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## A (Partial and Principled) Defense of Sentences of Life Imprisonment

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# A (PARTIAL AND PRINCIPLED) DEFENSE OF SENTENCES OF LIFE IMPRISONMENT

PROFESSOR MIRKO BAGARIC\* AND JENNIFER SVILAR\*\*

## ABSTRACT

There has been more than a five-fold increase in the number of life sentences in the United States over the past four decades. One in seven prisoners in the United States is serving a life (or virtual) life sentence. This amounts to over 200,000 prisoners. The increase has occurred against the backdrop of near universal condemnation by scholars and public policy advocates – many of whom are now advocating for the abolition of life sentences. Arguments that life sentences are not an effective deterrent or means of protecting the community have some merit. Yet, we argue that in a limited range of circumstances, penalties of life imprisonment are appropriate. The proportionality principle commands that the devastating consequences of certain crimes are punishable by a permanent loss of liberty. Any lesser form of punishment fails to acknowledge the suffering inflicted by the crime and the loss experienced by the victim. First-degree murder mandates no lesser punishment. The reforms in this Article, while justifying some life terms and enhancing the integrity of the sentencing system, would paradoxically reduce the number of prisoners sentenced to life imprisonment in the United States by over 60% given that life terms for all other offenses should be abolished. The same rationale that justifies life imprisonment for first-degree murder also requires that lesser forms of punishments are imposed for all other crimes – life in prison is too harsh given the seriousness of all other offenses.

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## I. INTRODUCTION

The number of prisoners sentenced to life imprisonment has increased markedly in the United States in recent decades,<sup>1</sup> despite a decline in the overall prison population in recent years.<sup>2</sup> This is largely an American phenomenon. Approximately 40% of all offenders in the world serving life sentences are in American prisons.<sup>3</sup>

The runaway increase in life sentences in America has occurred despite near universal criticism by scholars and public policy advocates.<sup>4</sup> The topic of life

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<sup>1</sup> Daniel S. Nagin, *Guest Post: Reduce Prison Populations by Reducing Life Sentences*, WASH. POST (Mar. 31, 2019), <https://www.washingtonpost.com/crime-law/2019/03/21/guest-post-reduce-prison-populations-by-reducing-life-sentences/>.

<sup>2</sup> See *infra* Part II.

<sup>3</sup> ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 15 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>.

<sup>4</sup> See, e.g., Cary Aspinwall, *Life Without Parole Is Replacing the Death Penalty — But the Legal Defense System Hasn't Kept Up*, MARSHALL PROJECT (May 22, 2021, 6:00 AM),

sentences, at both the theoretical and pragmatic level, is now especially important given the surge in violent crime, including homicides, in America in recent years<sup>5</sup> and the move away from capital punishment—there were (only) eleven executions in the United States in 2021.<sup>6</sup>

Critics of life sentences argue that life terms are inappropriate because they are not effective deterrents, do not meaningfully enhance community safety, and are cruel.<sup>7</sup> While there is some merit to these arguments, we argue that life sentences are necessary and appropriate in a limited range of circumstances.

Life terms for offenders who commit first-degree murder will not deter other offenders; they will not meaningfully enhance community safety and they will impose suffering on the offender. But life terms for these offenses are the only legal response that is proportionate to the devastation inflicted on the victim. Only a permanent loss of liberty is commensurate with the harm caused by first-degree murder, can uphold the importance of human life, and preserve the integrity of the criminal justice system. This stems from the operation of the proportionality principle, which stipulates that the harshness of the sanction must match the severity of the crime.<sup>8</sup>

First-degree murder involves the intentional killing of another person.<sup>9</sup> Approximately 16,000 of these offenses are committed annually in the United States.<sup>10</sup> Every murder involves a tragic outcome; it is dramatic and results in extreme trauma to victims and suffering to their relatives. Many murderers are repeat offenders.<sup>11</sup> For example, in July 2021, twenty-five homicide suspects were arrested in Baltimore City alone, and, of those, ten were violent repeat offenders.<sup>12</sup> Included among these individuals is Davon Douglass, whose criminal history covers almost a

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<https://www.themarshallproject.org/2021/05/22/life-without-parole-is-replacing-the-death-penalty-but-the-legal-defense-system-hasn-t-kept-up>; ASHLEY NELLIS, SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 29 (2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/#IV.%20Crime%20of%20Conviction>.

<sup>5</sup> See *infra* Part III.

<sup>6</sup> *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last updated Feb. 22, 2022).

<sup>7</sup> See sources cited *supra* note 4.

<sup>8</sup> See *infra* Part V.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> 2019 *Crime in the United States: Murder*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/murder> (last visited Mar. 6, 2022).

<sup>11</sup> U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS (2019), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124\\_Recidivism\\_Violence.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf).

<sup>12</sup> Alexa Ashwell, *Report: Past Crimes Repeat Violent Offenders Were Charged with Prior to Homicide Arrests*, FOX 45 NEWS (July 7, 2021), <https://foxbaltimore.com/news/local/report-past-crimes-repeat-violent-offenders-were-charged-with-prior-to-homicide-arrests>.

decade and includes his arrest for the murder of a man in 2019.<sup>13</sup> Another individual, Garrick Powell, was charged in the murder of Safe Streets violence interrupter Dante Barksdale and had a long history of violence, including a previous murder charge of which he was cleared.<sup>14</sup> Yet another tragic story involves 24-year-old Yasemin Uyar, who was murdered by her former boyfriend, Tyler Rios, who had a long history of domestic violence.<sup>15</sup> Rios had been charged with choking Uyar multiple times, often spending up to 60 days in jail, and when Uyar was told to contact the court if he bothered her upon release, she did so.<sup>16</sup> But then, Uyar and her young son, Sebastian, went missing.<sup>17</sup> Sebastian was found with his father (Rios), and Uyar's body was found "half-naked stuffed in a duffel bag and discarded in the woods. She had been strangled and suffered blunt-force trauma two days before her remains were recovered."<sup>18</sup>

We argue that first-degree murder should always attract a standard penalty of life imprisonment. There should be only one mitigating factor capable of reducing the harshness of this penalty—youth. The corollary of our argument is that life imprisonment should be abolished for all other offenses. The logic in favor of life imprisonment for first-degree murder also requires lesser forms of punishment for all other offenses. Life imprisonment constitutes too much suffering for all other offense types, given that the harm caused by all other offenses cannot, in any measure, equate to the suffering inherent in a life prison term.

The net result of our recommendations is that the number of offenders sentenced to life imprisonment would reduce dramatically (by over 60%).<sup>19</sup> However, the life terms which are imposed would be more justifiable, thereby enhancing the integrity and predictability of the criminal justice system. Thus, this Article has two recommendations: life imprisonment should be the sentence for all offenders who commit first-degree murder and, secondly, life imprisonment should be abolished for all other offenses.

We propose that life imprisonment should equate to a minimum term of 30 years' imprisonment with no release after 30 years unless a risk assessment of the offender establishes that the prisoner is unlikely to reoffend. A 30-year nominal timeframe should be set for life terms because it is desirable to place some limits on the numerical disparities of time served among offenders of vastly different ages, while ensuring that a minimum level of punitiveness is exacted on first-degree murderers. Without the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Suzanne Russell, *After Daughter's Slaying, NJ Mom Is on a Mission to Help Domestic Violence Victims*, MY CENT. JERSEY (Sept. 13, 2021, 5:02 AM), <https://www.mycentraljersey.com/story/news/crime/2021/09/13/after-daughters-slaying-nj-mom-mission-fight-domestic-violence/5572276001/>.

