

Roundtable on the Future of Justice Policy

Examining Criminalization, Punitive Excess and the Courts in the United States: Implications for Justice Policy and Practice

Co-hosted by Merritt College and the Justice Lab at Columbia University

Life Without Parole: The Shocking Reality

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Premeditated murder—a murder with malice aforethought, a planned, deliberate, expressed intention to kill a person—carries a maximum sentence of 25 years to life imprisonment. To receive a life without the possibility of parole sentence (LWOP), proof of intent or premeditation is not only unnecessary, it does not need to be a consideration. To receive a life without parole sentence a defendant doesn't even have to kill anyone.¹

As absurd as it sounds, under the antiquated felony murder rule, a person can be convicted of first-degree murder and sentenced to life without parole even if the death was accidental, unforeseen, or otherwise unintended and, yes, even if the defendant did not kill anyone. The felony-murder rule is a prosecutor's favorite because criminal liability for a homicide is significantly broadened. The only proof required to secure a first-degree murder conviction is that the defendant is involved in the commission, attempted commission, or flight following the commission of a statutorily enumerated felony.²

The People of the State of California vs Homer Brown is a prime example. Ask yourself if this crime is decidedly more heinous than a murder that was planned and executed in cold blood. In 1979, Homer Brown and his co-defendant entered the HFJ Liquor Store in Long Beach California with intention to commit robbery. Brown searched the store owner for weapons, and removed two handguns from his person. Distracted by a customer, Brown turned his attention away from the store owner, who rose from the floor with a gun trained on Brown. Brown took two bullets in the buttocks as he attempted to flee. A gun fight ensued between Brown's co-defendant and the store owner. The co-defendant was shot in the leg; the store owner was fatally wounded. Brown and his co-defendant were both convicted of first-degree murder under the felony-murder rule and sentenced to life without the possibility of parole.³

Notwithstanding the culpability of both defendants in this tragic crime, the question is whether or not a crime as such is more heinous than premeditated murder and deserving of a harsher punishment: life without parole as opposed to life *with* parole. It is a fundamental principle of law and equity that the imposed punishment should be proportional to the crime and the level of culpability, i.e. "the time should fit the crime." The felony murder doctrine is inconsistent with this bedrock principle of the law.⁴

¹ Senate Concurrent Resolution 48 on Criminal Sentencing (1). Available from https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SCR48

² Ibid.

³ The People of the State of California vs Homer Brown. Available from <https://caselaw.findlaw.com/ca-court-of-appeal/1777677.html>

⁴ Senate Concurrent Resolution 48 on Criminal Sentencing (2). Available from https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SCR48

Felony murder was conceived in England in the 1700s and adopted by the United States in the early 1800s. After much criticism from the courts about severe sentencing of individuals who had no malice aforethought or intent to kill, Parliament abolished the felony—murder rule in 1957. England has since done the same with the life without parole sentence. Life without parole is an internationally condemned practice that has been ruled inhumane and outlawed in 25 countries.⁵

LWOP became a sentence for murder in California when the Legislature believed the death penalty provisions might well be held unconstitutional. The no possibility of parole sentence was discussed in only one paragraph of a 14-page analysis of Senate Bill 155 (January 1977) prepared by the Senate Committee on the judiciary: "Until now the penalty of life imprisonment without the possibility of parole has been rarely used in California. This bill would make it the alternative punishment for all crimes which the death penalty is authorized. Should the death penalty provisions be held invalid, all those already sentenced to death would be sentenced instead to life imprisonment without the possibility of parole. Thus, the bill, if enacted, would result in an increasing number of prison inmates incarcerated with no hope of eventual release."⁶

Despite California voters restoring the death penalty in 1978, the number of prisoners with no hope of parole has rocketed. By 2012, the Golden State had sentenced 4,603 people⁷ to LWOP. Showing no sign of losing momentum, California currently has close to 5,200 men and women incarcerated with LWOP sentences.

According to Joanne Scheer, founder and director of the Felony Murder Elimination Project, CDCR's Division of Internal Oversight Research is unable to give an accounting of the number of California LWOP prisoners who were convicted under the felony murder rule.⁸ However, in 2016 a survey was conducted at Central California Women's Facility (CCWS) to determine how many women were convicted under the felony murder rule. The results of that survey revealed that out of 154 women serving LWOP at CCWS, 138 had been convicted under the FM rule. Of that 138 only 20 were found guilty of actually killing someone. Using these survey results as a basis for estimation for the entire CA LWOP population, it could be inferred that approximately 89 percent were convicted under the felony murder rule, while only 14 percent actually committed the fatal act. Certainly, the percentage of men found guilty of being the actual perpetrator could be higher. Nevertheless, under the felony murder rule a person can be convicted of first degree murder and sentenced to life without the possibility of parole, even if the death was not premeditated.

