of time. In confronting violent crime in today's society, prosecutors should be given every constitutionally permissible advantage.¹⁹⁰

B. Problems with the Current Applications of Life-Without-Parole

Despite life-without-parole's advantages, it is not a panacea for the problems of violent crime or the question of how best to punish murderers. Problems and uncertainties plague the use of life-without-parole both in its current application by thirty states and in the potential effect of its large scale implementation on the Nation's criminal justice and corrections systems. The following sections explore these current problems and potential effects.

1. Relatively Little Use of the Sanction in Capital Cases

Perhaps the most telling criticism of life-without-parole, especially in states that use LWOP as an alternative to the death penalty, is that LWOP simply is not used often enough to make any real difference. The low numbers of life-without-parole inmates in Alabama and Ken-

incurred by a system which incarcerates many inmates for their natural lives and still has the death penalty with all of its attendant costs as well.

187. Cheatwood, *supra* note 16, at 51-52.

188. Carnes Interview, *supra* note 3; Field Interview, *supra* note 135; Kallaher Interview, *supra* note 160; Wilson Interview, *supra* note 148.

189. Kallaher Interview, *supra* note 160; *see supra* notes 1-3 and accompanying text.

190. Nevada Deputy Attorney General John Mayer summarizes the opinion of many prosecutors who support LWOP by stating that "[life-without-parole] is beneficial because it places [violent offenders] in an atmosphere where it limits the persons they can hurt." Stewart & Lieberman, *supra* note 2, at 17.

tucky relative to both convicted murderers and overall prison populations demonstrate a reluctance on the part of juries and judges to impose the sanction in place of capital punishment in heinous cases.¹⁹¹ Caught between public perception that "life" sentences do not mean life imprisonment and that a sentence of death may never be carried out because of "crafty lawyers" and a lenient federal appeals system, jurors may vote to impose the death penalty merely in hopes of keeping murderers behind bars during a tortuous, protracted appellate process that may be longer than a parole-eligible "life" sentence.¹⁹²

Life-without-parole statutes can incarcerate violent murderers and protect society without legitimizing death in any form. Many citizens, however, remain unaware of how life-without-parole statutes are applied, where the statutes exist, and exactly what they mean. Jurors who cannot be apprised of parole procedures in most capital cases hardly can be expected to apply, with very little knowledge, a relatively new sentence when the more familiar death sentence, even with its problems, remains an alternative.¹⁹³ The infrequent application of life-without-parole will persist as long as the public remains unaware of death penalty alternatives. Once legislators and judges permit jurors a clear understanding of parole law and capital sentencing alternatives like LWOP, juries may be less reticent to apply the life-without-parole sanctions already in place.¹⁹⁴

2. A Lack of Information in General

Any hope for progress in educating politicians and the public about life-without-parole must be tempered by the realization that little is known formally about the sanction. Only two published articles specifically address life-without-parole,¹⁹⁵ and no studies have been done to address several crucial questions pertaining to LWOP.

191. See *supra* notes 129, 160, and accompanying text.

192. See Paduano & Smith, *supra* note 47, at 212-13; see also Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 819-20 (1986). American criminal justice and political systems seem to have a knee-jerk reaction about equating being tough on violent crime with supporting capital punishment. Such a reaction certainly did not hinder George Bush's prospects in the 1988 election when he attacked Michael Dukakis for being "soft on crime" and highlighted the Massachusetts Democrat's opposition to the death penalty. Cohen, *Politicians, Voters and Voltage*, TIME, Feb. 13, 1989, at 96.

193. See Paduano & Smith, *supra* note 47, at 214-20.

194. Once politicians cease relying on capital punishment to demonstrate their toughness and see that other "tough" measures against violent crime are not only possible but also more effective, perhaps other states and the federal government will adopt and use life-without-parole in their capital sentencing schemes. See Berg, *As Violence Soars, Death Penalty Gains Favor, but Does It Really Deter Crime?*, Minneapolis Star Tribune, June 1, 1989, at 10A, col. 1.