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

<sup>19</sup> NELLIS, *supra* note 4.

setting of a 30-year default term, murderers who commit their offense at age 20 would serve on average 60 years in prison (given that adult life expectancy is 80 years of age), while those aged 70 would serve only 10 years. A 30-year nominal term limits this disparity. In this way, youth is also effectively incorporated as a mitigating factor in setting penalties for first-degree murders.

An important assumption made in this Article is that while a life term for first-degree murder might be an appropriate penalty, the death penalty is too harsh. The appropriateness of the death penalty as a criminal sanction has a very well developed and wide-ranging jurisprudence, and it is beyond the scope of this Article to examine this at length. Briefly, our view is that the death penalty should be abolished because it, paradoxically, undercuts the importance of human life; is inhumane in its implementation (there is no guaranteed pain-free way to kill people); and there are less drastic options that can serve the same ends as the death penalty. Indeed, this Article focuses on the best alternative sanction to achieve all of the appropriate goals of the death penalty.

Omitting in depth analysis of the death penalty does not meaningfully limit our recommendations considering there are a relatively small number of executions carried out annually in the United States (less than twenty in 2020 and five in 2021 as of September 1, 2021),<sup>20</sup> and these are on the decline as opposition to the death penalty continues to grow.<sup>21</sup> A Death Penalty Information Center survey notes that “[a] 2010 poll by Lake Research Partners found that a clear majority of voters (61%) would choose a punishment other than the death penalty for murder.”<sup>22</sup> Thus, even if readers support the death penalty as a sanction for some first-degree murderers, the reform proposals in this Article are highly relevant because the reality now and for the foreseeable future is that only a small number (less than 0.1 percent)<sup>23</sup> of murderers would be dealt with by means of execution. Moreover, it is relevant to note at the outset, that the proposals in this Article only relate to the sentencing of adults. The Supreme Court has held that life terms without parole are unlawful for juveniles.<sup>24</sup> There are sound legal, biological, and normative reasons for this – especially given the enhanced rehabilitative prospects of juveniles.<sup>25</sup>

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<sup>20</sup> It has been noted that: “295 death sentences were imposed in the U.S. in 1998. The number of death sentences per year has dropped dramatically since then.” *Facts About the Death Penalty*, *supra* note 6. The report further notes there were 17 executions in 2020, and there are currently 2,455 prisoners on death row. *See id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See Assault or Homicide*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nchs/fastats/homicide.htm> (last updated Jan. 5, 2022); *Facts About the Death Penalty*, *supra* note 6. The United States is the only developed nation apart from Japan that still imposes the death penalty. *See Japan Executes First Foreigner in Years, a Chinese Man Who Killed a Family*, REUTERS (Dec. 26, 2019, 12:03 AM), <https://www.reuters.com/article/us-japan-deathpenalty/japan-executes-first-foreigner-in-years-a-chinese-man-who-killed-a-family-idUSKBN1YU07N>.

<sup>24</sup> *See infra* Part V.

<sup>25</sup> *Id.*

In Part II of the Article, we examine the incidence of life imprisonment and the circumstances in which this sanction is imposed. This is followed by an explanation in Part III of why, given the current surge in serious crime, a close examination of the life imprisonment is necessary. In Part IV, we evaluate two of the main arguments in favor of life terms for crimes other than first-degree murder (deterrence and community deterrence) and explain why they are not compelling. This is followed in Part V by a discussion of why the principle of proportionality justifies life sentences for first-degree murder. Part VI evaluates the contention that life terms are cruel and explains why life terms for all other offenses should be abolished. The reform proposals are summarized in the concluding remarks.

## II. THE CURRENT USE OF LIFE SENTENCES

### A. Overall Incarceration Patterns

The United States incarcerates more of its people than any other nation—and by a big margin.<sup>26</sup> But in recent years, incarceration numbers have been declining.<sup>27</sup> The move towards mass incarceration commenced approximately 50 years ago<sup>28</sup> when former President Nixon declared a “War on Drugs.” The most obvious manifestation of this was the introduction of severe prescriptive sentencing guidelines.<sup>29</sup> As Michael Tonry notes, prescribed penalties have had a profound impact:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP [life without parole] laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe “career criminal,” “dangerous offender,” and “sexual predator” laws. These laws, because they required sentences of

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<sup>26</sup> ROY WALMSLEY, INST. FOR CRIM. POL’Y RSCH., WORLD PRISON POPULATION LIST 2 (12th ed. 2018), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf) (providing statistics for prison populations by nation).

<sup>27</sup> *Id.* at 6.

<sup>28</sup> See SASHA ABRAMSKY, AMERICAN FURIES: CRIME, PUNISHMENT AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT (2007); ANTHONY THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: RE-ENTRY, RACE, AND POLITICS (2009). The war on drugs has been widely acknowledged as a failure. See, e.g., Alex Norcia, *Poll Shows Huge Public Opposition to “War on Drugs,” After 50 Years*, FILTER (June 9, 2021), <https://filtermag.org/war-on-drugs-poll/>; David Farber, *The War on Drugs Turns 50 Today. It’s Time to Make Peace.*, WASH. POST (June 17, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/06/17/war-drugs-turns-50-today-its-time-make-peace/>.

<sup>29</sup> William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and Its Progeny*, 40 CONN. L. REV. 631, 633 (2008); NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 325 (Jeremy Travis et al. eds., 2014).

historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.<sup>30</sup>

Although the United States' federal jurisdiction and each of its states have different sentencing systems,<sup>31</sup> each jurisdiction shares key sentencing objectives in the form of community protection, general deterrence, specific deterrence, rehabilitation, and retribution.<sup>32</sup> While these objectives vary in importance, community protection has proven to be the most influential.<sup>33</sup> This is reflected most prominently in the harsh prescriptive sentencing laws—manifested in fixed, minimum, or presumptive penalties—that now apply at least to some extent in all American jurisdictions.<sup>34</sup>

The United States Sentencing Commission (USSC) *Guidelines Manual* (“Federal Sentencing Guidelines” or “Guidelines”) is a good example of typical prescriptive penalty laws.<sup>35</sup> The sanction imposed on offenders is principally determined by the offender’s prior criminal history and the perceived severity of the crime.<sup>36</sup> There are also dozens of other considerations that can influence the penalty.<sup>37</sup> Additionally, judges can deviate from the Guidelines where there are relevant mitigating and aggravating considerations, which are taken into account mainly in the form of “adjustments” and “departures.”<sup>38</sup> For example, a penalty can be reduced by three

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<sup>30</sup> Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503, 514 (2014). For a list of jurisdictions in the United States that use guideline sentencing, see *Sentencing Guidelines Resource Center*, U. OF MINN. ROBINA INST. CRIM. L. & CRIM. JUST., <http://sentencing.umn.edu/> (last updated Aug. 23, 2019) (click “Jurisdictions”).

<sup>31</sup> Sentencing (and more generally, criminal law) in the United States is mainly the province of the states. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

<sup>32</sup> See U.S. SENT’G GUIDELINES MANUAL (U.S. SENT’G COMM’N 2021).

<sup>33</sup> See NATIONAL RESEARCH COUNCIL, *supra* note 29, at 68.

<sup>34</sup> Nineteen of the United States’ jurisdictions in fact have extensive guideline sentencing systems: Alabama, Kansas, Oregon, Maryland, Pennsylvania, Arkansas, Massachusetts, Tennessee, Delaware, Michigan, Utah, District of Columbia, Minnesota, Virginia, Federal (U.S. courts), North Carolina, Washington, Florida, and Ohio. See Richard S. Frase & Kelly Lyn Mitchell, *What Are Sentencing Guidelines?*, U. OF MINN. ROBINA INST. CRIM. L. & CRIM. JUST. (Mar. 21, 2018), <http://sentencing.umn.edu/content/what-are-sentencing-guidelines>.