The Sentencing Project reported the LWOP sentence is now the fastest growing life sentence in the United States. As of 2017, over 50,000 Americans are imprisoned with no hope of release.⁹

The ACLU reported that 3,200 of those are serving life without parole sentences for non-violent crimes.¹⁰ This means the U.S. has more people serving a life without parole sentence for nonviolent crimes than the reported cases of LWOP in the entire rest of the world combined.

⁵ Available from https://decarceratepa.info/press_release/new-campaign-demands-end-life-without-parole

⁶ Available from <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>

⁷ Available from <https://sanquentinnews.com/the-182-women-serving-life-without-parole/>

⁸ Joanne Scheer

⁹ Available from <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>

¹⁰ Available from <https://www.aclu.org/news/more-3200-serving-life-without-parole-nonviolent-offenses-finds-aclu?redirect=criminal-law-reform/more-3200-serving-life-without-parole-nonviolent-offenses-find-s-aclu>

If you don't find that incredible, see if you can get your head around this next fact: The vast majority of people who are sentenced to life without the possibility of parole ultimately become the safest prisoners for release - bar none. The absolute *safest prisoners* for release.

Bear in mind that many LWOPs (prisoners serving an LWOP sentence) had no intention of killing anyone, meaning they did not premeditate a murder. Also keep in mind the fact that many LWOPs did not kill anyone at all, intentionally or otherwise. They were aiders and abettors in a felony that resulted in human death, and were convicted of first-degree murder under the felony murder rule. It should also be noted that an LWOP sentence does not change the circumstances of the case or the culpability of the offender. Nor does it affect the behavior of the prisoner while in prison.

According to the California Department of Corrections and Rehabilitation (CDCR) 2011 Adult Evaluations Outcome Report, 860 convicted murderers were released between 1995 and 2011. Five were returned to prison, *none* for murder, attempted murder, or assault and battery.¹¹ These numbers place convicted murderers, all by themselves, in an extraordinary category: they have the lowest recidivism rate for new crimes of all other offenders, phenomenally low—less than one percent.¹² In comparison, the rest of the general prison population recidivates at 68 percent, with crimes that *do* include murder, attempted murder, and assault and battery.¹³

Before any of these less-than-one-percenters were even considered for release they had to receive a low-risk assessment evaluation score. A risk assessment is an evaluation that predicts an inmate's recidivism risk. The CDCR uses a risk assessment tool aptly named the California Static Risk Assessment (CSRA).¹⁴ On a scale of one (1) to five (5), one equals low risk and five equals high risk. With a low risk evaluation the less-than-one-percenters were deemed unlikely to commit a new crime.

Paradoxically, LWOPs are also evaluated and given risk assessment scores. The majority of LWOPs over age 50 who have served 15 or more consecutive years are low risk, with a CSRA score of one (1).¹⁵ This places LWOPs on equal standing with the less-than-1-percenters.

In 2011, the CDCR's Office of Research published the "Expert Panel Study of Inmate Classification Score System,"¹⁶ which was authored by professors at University of California campuses at Irvine, Los Angeles, Davis, and Berkeley. In 2017, CDCR posted a "Notice of Change to Regulations,"¹⁷ stating: The "Expert Panel also cited research that inmates sentenced to life without the possibility of parole—LWOP—are less likely to engage in violent behavior than inmates sentenced to lengthy determinate prison terms."

¹¹ CDCR Adult Institutions Outcome Evaluation Report, 2011. Available from <https://sites.cdcr.ca.gov/research/wp-content/uploads/sites/9/2018/04/2011-Outcome-Evaluation-Report.pdf>

¹² Christopher Moraff, *America's Other Death Penalty*. Available from <http://america.aljazeera.com/opinions/2015/6/americas-other-death-penalty.html>

¹³ Available from <https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx>

¹⁴ Available from <http://ucicorrections.seweb.uci.edu/files/2013/12/Development-of-the-CSRA-Recidivism-Risk-Prediction-in-the-CDCR.pdf>

¹⁵ Available from <https://sites.cdcr.ca.gov/research/wp-content/uploads/sites/9/2018/04/2017-Outcome-Evaluation-Report.pdf>

¹⁶ Available from <http://www.cdcr.ca.gov/Reports/docs/2010-2011-Classification-Study-Final-Report-01-10-12.pdf>

¹⁷ Available from <http://www.cdcr.ca.gov/Reports/docs/2010-2011-Classification-Study-Final-Report-01-10-12.pdf>

The less-than-one-percenters previously mentioned were sentenced to “lengthy determinate prison terms as well as life *with* parole sentences.” LWOPs are less likely to engage in violent behavior than the less-than-one-percenters, and heretofore safest prisoners for release. “Heretofore” because LWOPs are now considered the safest prisoners for release, bar none.