195. Cheatwood, *supra* note 16; Stewart & Lieberman, *supra* note 2.

For example, in states that let jurors choose life-without-parole as a sentencing option in first degree or capital murder trials, what factors do jurors consider determinative when choosing between LWOP and the death penalty? No polling studies have been done. What circumstances led to the passage of the LWOP legislation in the specific states that have life-without-parole as an alternative to the death penalty? No formal studies have been done. What are the effects of incarcerating someone for forty, fifty, even sixty years? In an era in which "long-term" incarceration is accepted as seven years, the physical and psychological effects of true long-term incarceration simply are not known.¹⁹⁶ Studies in this area are crucial to determine if life-without-parole could or should be an important development in fighting violent crime.

C. Future Implications

Potential problems of life-without-parole are used consistently as arguments against its widespread implementation. Opponents of the sanction maintain that LWOP will create massive overcrowding and that this growing prison population will age behind bars, further burdening taxpayers because of the costs of illness and infirmity. Others claim that life-without-parole will destroy discipline in prisons and that prisoners without hope of release will become uncontrollable and disrespectful of authority. While planning for these effects is essential, current evidence indicates that only the expense of an aging prison population looms as a real threat, and that this threat can be minimized.

1. Problems for Prison Overcrowding

The federal government demands that prisons shall not be overcrowded. The fears that life-without-parole inmates will "fill up" all existing prisons, and that states will not build enough prisons to meet their needs, however, have not come to fruition. Experiences in Ala-

196. Wilson & Vito, *Long-Term Inmates: Special Needs and Management Considerations*, FED. PROBATION, Sept. 1988, at 21. As the average time served by inmates released from state correctional facilities is 24.8 months according to a 1986 study, the seven-year period has been accepted by most scholars as distinguishing a "long-term" inmate. *Id.* But see *id.* at 23-24.

Professor Derral Cheatwood outlines an excellent research agenda for increasing knowledge about life-without-parole. He advocates study in the areas of what social and political processes lead to passage of life-without-parole statutes; LWOP's effects on crime rates, prosecutorial offices, and corrections systems; and conducting such studies in particular states and across longitudinal state lines. Cheatwood, *supra* note 16, at 56-57. Regarding life-without-parole just as a capital sentencing option, it would be enlightening to poll jurors about their reasons for choosing or not choosing life-without-parole over the death penalty or regular life sentences, and to conduct studies on LWOP inmates (such as the eight men in Kentucky, see *supra* note 162) to gauge the effects of their incarceration.

bama and Kentucky seem to indicate that life-without-parole inmates do not risk overcrowding the Nation's prisons. Murderers serving life-without-parole comprise less than one-and-one-half percent of Alabama's entire prison population.¹⁹⁷ LWOP-25 and lengthy Truth in Sentencing inmates constitute less than two percent of Kentucky's prison population, with LWOP-25 inmates alone comprising less than one half of one percent.¹⁹⁸ Although these percentages will increase if life-without-parole sentences are issued more frequently, and although the existing low percentages nevertheless restrict prison officials' alternatives in reducing prison overcrowding, the figures nevertheless indicate that significant flexibility remains in incarcerating or paroling less violent criminals who have not committed murder.

If a prison system should incarcerate anyone, violent murderers surely must rank at the top of the list. If prisons are full, then violent murderers are exactly who should be imprisoned. Society must decide the proper balance between the financial costs of building and running needed prisons and the social costs of doing without them. The millions of dollars that potentially could be saved by avoiding lengthy capital punishment appeals probably would build a substantial number of prisons or fund the development of alternatives to incarceration for less violent offenders.¹⁹⁹ Income earned by life-without-parole inmates working within a prison system also could augment that system's building or incarceration alternatives budget.

Additionally, executive commutation exists as a potential release mechanism that could relieve prison overcrowding in extreme situations by providing release for life-without-parole inmates. Several states presently use commutation to reduce prison populations.²⁰⁰ At least one commentator believes that as long as life-without-parole penalties are commuted quietly in limited numbers after twenty or more years, the public will not protest commutation.²⁰¹ The availability and acceptance of commutation as a way for states²⁰² to relieve prison overcrowding bolsters the potential effectiveness of life-without-parole.