<sup>35</sup> Melissa Hamilton, *Sentencing Disparities*, 7 BRIT. J. AM. LEG. STUD. 6, 177 (2017).

<sup>36</sup> See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1133, 1135 (2008).

<sup>37</sup> AMY BARON EVANS & PAUL HOFER, LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION, at i (2010), [https://static1.squarespace.com/static/551cb031e4b00eb221747329/t/5883e40717bffc09e3a59ea1/1485038601489/Litigating\\_Mitigating\\_Factors.pdf](https://static1.squarespace.com/static/551cb031e4b00eb221747329/t/5883e40717bffc09e3a59ea1/1485038601489/Litigating_Mitigating_Factors.pdf).

<sup>38</sup> *Id.* Adjustments are considerations that increase or decrease a penalty by a designated amount. These are set out in Chapter 3 of the U.S. Sentencing Guidelines. U.S. SENT’G

levels if it is accompanied by an early guilty plea.<sup>39</sup> Further discretion is built into the system by the fact that judges can invoke considerations which are not expressly set out in the Guidelines to justify departing from the relevant guideline range<sup>40</sup> if the judges articulate their reasoning for the departure.<sup>41</sup> While the Guidelines are only advisory,<sup>42</sup> the guideline range has a significant impact on sentencing outcomes with approximately 50% of all sentences coming within the stipulated range.<sup>43</sup>

## B. Incarceration Numbers and Trends

### 1. Overall Incarceration Trends

Apart from the death penalty, incarceration is the harshest criminal sanction. Incarcerated offenders are held in two forms of detention: prisons and jails. Prisons are long-term confinement institutions run by state or federal governments, which hold offenders with sentences that are typically longer than one year in duration.<sup>44</sup> Jails are temporary detention facilities, operated by a sheriff, police chief, or city or county administrator, and generally hold offenders who are sentenced to a term of one year or less.<sup>45</sup>

Currently, there are nearly two million Americans incarcerated in state and federal prisons and local jails.<sup>46</sup> Total incarceration numbers peaked at 2,310,000 in 2008.<sup>47</sup> Leading up to the mid-2000s, prison numbers increased more than four-fold in four

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GUIDELINES MANUAL ch. 3 (U.S. SENT'G COMM'N 2021). Departures more readily enable courts to impose a sentence outside the applicable guideline range. *Id.* at 467; *see also id.* § 1A4(b).

<sup>39</sup> U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.3 (U.S. SENT'G COMM'N 2021).

<sup>40</sup> *Id.* § 5K2.0(a)(2)(B); *see also* Gall v. United States, 552 U.S. 38, 49–50 (2007); Pepper v. United States, 562 U.S. 476, 501 (2011).

<sup>41</sup> U.S. SENT'G GUIDELINES MANUAL § 5K2.0(e) (U.S. SENT'G COMM'N 2021).

<sup>42</sup> United States v. Booker, 543 U.S. 220, 245 (2005). In *Booker*, the Supreme Court held that aspects of the Guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial.

<sup>43</sup> U.S. SENT'G COMM'N, ANNUAL REPORT 2018, at 8 (2018), <https://www.ussc.gov/about/annual-report-2018>.

<sup>44</sup> DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUSTICE, NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 5 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

<sup>45</sup> *Id.*

<sup>46</sup> Press Release, Vera Inst. of Just., *Incarceration Declined Only Slightly from Fall 2020 to Spring 2021 after an Unprecedented Drop in Incarceration in 2020* (June 7, 2021), <https://www.vera.org/newsroom/incarceration-declined-only-slightly-from-fall-2020-to-spring-2021-after-an-unprecedented-drop-in-incarceration-in-2020>.

<sup>47</sup> Press Release, Bureau of Just. Stat., *Prison and Jail Incarceration Rates Decreased by More than 10% from 2007 to 2017* (Apr. 25, 2019), <https://www.bjs.gov/content/pub/press/p17ji17pr.cfm>; *see also* KAEBLE & COWHIG, *supra* note 44, at 2.

decades.<sup>48</sup> The incarceration rate in the United States has dropped in recent years and, as of 2018, was at its lowest level since 1995–1996.<sup>49</sup> Between 2006 and 2018, the rate fell by 17% from 666 prisoners per 100,000 residents in federal and state prisons in 2008 to 555 sentenced prisoners per 100,000 residents in 2018.<sup>50</sup> Between 2017 and 2018, the total prison population diminished by 1.6%.<sup>51</sup>

The rate at which prison numbers have been falling has increased in the past two years, in part as a result of the COVID-19 pandemic.<sup>52</sup> Even so, some of the largest outbreaks of COVID-19 occurred in prisons and large jails.<sup>53</sup> The incarceration levels in state and federal prisons and local jails dropped from 2.1 million in 2019 to 1.8 million in mid-2020.<sup>54</sup> State and federal prisons incarcerated about 1,311,100 people in mid-2020, and the population further declined, leveling out at about 1,249,300 in late 2020.<sup>55</sup> The incarceration level of local jails declined about 17% from mid-2019 to late 2020, with most of the decline occurring during the first part of the COVID-19 pandemic.<sup>56</sup> In population percentage terms, the rate of people behind bars at state and federal prisons and local jails dropped from 644 people per 100,000 residents to 551 people per 100,000 residents in the first half of 2020.<sup>57</sup> The rate further dropped to 549 people per 100,000 residents in late 2020.<sup>58</sup>

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<sup>48</sup> *Policies Have Reduced Prison Populations, Expanded Prison Alternatives, Protected Public Safety*, THE PEW CHARITABLE TRUSTS (Mar. 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth>.

<sup>49</sup> John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/>.

<sup>50</sup> *Id.*

<sup>51</sup> E. ANN CARSON, BUREAU OF JUST. STAT., NCJ 253516, PRISONERS IN 2018, at 1 (Apr. 2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf>.

<sup>52</sup> See Press Release, Vera Inst. of Just., *supra* note 46.

<sup>53</sup> JACOB KANG-BROWN ET AL., VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN 2020, at 2 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.*; see also Weihua Li et al., *There Are Fewer People Behind Bars Now than 10 Years Ago. Will It Last?*, MARSHALL PROJECT, <https://www.themarshallproject.org/2021/09/20/there-are-fewer-people-behind-bars-now-than-10-years-ago-will-it-last> (last updated Sept. 27, 2021, 1:00 PM).

## 2. Life Imprisonment Trends

One form of incarceration has grown significantly in the United States. More than 200,000 inmates—one out of every seven—are serving life sentences.<sup>59</sup> Three types of what are known as “life sentences” are imposed:

- Life without the possibility of parole (LWOP);
- Life with the possibility of parole (LWP); and
- Virtual life sentences, which are prison terms of at least 50 years.<sup>60</sup>

The United States is not alone in using life imprisonment.<sup>61</sup> In fact, between 2000 and 2014, the number of people serving life sentences worldwide rose by 84% to 479,000.<sup>62</sup> Other countries that use life sentences include Turkey, India, and Great Britain,<sup>63</sup> while Colombia and Serbia recently modified their stance on life sentences following brutal crimes against children.<sup>64</sup> South African jails hold almost 17,000 individuals serving life sentences.<sup>65</sup>

The United States incarcerates roughly 40% of the world’s population serving life sentences and 83% of those serving LWOP sentences.<sup>66</sup> In fact, a 2016 international analysis showed that “the number of people serving life imprisonment in the United States is higher than the *combined* total in the other 113 countries surveyed.”<sup>67</sup> The use of life sentences on such a large scale is a “relatively new phenomenon in the United States. Until 1970, only seven states had a provision for life without parole in

<sup>59</sup> ASHLEY NELLIS, SENT’G PROJ., NO END IN SIGHT: AMERICA’S ENDURING RELIANCE ON LIFE IMPRISONMENT 4, 11 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>.