The same Expert Panel concluded that age is the predictor, citing a finding that the likelihood of misconduct decreases roughly 2 to 4 percent with each additional year of age.¹⁸ Convicted murderers serve lengthy prison terms, consequently they age. They grow older than those prisoners who are still entering and exiting through recidivism’s revolving door with high risk assessment scores—which includes risks for violence.

In a comprehensive study, the Criminal Justice Center at Stanford Law School explains: “For most offenses—and in most societies—crime rates rise in the early teen years, peak mid-to-late-teens, and subsequently decline dramatically. Not only are most violent crimes committed by people under the age of 30, but even the criminality that continues after that declines drastically after age 40 and even more so after age 50.”¹⁹

The CDCR October 2010 Recidivism Report concurs: “Inmates designated as serious or violent offenders recidivated at a lower rate than those who were not, and older inmates who serve 15 years or more at the lowest rate.”²⁰

A wide range of studies show that older prisoners rarely reoffend after release, particularly if they have served lengthy sentences. Prisons are not equipped to be nursing homes. Even China releases its prisoners after 25 years.²¹ Refusing to release elderly prisoners that no longer pose a threat to society is irresponsible, at best. At worst, it is a mean-spirited violation of the Eighth Amendment, which was meant to protect against cruel and unusual punishment.

Furthering the irony of LWOP (taxpayers take note): LWOPs reach the aforementioned “safest prisoners for release” status at an age when the increased need for health care doubles the cost of housing them.²²

Contrary to the ever-popular “touch on crime” rhetoric, the LWOP sentence has nothing to do with public safety. The very existence of a no-parole sentence makes the case that rehabilitation is not possible, which is the how and the why the LWOP sentence literally sustains the mass incarceration system. Rehabilitation is to the prison industry what hydro-powered cars are to the oil companies.

¹⁸ Available from <http://www.cdcr.ca.gov/Reports/docs/2010-2011-Classification-Study-Final-Report-01-10-12.pdf>

¹⁹ Robert Weisberg, Debbie A. Mukamal, and Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, Stanford Criminal Justice Center, 2011. Available from <https://law.stanford.edu/publications/life-in-limbo-an-examination-of-parole-release-for-prisoners-serving-life-sentences-with-the-possibility-of-parole-in-california/>

²⁰ CDCR Recidivism Report, October 2010. Available from <https://www.prisonlegalnews.org/news/2013/mar/15/california-cdcr-releases-latest-recidivism-report/> and <https://sites.cdcr.ca.gov/research/wp-content/uploads/sites/9/2018/04/2017-Outcome-Evaluation-Report.pdf>

²¹ Available from <http://justicenotjails.org/death-sentence/>

²² Available from <http://www.osborneny.org/resources/resources-on-aging-in-prison/osborne-aging-in-prison-white-paper/>

Long before the public began paying attention to the burgeoning multi-billion-dollar prison budgets, guard union executives realized that prison expansion and life without parole sentences were synonymous. The increased budgets for medical costs for aging LWOP prisoners—millions of taxpayer-funded expenses for each individual LWOP—is incidental to the special interest groups that benefit. Their primary objective as prison profiteers is to preserve the LWOP sentence itself. By keeping rehabilitation a myth in America, a dubious concept at best, the mass incarceration system will continue to thrive.

The felony murder rule and the life without parole sentence are the root of the problem. The United States has the highest rate of incarceration on the planet. Not even the most repressive regimes like Russia, China, or even Iran come close.²³ The United States represents five percent of the world's population, yet houses 25 percent of the world's prisoners,²⁴ and in California, incarceration of an inmate is costing taxpayers \$70,836 annually.²⁵

The felony murder rule is what makes the life without parole sentence so easily exploitable, and the life without parole sentence is what makes these wildly disproportionate numbers possible. Maybe it's time for the Land of the Free to catch up with the rest of the world and eliminate the felony murder rule and LWOP. Sentencing people to life without the possibility of parole makes no sense when they ultimately become the safest prisoners for release.

²³ Michelle Alexander, *The New Jim Crow*, The New Press, New York (January 2012). Available from <https://thenewpress.com/books/new-jim-crow>

²⁴ Available from <https://www.aclu.org/prison-crisis>; <http://www.politifact.com/virginia/statements/2014/dec/15/jim-webb/webb-says-us-has-5-percent-worlds-population-25-pe/>

²⁵ Bill Text SCR-48 Criminal Sentencing (page 1)