2. An Ever-Aging Prison Population

By incarcerating violent murderers for the rest of their natural lives, a life-without-parole sanction guarantees that these prisoners will

197. See *supra* note 129 and accompanying text.

198. See *supra* note 160 and accompanying text.

199. See *supra* note 186 and accompanying text.

200. Martin, *supra* note 47, at 604-05 (Georgia, Maryland, Oklahoma, Utah, and Wyoming).

201. Cheatwood, *supra* note 16, at 50.

202. All states permit commutation except Alabama, Rhode Island, South Carolina, and Vermont. See *supra* note 141.

age and die in prison. Indeed, this result is one of the penalty's primary objectives. Critics of life-without-parole, however, maintain that this goal eventually only overburdens the state with elderly inmates.²⁰³ The states would have to pay the costs of providing proper medical treatment for these inmates.²⁰⁴

The needs of elderly inmates are generally much greater than those of the younger, average inmate population. The elderly have more chronic health problems.²⁰⁵ They require expensive medication and often fill all available bed space in small hospital or infirmary facilities.²⁰⁶ They often require housing that is accessible to the physically handicapped²⁰⁷ and need specialized recreation, education, and work programs.²⁰⁸ The elderly require greater protection from victimization from other inmates²⁰⁹ and place additional psychological strains on other inmates and prison staff.²¹⁰ They are simply old and need to be treated accordingly, but studies and literature on aged offenders have failed to develop a comprehensive picture of their needs and how they could be helped in prison.²¹¹

Although the potential problem is substantial and little planning has been done to meet the eventual need, the problem can be mitigated and perhaps even circumvented. The commutation of elderly inmates' sentences would enable corrections departments to avoid the costs of caring for convalescents. Commutation, however, could be socially irresponsible if elderly persons merely were returned to the streets without adequate provisions to care for themselves.

Life-without-parole sentences that provide for incarceration for a set minimum of years is another possible solution. Kentucky's LWOP-25 sanction was passed specifically to incarcerate violent murderers during their peak years of criminal activity while providing a release

203. In time, thousands of inmates could stockpile in prisons and suffer from ailments ranging from phlebitis to cancer and cataracts to kidney failure. See Stewart & Lieberman, *supra* note 2, at 17 (remarks of Morris Dees, Director, Southern Poverty Law Center, Montgomery, Ala.).

204. In time, corrections departments could be running old age homes for toothless and bed-ridden inmates who in all probability would not, or could not, hurt anyone ever again. *Id.* (remarks of Ronald Tate, Spokesperson, Alabama Department of Corrections, Montgomery, Ala., and Morris Dees).

205. Cheatwood, *supra* note 16, at 55.

206. See *id.*

207. Wilson & Vito, *supra* note 197, at 25.

208. *Id.*

209. *Id.*

210. Cheatwood, *supra* note 16, at 55.

211. Chaiklin & Fultz, *The Service Needs of Older Offenders*, 1 JUST. PROF. 26 (1985); see also McCarthy, *The Health Status of Elderly Inmates*, 45 CORRECTIONS TODAY 64 (1983); Morton & Anderson, *Elderly Offenders: The Forgotten Minority*, 44 CORRECTIONS TODAY 14 (1982). Dr. Deborah Wilson believes that the growing length of prison terms, at least in Kentucky, will force prison officials to address better the needs of elderly inmates. Wilson Interview, *supra* note 148.

mechanism when these inmates no longer pose a heightened threat to society.²¹² If society considers true life-without-parole sentences to be meaningful and appropriate punishments for murder, society also may need to think in terms of designing some prisons as "maximum security convalescent homes."²¹³

3. Discipline Problems—Creating "Super Inmates"?

The spectre of inmates with nothing to lose acting in total disregard of prison discipline looms as the most frightening consequence of life-without-parole. Without hope of release through legal means, inmates may decide to seek freedom through illegal means—taking hostages, escaping, and rioting. Guards and other persons working in correctional facilities could be placed in greater personal risk. By removing the correctional incentive of earlier release through good behavior and parole, widespread use of life-without-parole threatens to leave nothing short of capital punishment as a sanction against dangerous and disruptive behavior within prisons.²¹⁴

Many professionals in corrections systems, however, do not share this pessimistic view of life-without-parole.²¹⁵ While the life-without-parole inmate has significantly less chance of normal release than other inmates, maximum security measures already in place in most prisons can control inmate behavior so that LWOP inmates do not pose a qualitatively different security threat than other prisoners.²¹⁶ Measures such as loss of privileges and isolation are useful in controlling the behavior of all types of inmates.²¹⁷ Some experts maintain that life-without-parole inmates actually may be the best behaved inmates in a prison because they are the most institutionalized.²¹⁸ Life-without-parole inmates may challenge the system for a time, but eventually realize that their lives are dominated by the prison's structure and adapt accordingly.²¹⁹ An institutionalized, experienced inmate is not a security risk.