<sup>60</sup> MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE 3 (2018).

<sup>61</sup> As of 2014, the criminal justice systems of 183 countries and territories featured life sentences. *See As the Death Penalty Becomes Less Common, Life Imprisonment Becomes More So*, ECONOMIST (July 6, 2021) [hereinafter ECONOMIST], <https://www.economist.com/international/2021/07/06/as-the-death-penalty-becomes-less-common-life-imprisonment-becomes-more-so>.

<sup>62</sup> *Id.*

<sup>63</sup> Great Britain recently reduced the age at which a judge may impose a life sentence from 21 to 18. *Id.*

<sup>64</sup> *See id.* Serbia passed “Tijana’s Law,” which permits judges to sentence murderers and rapists of children to LWOP. *Id.* Colombia also reversed its position on life sentences, allowing them again after a 13-year-old girl was gang raped by soldiers. *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> NELLIS, *supra* note 59, at 15.

<sup>67</sup> MAUER & NELLIS, *supra* note 60, at 9.

their sentencing codes, whereas every state except Alaska now permits this punishment.”<sup>68</sup>

Surprisingly, a substantial number of those serving life sentences are serving them for nonviolent offenses.<sup>69</sup> Overall, 19% of inmates serving life sentences have been sentenced for sex offenses; 8% for robbery; 4% for assault; 3% for drug offenses; 2% for property offenses and 4% for other offenses. The remaining 57% of offenders serving life sentences are sentenced for homicide, and of these, 72% have been sentenced for first-degree murder.<sup>70</sup>

By way of definitional clarity, it is important to note that first-degree murder does not have a uniform definition throughout the United States. We adopt the definition adopted by the Bureau of Justice Statistics (BJS), which is stated below. This noted, there are three forms of homicide offenses: murder, nonnegligent and negligent manslaughter, and unspecified homicide offenses.<sup>71</sup>

First-degree murder is “intentionally causing the death of another person without extreme provocation or legal justification, or causing the death of another while committing or attempting to commit another crime.”<sup>72</sup> A lesser form of homicide is nonnegligent (or voluntary) manslaughter, which is “intentionally and without legal justification causing the death of another when acting under extreme provocation.”<sup>73</sup> Negligent (or involuntary) manslaughter is “causing the death of another person through recklessness or gross negligence, without intending to cause death . . . [and] includes vehicular manslaughter but excludes vehicular murder (intentionally killing someone with a motor vehicle), which is classified as murder.”<sup>74</sup>

There are harsh penalties for first-degree murder in all American jurisdictions, although the penalties are not uniform. The penalties range from death or life without parole (such as in the federal jurisdiction; Alabama; Arizona; Louisiana; Florida; and North Carolina);<sup>75</sup> to life without parole (such as Delaware and Indiana);<sup>76</sup> to a designated minimum term, such as 30 to 60 years in the District of Columbia; 20 to 99 years in Alaska; 25 years to life in California; 20 to 60 years in Illinois; 30 years in

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<sup>68</sup> *Id.* at 25.

<sup>69</sup> NELLIS, *supra* note 59, at 5; MAUER & NELLIS, *supra* note 60, at 10.

<sup>70</sup> NELLIS, *supra* note 59, at 20.

<sup>71</sup> *Prisoner Recidivism Analysis Tool – 2005*, BUREAU OF JUST. STAT., [https://www.bjs.gov/recidivism\\_2005\\_arrest/templates/terms.cfm](https://www.bjs.gov/recidivism_2005_arrest/templates/terms.cfm) (last updated Feb. 4, 2016) (click “Definitions”).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See 18 U.S.C. § 1111; ALA. CODE § 13A-6-2 (1975); ARIZ. REV. STAT. ANN. § 13-1105 (2009); LA. STAT. ANN. § 14:14:30 (2015); FLA. STAT. § 782.04 (2019); N.C. GEN. STAT. § 14-17 (2017).

<sup>76</sup> See DEL. CODE ANN. tit. 11, § 4209A (2022); IND. CODE § 35-50-2-3 (2022).

Minnesota; 20 to 25 years in New York; 30 years in South Carolina; 20 to 26 years in Washington (if no prior convictions).<sup>77</sup>

Life without parole has steadily increased and has “has risen considerably faster than either life with parole or virtual life sentences. The number of people serving LWOP stands at 55,945.”<sup>78</sup> This number is higher than ever before, according to the Sentencing Project.<sup>79</sup> Nearly 106,000 individuals were serving parole-eligible sentences in 2020, and about 7,000 people across the United States were serving LWP sentences for crimes they committed as minors.<sup>80</sup> And 7% of this population (or 675 people) is at least 55 years old.<sup>81</sup>

Looking at the United States as a whole, twenty-nine states had more people serving life sentences, though twenty-eight states reported lower LWP populations, in 2020 than in 2016.<sup>82</sup> Pennsylvania alone has the second highest number of individuals serving life sentences (8,842 individuals), nationally and globally.<sup>83</sup> Life sentences are imposed disproportionately. For example, 30% of those serving life sentences are 55 years of age or older, and this number has tripled since 2000.<sup>84</sup> Even though women make up only about 3% of the life sentence population, the number of women serving such sentences increased by 43% between 2008 and 2020, while there was only a 29% increase among men.<sup>85</sup>

Why do life imprisonment numbers continue to grow? It is due to “changes in law, policy and practice that lengthened sentences and limited parole,” largely due to public fear about crime that stems from sensationalized media coverage rather than actual violence rates.<sup>86</sup> Indeed, such increases are due to “[p]olicy choices, not criminal offending patterns.”<sup>87</sup> Life sentences became more popular before violent crime rates

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<sup>77</sup> See D.C. CODE § 22-2104 (2013); ALASKA STAT. § 12.55.125 (2019); CAL. PENAL CODE § 190(a) (1996); 730 ILL. COMP. STAT. § 5-4.5-20(a) (2020); MINN. STAT. § 609.185 (2014); N.Y. PENAL LAW § 125.27; (McKinney 2019); S.C. CODE ANN. § 16-3-20 (2010); 2020 WASH. STATE ADULT SENT’G GUIDELINES MANUAL, §7, at 388 (WASH. STATE CASELOAD FORECAST COUNCIL 2020).

<sup>78</sup> NELLIS, *supra* note 59, at 15.

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.* at 14, 16. “[I]n Georgia, Maryland, and Tennessee, and Wisconsin, nearly 10% of the people serving a life sentence were under 18 at the time of their crime.” *Id.* at 25.

<sup>81</sup> *Id.* at 22.

<sup>82</sup> *Id.* at 4, 15.

<sup>83</sup> *Id.* at 8.

<sup>84</sup> *Id.* at 4, 20.

<sup>85</sup> *Id.* at 18.

<sup>86</sup> *Id.* at 4.

<sup>87</sup> MAUER & NELLIS, *supra* note 60.

began to rise in the late 1980s and early 1990s.<sup>88</sup> Additionally, more and more crimes authorize life sentences as punishment: between 2012 and 2020, the primary offense for which someone was sentenced to life was homicide,<sup>89</sup> but there was “also a 40% increase in the number of people serving life for a sex-related offense and another 9% increase in the number of people serving life sentences for aggravated assault, robbery, or kidnapping.”<sup>90</sup>

The growth in life sentences largely stems from the decline in the use of the death penalty. It has been recently noted that:

Life-without-parole sentences are steadily replacing the death penalty across the United States. Almost 56,000 people nationwide are now serving sentences that will keep them locked up until they die, an increase of 66% since 2003, according to The Sentencing Project, a nonprofit that advocates for shorter prison terms. By comparison, only 2,500 people nationally are on death row according to the Death Penalty Information Center; the number of new death sentences dwindled to 18 last year, as prosecutors increasingly seek life instead. Executions are less popular with Americans than they used to be, according to Gallup, and are astronomically expensive to taxpayers. In Dallas, the district attorney’s office says it asks for capital punishment only for egregious crimes where defendants present a continuing threat to society.<sup>91</sup>

In fact, life sentences are often viewed as a humane alternative to the death penalty.<sup>92</sup> However, because similar problems exist with both forms of punishment, “legal scrutiny bestowed on the death penalty should also encompass sentences so long that they cannot be outlived.”<sup>93</sup>

Racial disparities, though clearly present throughout the entire criminal justice system, are even more pronounced among those serving life sentences.<sup>94</sup> More than two-thirds of those serving life sentences are people of color,<sup>95</sup> and one in five Black men in prison are serving a life sentence.<sup>96</sup> Latinx individuals account for 16% of those serving life sentences.<sup>97</sup> For LWOP sentences specifically, 55% of individuals

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<sup>88</sup> NELLIS, *supra* note 59, at 13.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Aspinwall, *supra* note 4.

<sup>92</sup> NELLIS, *supra* note 59, at 12.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.* at 4.

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.* at 4.

servicing these sentences are Black.<sup>98</sup> In North Carolina, for instance, 62% of the individuals serving LWOP sentences for homicide are Black, and 81% of individuals serving LWOP sentences under the state's habitual offender laws are Black.<sup>99</sup> Similar trends are seen in Mississippi, where 75% of the individuals serving LWOP sentences under habitual offender laws are Black.<sup>100</sup> Any reforms relating to life sentences need to be cognizant of this consideration and attempt to curtail the disproportionate impact on African Americans.

### 3. Reforms Aimed at Reducing Life Sentences

There are already some meaningful reforms that have occurred to address overly long prison terms. For example, California has a law that allows prosecutors to request sentence modifications from the court if the sentences are believed to be excessive.<sup>101</sup> Legislation in Washington D.C. allows individuals who were under twenty-five at the time of their offense to petition the court for resentencing and early release after serving fifteen years.<sup>102</sup> And Senator Cory Booker introduced the Second Look Act in 2019 to allow an individual incarcerated in federal prison to seek a sentence modification after ten years.<sup>103</sup>

On the federal side, proposed federal legislation termed the BREATHE Act would eliminate life sentences.<sup>104</sup> The bill consists of several sections, one of which would "divest federal resources from incarceration and policing," while the others call for "sweeping changes that would eliminate federal programs and agencies 'used to finance and expand' the U.S. criminal-legal system."<sup>105</sup> Not only would the Act end life sentences, it would also abolish mandatory minimum sentencing laws.<sup>106</sup>

Opponents of life sentences have argued for more wide-ranging reforms. Hence it has been suggested that many have argued that reducing life sentences and allowing for early prison release would endanger communities, but there is no proof that long prison sentences benefit communities by being "a strong deterrent to violent crime."<sup>107</sup> Without such efforts, long-term incarceration will continue to be a problem

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<sup>98</sup> *Id.* at 18.

<sup>99</sup> *Id.* at 28.

<sup>100</sup> *See id.* at 29.

<sup>101</sup> *Id.* at 5.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Kat Stafford, *Movement for Black Lives Seeks Sweeping Legislative Changes*, AP NEWS (July 7, 2020), <https://apnews.com/article/us-news-ap-top-news-racial-injustice-politics-police-68ae4df39c5fdc5038fc3b764b1a8217>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> S. POVERTY L. CTR. ACTION FUND, *LONG ROAD TO NOWHERE: HOW SOUTHERN STATES STRUGGLE WITH LONG-TERM INCARCERATION* 8 (2021),

in the United States. In looking at the prison systems in three southern states—Alabama,<sup>108</sup> Florida,<sup>109</sup> and Louisiana<sup>110</sup>—the Southern Poverty Law Center (SPLC) Action Fund addresses this head on, noting that there are a variety of potential solutions, “from expanding parole eligibility and making it retroactive, to increasing incentives for rehabilitation credits, to recalibrating triggers for LWOP sentences.”<sup>111</sup>

The Sentencing Project takes its own unique approach: mass imprisonment beyond twenty years is an almost uniquely American phenomenon, and the Sentencing Project recommends the placement of a maximum of twenty years<sup>112</sup> on prison sentences to reduce mass incarceration and ensure resources saved by this change are redistributed into communities that need them most.<sup>113</sup> However, this change does not completely preclude the potential for longer prison sentences: if, after twenty years, an individual still acts in a way that would put public safety at risk, a court may impose an additional period of civil confinement.<sup>114</sup> Even after an additional period was imposed, the person would be periodically reassessed for release.<sup>115</sup>

Additionally, in 2018, the Penal Reform Institution (PRI), in conjunction with the University of Nottingham, issued a policy briefing recommending that LWP sentences be abolished and that other life sentences “should be used only when strictly needed to protect society and only in cases where the ‘most serious crimes’ have been committed.”<sup>116</sup>

Thus, there is some momentum for changing the approach to life sentences, but pragmatically, there are no meaningful changes which have occurred.

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[https://www.splcactionfund.org/sites/default/files/Long-Road-to-Nowhere.pdf?\\_sm\\_au\\_=iVVnr30kWPHZ84rHFGkQjKQHL7C8J](https://www.splcactionfund.org/sites/default/files/Long-Road-to-Nowhere.pdf?_sm_au_=iVVnr30kWPHZ84rHFGkQjKQHL7C8J).

<sup>108</sup> Alabama’s prisons are the most crowded in the country, at 151% capacity as of February 2021. *Id.* at 5.

<sup>109</sup> Florida has the nation’s third-largest prison population and boasts the nation’s oldest prison population. *Id.*

<sup>110</sup> Louisiana is known as the “incarceration capital of the world” and holds more individuals serving LWOP sentences than Alabama, Georgia, New York, and Texas combined. *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> NELLIS, *supra* note 59, at 6. Similar approaches are seen outside of the United States. *See, e.g.,* ECONOMIST, *supra* note 61 (noting that the European Court of Human Rights (ECHR) ruled that offenders have a right to hope for eventual release, while the International Criminal Court calls for review of sentences after 25 years).

<sup>113</sup> NELLIS, *supra* note 59, at 6.

<sup>114</sup> *Id.* Norway engages in a similar practice. *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> PENAL REFORM INT’L ET AL., LIFE IMPRISONMENT: A POLICY BRIEFING 11 (2018), [https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI\\_Life-Imprisonment-Briefing.pdf](https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Life-Imprisonment-Briefing.pdf).

### III. FOCUS ON LIFE SENTENCES – INCREASING RATES OF VIOLENT CRIME IN THE UNITED STATES

As alluded to above, there are ostensibly strong reasons to reduce the number of life terms that are imposed. In proposing law reform, it is necessary to make recommendations that are pragmatically achievable. An important consideration relating to what is achievable in the context of harsh prison terms is the community attitude towards criminal justice. This is influenced by crime rates and fear of crime.