Life-without-parole inmates are not greater security risks and do

212. See *supra* note 151 and accompanying text.

213. Cheatwood, *supra* note 16, at 55.

214. Even the use of capital punishment against an LWOP inmate who murders another inmate behind bars cannot be mandatory. See *Sumner v. Shuman*, 483 U.S. 66 (1987).

215. See, e.g., Stewart & Lieberman, *supra* note 2, at 16-17.

216. See generally Cheatwood, *supra* note 16, at 53-54.

217. Stewart & Lieberman, *supra* note 2, at 16-17 (remarks of Jerry Springborn, Clinical Services Supervisor, Illinois Department of Corrections).

218. Wilson Interview, *supra* note 148.

219. *Id.* Dr. Wilson feels that eventually long-term and life-without-parole inmates become more involved in a prison's "underground"—its economy, drug trade, social relations, and illegal gambling. This activity provides the inmates with both outlets for their antiauthority feelings and a stake in the ongoing, normal operation of the prison that would be disrupted by riots and escape attempts. *Id.*

not cause more discipline problems than other inmates. Life-without-parole inmates in Alabama commit fifty percent fewer discipline infractions per capita than other inmates.²²⁰ Prisons are obviously more capable than society in general at securing violent, dangerous persons and limiting their actions.²²¹

Although some life-without-parole inmates may not become institutionalized and indeed become "super inmates,"²²² this possibility exists for all inmates. In two of the worst American prison riots of this century, Attica in 1971 and New Mexico Prison in 1980, none of the prisoners involved were serving life-without-parole sentences.²²³ All of the rioters potentially were eligible for parole, yet they were not induced to respect authority.

Prisons house those most prone to violent acts and those who fail to respect authority. The current use of life-without-parole does not indicate that LWOP inmates are any more prone to such antisocial behavior behind bars than any other type of inmate. Corrections professionals and prisoners voice legitimate concerns regarding the potential problems of life-without-parole.²²⁴ In practice, however, corrections systems have been able to adjust and meet the needs created by relatively small numbers of life-without-parole inmates. Prisoners like Harlin Philip Seritt voice threats, but remain behind bars.²²⁵

VI. RECOMMENDATIONS AND CONCLUSION

For states grappling with both the problems of violent crime and a public perception that the criminal justice system fails to deal adequately with such crime, life-without-parole appears to offer a viable alternative. Life-without-parole is a punishment that does exactly what it says and adds certainty to punishment that the death penalty and

220. Schinbaum Interview, *supra* note 138; *see also* Cheatwood, *supra* note 16, at 54 (remarks of Robert Dickover, California Prison System).

221. As Assistant Alabama Attorney General Ed Carnes puts it: "It's a choice between [violent murderers] committing offenses on the street or giving prison officials a hard time. We're more concerned with how they behave out on the street." Stewart & Lieberman, *supra* note 2, at 16 (view reiterated in Carnes Interview, *supra* note 3); *see also* Cheatwood, *supra* note 16, at 54.

222. Stewart & Lieberman, *supra* note 2, at 16.

223. At the times of the respective riots, neither New York nor New Mexico had life-without-parole as a punishment for any crime. *See* Letter from Charles A. Graddick, Attorney General of the State of Alabama to *Birmingham News* (May 16, 1985) (discussing the St. Clair prison riot in Alabama in which one of seven ringleaders had been serving life-without-parole for being a habitual offender). *But see generally* Troncale & Bailey, *Locked up for Life, Convicts See Nothing to Lose in Riot*, *Birmingham News*, Apr. 17, 1985, at 1A, col. 1.

224. *See, e.g.*, Stewart & Lieberman, *supra* note 2, at 39 (remarks of Anthony Trivisono, Executive Director, American Correctional Association, and Vernon Johnson, Alabama LWOP inmate).

225. *See supra* notes 1-3 and accompanying text.

regular life sentences sorely lack. The Supreme Court and lower courts have repeatedly affirmed life-without-parole's constitutionality, and a majority of states have employed life-without-parole in a variety of sentencing schemes. The availability of life-without-parole as punishment for the most heinous and violent murderers displays both an implacable hardness against the wanton taking of human life and a sensitivity to the inherent value of all human life.