The crime rate in the United States for much of the past few decades has been declining.<sup>117</sup> According to the Pew Research Center, both the FBI and BJS show a decline in violent and property crime rates in the United States since the early 1990s.<sup>118</sup> It is difficult to know exactly how much crime exists in the United States, however, because the FBI and BJS “paint an incomplete picture” and focus on “a handful of specific violent and property crimes while excluding other kinds of crime.”<sup>119</sup> Even so, according to the FBI, the violent crime rate fell 49% between 1993 and 2019, and the property crime rate fell 55% during the same time.<sup>120</sup> Based on BJS data, the violent crime rate declined 74% over the same period, and the property crime rate declined 71%.<sup>121</sup> In 2014, the United States had its lowest homicide rate in its history, though it still had “the highest homicide rate of any comparably prosperous country.”<sup>122</sup> And by 2019, the U.S. homicide rate was roughly 11% higher than it was in 2014.<sup>123</sup>

There has been a reversal of this trend in the past two years, which has seen a marked increase in the rate of crime, and especially violent crime, and it is a uniquely American problem.<sup>124</sup> Major cities experienced a 33% increase in homicides in 2020, even as the COVID-19 pandemic spread throughout the country, and the surge continued into the first quarter of 2021.<sup>125</sup> The rate of increase in the murder rate is

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<sup>117</sup> Gramlich, *supra* note 49.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Eric Levitz, *Progressives Don't Need to Downplay Rising Homicides*, INTELLIGENCER (July 1, 2021), [https://nymag.com/intelligencer/2021/07/progressives-dont-need-to-downplay-rising-homicides.html?\\_sm\\_au\\_=iVVnr30kWPHZ84rHFGkQjKQHL7C8J](https://nymag.com/intelligencer/2021/07/progressives-dont-need-to-downplay-rising-homicides.html?_sm_au_=iVVnr30kWPHZ84rHFGkQjKQHL7C8J).

<sup>123</sup> *Id.*

<sup>124</sup> See German Lopez, *Murders Are Up. Crime Is Not. What's Going On?*, VOX (July 21, 2021, 9:30 AM), <https://www.vox.com/22578430/murder-crime-2020-2021-covid-19-pandemic>.

<sup>125</sup> Emma Tucker & Peter Nickeas, *The US Saw Significant Crime Rise Across Major Cities in 2020. And It's Not Letting Up*, CNN (Apr. 3, 2021, 10:52 PM), <https://edition.cnn.com/2021/04/03/us/us-crime-rate-rise-2020/index.html>; see also Adam Gelb, *America's Surge in Violence: Why We Must Reduce Violent Crime for Prison Reform to Work*, USA TODAY (Mar. 9, 2021, 9:29 AM),

the highest on record according to FBI records.<sup>126</sup> In Chicago, for example, homicides were up 33% and shootings were up nearly 40% during the first three months of 2021.<sup>127</sup> Homicides increased in Los Angeles nearly 36% through March 30, 2021.<sup>128</sup> In New York City, murders went up by about 14%, and shootings increased nearly 50% through March 28, 2021.<sup>129</sup> Additionally, sixty-three “of the 66 largest police jurisdictions saw increases in at least one category of violent crimes in 2020, which include homicide, rape, robbery, and aggravated assault.”<sup>130</sup> The increase in homicides are attributable to “a ‘perfect storm’ of factors,” including economic collapse, social anxiety due to the pandemic, de-policing in large cities, shifts in police resources, and release of defendants before trial or before sentences were fully served based on the high risk of COVID-19 in jails.<sup>131</sup>

Before 2020, “the largest recorded one-year rise in murders in U.S. history was a 12.7 percent increase in 1968.”<sup>132</sup> According to Thomas Abt, Director of the National Commission on COVID-19 and Criminal Justice, there are a number of reasons for the crime spike: “it wasn’t just the pandemic, or police violence, or more guns, it was all of these things happening simultaneously and perhaps more.”<sup>133</sup> Murder rates had risen before lockdowns were ordered, and although it is possible that murder rates continued to increase because police were diverting their resources to respond to the protests that occurred in 2020, no “connection between the number of Black Lives Matter protests and the change in murder in big cities” existed.<sup>134</sup> On the other hand, “[c]hanges in how the public perceives the legitimacy of policing—caused in part by the highly publicized killings of George Floyd, Breonna Taylor, and others—may have driven violence up.”<sup>135</sup> Murder rates continued to increase in the fall of 2020,

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<https://www.usatoday.com/story/opinion/2021/03/09/why-reducing-violence-essential-prison-reform-work-column/4626310001/>.

<sup>126</sup> Jeff Asher, *Murder Rose by Almost 30% in 2020. It’s Rising at a Slower Rate in 2021.*, N.Y. TIMES (Sept. 22, 2021), <https://www.nytimes.com/2021/09/22/upshot/murder-rise-2020.html>.

<sup>127</sup> See Tucker & Nickeas, *supra* note 125.

<sup>128</sup> *Id.*

<sup>129</sup> See *id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Rob Arthur & Jeff Asher, *What Drove the Historically Large Murder Spike in 2020?*, INTERCEPT (Feb. 21, 2021, 6:00 AM), <https://theintercept.com/2021/02/21/2020-murder-homicide-rate-causes/>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

probably due to pandemic fatigue, as well as “the worsening economic and psychological strain of life under lockdown.”<sup>136</sup>

Further, it has been noted that “[t]he year of the pandemic was also the year of the gun”: shootings doubled in New York, and non-suicide gun deaths increased nearly 25% nationally.<sup>137</sup> Gun sales were also up: 2020 was “the best year for gun sales – ever,” with 20 million guns sold legally during the year, up from 12.4 million in 2019.<sup>138</sup> Guns were bought by a variety of Americans, with an estimated 40% being first-time buyers.<sup>139</sup> It is not completely clear why these patterns emerged, but “[w]hatever the reasons, it means 8 million new guns are now in the possession of people who potentially have less experience handling them.”<sup>140</sup> The number of assaults with guns also spiked in 2020, and based on background-check statistics, gun sales continued to occur at near-record levels in January and February 2021.<sup>141</sup>

In the big picture, the U.S. homicide rate went up by more than 30% in 2020, and gun assaults and aggravated assaults spiked as well, causing the National Commission on COVID-19 and Criminal Justice to “deem the crime surge of 2020 a ‘large and troubling increase’ with ‘no modern precedent.’”<sup>142</sup> Unfortunately, 2022 likely will see “an even higher jump.”<sup>143</sup>

Due to the escalation in the rate of violent crime, there is already resistance to reforms designed to make the criminal justice system less punitive.<sup>144</sup> There have been calls to “recalibrate and shift back toward a traditional pro-law-and-order political platform” and “punish statewide attorneys general and federal legislators alike for throwing law enforcement under the bus . . . .”<sup>145</sup> And it has been expressly noted that President Biden is planning reforms to address the increasing crime rate:

A nationwide surge in violent crime has emerged as a growing area of concern inside the White House, where President Joe Biden and his aides have listened with alarm as local authorities warn a brutal summer of killing lies ahead. Biden plans to address the spike in shootings, armed robberies and

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<sup>136</sup> *Id.*

<sup>137</sup> Martin Kaste, *Did Record Gun Sales Cause a Spike in Gun Crime? Researchers Say It’s Complicated*, NPR (Mar. 3, 2021, 5:01 AM), <https://www.npr.org/2021/03/03/971854488/did-record-gun-sales-cause-a-spike-in-gun-crime-researchers-say-its-complicated>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Josh Hammer, *Eye on the News: Recover the Moral Imperative of Law and Order*, CITY J. (Mar. 18, 2021), [https://www.city-journal.org/recover-the-moral-imperative-of-law-and-order?wallit\\_nosession=1](https://www.city-journal.org/recover-the-moral-imperative-of-law-and-order?wallit_nosession=1).

<sup>143</sup> Levitz, *supra* note 122.

<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

vicious assaults on Wednesday afternoon following a meeting with state and local officials, law enforcement representatives and others involved in combating the trend.<sup>146</sup>

Moreover, the fact that homicide rates climbed following the murder of George Floyd and the related protests naturally makes one question “whether the increase in violence can be explained by a decline in funding for police departments, a reduction in police morale or a fraying of police-community relations rather than the pandemic.”<sup>147</sup> But during 2020, most cities continued to provide appropriately-staffed patrols within their communities, and only a few cities actually decreased police funding, which, taken together, does not explain the violent crime increase.<sup>148</sup> In any event, the increasing violent crime rate will shine a policy spotlight on the desirability of life terms.

The move to reduce the use of life imprisonment is likely to be slowed by the increase in violent crime, and hence any changes to the implementation of life terms requires a strong theoretical rationale, while being cognizant of broader societal atmospherics regarding attitudes towards crime and punishment.

In light of that, we now analyze the key arguments in favor of life terms, with a particular focus on how they relate to penalties for murder.

#### IV. ARGUMENTS FOR LIFE SENTENCES THAT DO NOT WORK: DETERRENCE AND COMMUNITY PROTECTION

##### A. *General Deterrence*

One of the main arguments in favor of life terms is that they deter the commission of serious offenses by other people. This argument, however, is debunked by the weight of empirical evidence.

General deterrence focuses on the effect of criminal sanctions on the general community and, in particular, potential offenders. There are two forms of general deterrence. Marginal general deterrence is the theory that there is a link between higher penalties and lower crime. Absolute general deterrence is the more modest version of the theory, contending that prudential reasoning means that the mere existence of criminal sanctions, regardless of their severity, discourages people from committing offenses for fear of the consequences.<sup>149</sup> Pursuant to this version of theory, the greatest

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<sup>146</sup> Jeff Zeleny & Kevin Liptak, *Concerns Rising Inside White House Over Surge in Violent Crime*, CNN (June 22, 2021, 5:20 PM), <https://edition.cnn.com/2021/06/22/politics/crime-surge-white-house-concern/index.html>.

<sup>147</sup> Aaron Chalfin & John MacDonald, *We Don't Know Why Violent Crime Is Up. But We Know There's More than One Cause.*, WASH. POST (July 9, 2021, 3:17 PM), [https://www.washingtonpost.com/outlook/we-dont-know-why-violent-crime-is-up-but-we-know-theres-more-than-one-cause/2021/07/09/467dd25c-df9a-11eb-ae31-6b7c5c34f0d6\\_story.html](https://www.washingtonpost.com/outlook/we-dont-know-why-violent-crime-is-up-but-we-know-theres-more-than-one-cause/2021/07/09/467dd25c-df9a-11eb-ae31-6b7c5c34f0d6_story.html).

<sup>148</sup> *Id.*

<sup>149</sup> See DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE 7 (2011), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf>; Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the*

deterrent to committing crime is not the magnitude of the penalty, but the likelihood of apprehension if a person commits a criminal act.

Marginal general deterrence is the version of the theory which could potentially justify life imprisonment. It is, however, the least persuasive form of general deterrence<sup>150</sup> despite the semblance of correlation between lower crime and higher penalties in the United States for much of the past 30 years. As noted above, during this period the number of serious crimes committed in the United States (until recently) has decreased.<sup>151</sup> While there was also an increase in imprisonment of offenders during this period, a causal nexus between these events has not been established.<sup>152</sup> The reduction in commission of offenses was more likely to have been attributable to an expansion in police numbers and thus the greater probability (both perceived and actual) of detection of crime<sup>153</sup>—which accords with the absolute deterrence theory—as well as other socio-political factors,<sup>154</sup> and the fact that more offenders were incapacitated and thus prevented from committing offenses.

A 2014 report of the National Research Council of the National Academies made the following observations about the deterrent effect of harsh sanctions following an extensive literature review of key empirical studies:

Ludwig and Raphael (2003) find no deterrent effect of enhanced sentences for gun crimes; Lee and McCrary (2009) and Hjalmarsson (2009) find no evidence that the more severe penalties that attend moving from the juvenile to the adult justice system deter offending; and Helland and Tabarrok (2007) find only a small deterrent effect of the third strike of California's three strikes law. As a consequence, the deterrent return to increasing already long sentences is modest at best.<sup>155</sup>

This finding is supported even in relation to the connection between the threat of capital punishment and homicide rates.<sup>156</sup> The Death Penalty Information Center

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*Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159 (2012).

<sup>150</sup> See RITCHIE, *supra* note 149, at 12.

<sup>151</sup> JANET L. LAURITSEN & MARIBETH L. REZEY, BUREAU OF JUST. STAT., TECHNICAL REPORT: MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 4 (2013), <http://www.bjs.gov/content/pub/pdf/mpcncvs.pdf>.

<sup>152</sup> See Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 593–94 (2009).

<sup>153</sup> See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, J. ECON. PERSPS., Winter 2004, at 163, 177. (estimating the increase in police numbers to have been about fourteen percent in the 1990s).

<sup>154</sup> *Id.* at 178–83; Michael Ellison, *Abortion Cuts Crime Says Study*, GUARDIAN (Aug. 9, 1999, 8:47 PM), <http://www.theguardian.com/world/1999/aug/10/michaelellison>.

<sup>155</sup> NATIONAL RESEARCH COUNCIL, *supra* note 29, at 139.

<sup>156</sup> See, e.g., RICHARD HOOD & CAROLYNE HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 211–12 (2d rev. & updated ed. 1996); Richard Berk, *New Claims About*

notes that “according to a survey of the former and present presidents of the country’s top academic criminological societies, 88% of these experts rejected the notion that the death penalty acts as a deterrent to murder.”<sup>157</sup> The National Institute of Justice makes the same point in relation to the relationship between life sentences and the goal of marginal general deterrence. Lengthy sentences will not deter crime, and many believe that they could have the opposite effect because “[i]nmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment.”<sup>158</sup> Additionally, laws that are driven toward increasing criminal sanctions for crimes, such as by imposing a life sentence for certain crimes, do little to deter crime because “criminals know little about the sanctions for specific crimes.”<sup>159</sup> Therefore, prison may be more useful in serving the purposes of incapacitation and punishment, but not deterrence.<sup>160</sup> Accordingly, the weight of research evidence does not support the proposition that harsh sentences will reduce the incidence of crime in the community.<sup>161</sup>

While marginal deterrence does not work, the opposite is the case with absolute general deterrence. The link between lower crime rates and the increased likelihood of being detected for criminal activity rests on the assumption that some hardship awaits the offender *if* caught.<sup>162</sup> The nature or magnitude of the hardship is not an important consideration.

The fact that there is no correlation between harsh penalties and lower crimes is, admittedly, counterintuitive. Common sense suggests that people, as rational agents, make cost-benefit decisions about proposed courses of action. As such, the threat of a harsh punishment for engaging in certain conduct disincentivizes them from taking that course of action. However, the reality seems otherwise. In fact, the data suggests that people do generally engage in a cost-benefit analysis before committing a crime, but the decision-making process seems to be quite shallow. When contemplating committing crime, individuals seem to factor in the likelihood of being apprehended into their decision-making. If the likelihood is high, they often desist from the crime. However, a low-risk assessment of being caught will make it more probable that they

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*Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 313, 328 (2005); John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM, 269, 269–72 (Steven Raphael & Michael A. Stoll eds., 2009); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 145 (2003).

<sup>157</sup> *Facts About the Death Penalty*, *supra* note 6.

<sup>158</sup> NAT’L INST. JUST., NCJ 247350, FIVE THINGS ABOUT DETERRENCE 1 (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>.

<sup>159</sup> *Id.*

<sup>160</sup> *See id.* at 2.