Life-without-parole is employed effectively as a prosecutorial weapon against murder, and potentially saves money and lives—the lives of convicted murderers who would otherwise languish on death row as well as the innocent victims of paroled murderers who may kill again.²²⁶ These savings entail a cost, however, and incarcerating violent murderers for the rest of their lives poses some serious problems. If society, however, intends to use prisons to incarcerate, isolate, and punish criminals, then adequate planning and foresight can address potential overcrowding problems, needs of elderly inmates, and security risks caused by increased use of LWOP. When compared to the current, more prevalent practice of sentencing without imposing capital punishment, and the paroling of murderers supposedly serving life sentences, life-without-parole's philosophical and practical advantages outweigh its potential problems.

States that currently do not employ life-without-parole punishment should consider its adoption. A variety of schemes exist for implementing life-without-parole, but the most popular and effective seem to be those that use LWOP as one option among two or three for punishing murderers deemed most dangerous and severe. This approach allows maximum flexibility in tailoring sentences to fit specific crimes and is easily incorporated into existing sentencing schemes. The triple tiered approaches recently adopted by Maryland²²⁷ and Oklahoma²²⁸ deserve continued study and perhaps considerable emulation. To bury life-without-parole in parole statutes defeats the sanction's major advantage: allowing jurors and the public full knowledge concerning the precise sentence given to a violent murderer. The sanction functions best as part of a specific sentencing scheme for which a jury may be fully instructed, not as an internal mechanism of a corrections system.

Life-without-parole as a punishment for murder should be considered on its own merits, not in conjunction with LWOP as a punishment

226. The recidivism rates for murderers are generally quite low, however, and most murderers, whatever their penalties, do not kill again. See Marquart & Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 *Loy. L.A.L. Rev.* 5, 9-10, 22-26 (1989).

227. MD. ANN. CODE art. 27, § 412(b) (1987).

228. OKLA. STAT. ANN. tit. 21, § 701.9(A) (West Supp. 1988).

for habitual offenders or drug kingpins. Much of the public's perception of the sanction's potential problems stems from its possible, increased use on criminals other than violent murderers. While these uses are valid and often may be justified, life-without-parole as a punishment for murder accrues certain distinct philosophical advantages that are not shared by the sanction's other uses. Many opponents of capital punishment will champion life-without-parole as a crucial step toward abolishing the death penalty. While this argument seems sound in light of public opinion polls concerning the death penalty, the sanction also can be used effectively in tandem with capital punishment to benefit criminal justice systems and to protect citizens from violent criminals. Life-without-parole should not be seen solely as a stepping stone to eliminating capital punishment.

For states that are hesitant to adopt life-without-parole on a comprehensive scale, more intermediate uses, such as South Carolina's,²²⁹ are available. By mandating that all prisoners whose death sentences are commuted serve life-without-parole, a state ensures that all murderers deemed dangerous enough to kill will not again walk the streets after an executive commutation. States initially choosing and codifying this intermediate use of LWOP later may consider its expansion. By mandating life-without-parole after commutation of a death sentence, states such as Alabama that already employ life-without-parole for murderers could tighten their own systems and avoid the potential irony of a prisoner sentenced to death receiving commutation and subsequent release on parole while a less heinous murderer sentenced to LWOP remained in prison.

All states that employ or are considering adopting some form of life-without-parole also should continue to study the sanction's effects on the criminal justice and corrections systems and on LWOP prisoners themselves. Extensive additional information is still necessary to measure adequately the long-term effects of the sanction. Existing information, however, indicates that life-without-parole works as an effective sanction against violent murderers. It protects society better than a normal life sentence that allows parole and is a swifter and surer penalty in most cases than the death penalty. Life-without-parole is a hard sanction, consigning individuals to live their natural lives behind bars, but it accurately reflects society's disdain for the taking of human life.

229. S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. 1985).

Life-without-parole offers a legitimate alternative to capital punishment that provides a small measure of hope to inmates. Life-without-parole deserves greater use as a sanction against society's worst killers.

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* The Author wishes to thank the staff of the Capital Case Resource Center of Tennessee for their assistance, patience, and support in the writing of this Note. He also wishes to thank his wife, Amy, for these same contributions and countless others.