<sup>161</sup> *Id.*

<sup>162</sup> *See id.*

will engage in criminal behavior.<sup>163</sup> This is consistent with the theory of absolute general deterrence. The crime decision-making process does not seem to generally progress beyond this analysis to the deeper question of what is likely to happen if the person decides to commit an offense *and* they are apprehended. The disinclination of most individuals to engage in this next evaluative step explains the failure of marginal general deterrence. The reason that most offenders do not contemplate the second step is uncertain; however, that does not undermine the empirical findings, which debunk the theory of marginal general deterrence.<sup>164</sup>

Thus, general deterrence in a limited sense does work.<sup>165</sup> The threat of punishment deters many people from committing crime.<sup>166</sup> However, the deterrent impact of criminal penalties does not increase in proportion to the harshness of the threatened punishment.<sup>167</sup> Thus, absolute general deterrence justifies the imposition of criminal sanctions, but it cannot provide a rationale for imposing penalties which exceed the seriousness of the offense.<sup>168</sup> Accordingly, the aim of general deterrence cannot justify the imposition of harsh penalties, including life sentences, for offenders convicted of first-degree murder nor indeed any offenders.<sup>169</sup>

Another justification that is often invoked for life sentences is community protection. We now examine this in greater detail.

#### B. Community Protection

Ostensibly, incarceration is a sure method for protecting the community because while offenders are in prison they cannot commit offenses in the community. Life terms, by their nature, offer the greatest protection because the offender will never be released back into society. The success of incarceration as a means of protecting the community cannot be measured solely by the height of the prison wall. Incapacitation is only effective if the offender would have re-offended during the term of the prison sentence. Further, in assessing the effectiveness of incarceration, it is important to note that it also has an (admittedly crude) cost-benefit aspect. It is self-defeating to imprison offenders to prevent them from committing minor or trivial offenses, whose cost of imprisonment clearly exceeds the damage from their crimes.<sup>170</sup> Thus the efficacy of

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<sup>163</sup> See Bagaric & Alexander, *supra* note 149, at 160.

<sup>164</sup> *Id.* at 168.

<sup>165</sup> *Id.* at 163; RITCHIE, *supra* note 149, at 7.

<sup>166</sup> Bagaric & Alexander, *supra* note 149, at 166. This is a point also noted by the National Institute of Justice, which states: "The certainty of being caught is a vastly more powerful deterrent than the punishment."; NATIONAL INSTITUTE OF JUSTICE, *supra* note 158, at 1.

<sup>167</sup> NATIONAL INSTITUTE OF JUSTICE, *supra* note 158, at 1; see RITCHIE, *supra* note 149, at 23.

<sup>168</sup> See JUDICIAL COMM'N OF N.S.W., SENTENCING BENCH BOOK 5503 (2006) (explaining the proportionality principle).

<sup>169</sup> NATIONAL INSTITUTE OF JUSTICE, *supra* note 158, at 1.

<sup>170</sup> As noted in Part V of this Article, there is no accepted method for calibrating the cost of crime and hence this criterion should only be relevant if the nature of the crime is manifestly minor.

community protection to justify life terms for homicide offenses is dependent upon the assumption that these offenders would have committed serious offenses if they were released into the community.

This assumption has been challenged and, in the process, used as an argument against the imposition of long prison terms. Thus, it has been contended that the expansion of prison systems, including the increased use of life sentences, causes diminishing returns to public safety, while the reduction of prison populations in some states has not had a negative impact on public safety.<sup>171</sup> “[L]engthy prison terms are counterproductive for public safety as they result in incarceration of individuals long past the time that they have ‘aged out’ of the high crime years, thereby diverting resources from more promising crime reduction initiatives.”<sup>172</sup> Other ways in which life sentences do not protect the community include: they “are particularly ineffective for drug crimes as drug sellers are easily replaced in the community; increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety.”<sup>173</sup>

According to a 2019 University of California at Berkeley study, “negligible public safety gains are made from imprisoning individuals who are eligible for probation, and that those gains last only as long as the individual is in prison.”<sup>174</sup> Yet the extension of life imprisonment ignores the fact that it does not make communities safer.<sup>175</sup> Most people “age out” of criminal conduct, and as a result, “[l]engthy prison terms hold people well after their risk of committing a new offense becomes minimal.”<sup>176</sup> In fact, it is rare for individuals to reoffend after release following long prison sentences.<sup>177</sup> This is true regardless of race, ethnicity, education, community, or income.<sup>178</sup> Moreover, low recidivism rates are not the product of long prison sentences, but rather are indicative of individuals being able to overcome the difficulties of the prison system and improve their lives.<sup>179</sup>

The merit of suggestions that long prison terms do not protect the community can best be evaluated by examining recidivism data of offenders, particularly those who commit homicide offenses. The BJS in July 2021 released a wide-ranging report

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<sup>171</sup> Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 113, 114, 116 (2018).

<sup>172</sup> *Id.* at 118–19.

<sup>173</sup> *Id.* at 121.

<sup>174</sup> Yasmin Anwar, *Prison Time Has Little or No Bearing on Long-Term Public Safety*, BERKLEY NEWS (May 16, 2019), <https://news.berkeley.edu/2019/05/16/prison-public-safety/> (quoting UC Berkeley Professor David Harding).

<sup>175</sup> NELLIS, *supra* note 59, at 5.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 25.

<sup>179</sup> *Id.* at 28.

examining recidivism levels in thirty-four states.<sup>180</sup> It examined prisoners released in 2012 and examined recidivism rates for a five-year follow-up period (2012–17).<sup>181</sup> The data examined 92,100 released prisoners to represent the approximately 408,300 state prisoners released during this period.<sup>182</sup>

The overall re-offending rate was well over 50%.<sup>183</sup> About 62% of the released prisoners were arrested within three years, and 71% were arrested within five years.<sup>184</sup> Nearly half (46%) of offenders returned to prison within five years for a parole or probation violation or a new sentence. Offenders who had committed a homicide offense<sup>185</sup> comprised 2% of released prisoners and another 27.5% had committed a violent offense.<sup>186</sup> Sixty-five percent of violent offenders were arrested within five years. This group included 8,000 offenders (5,400 for murder/non-negligent manslaughter and 2,600 for negligent manslaughter).<sup>187</sup> Homicide offenders reoffended at a lower rate – their arrest rates was 41.3% after five years (and was similar for both categories of homicide offences).<sup>188</sup> Thus, 41.3% of homicide offenders will reoffend within five years, with 40.3% of murder/non-negligent offenders reoffending with this time.<sup>189</sup> It is noteworthy that the rate of re-offending for violent offenders was steady when compared to offenders released in 2005 and 2008 as well.<sup>190</sup>

The most telling part of the recidivism data relates to re-arrest for violent offenses. For all released offenders, the most serious offense committed was a violent offense in 28.3% of instances, with homicide accounting for 0.8% of these offenses.<sup>191</sup> The offenders who were most likely to be arrested for such offenses were those initially sentenced for violent offenses (32.4%), compared to those sentenced initially for drug

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<sup>180</sup> MATTHEW R. DUROSE & LEONARDO ANTENANGELI, BUREAU JUST. STAT., NCJ 255947, RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012–2017), at 1 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf>.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See *supra* notes 71–74 and accompanying text.

<sup>186</sup> DUROSE & ANTENANGELI, *supra* note 180, at tbl.2 (defining violent offenses as: “Violent offenses include homicide, rape or sexual assault, robbery, assault, and other unspecified violent offenses.”).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at tbl.5.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at tbl.21.

<sup>191</sup> *Id.* at tbl.10.

offences (22.6%).<sup>192</sup> For offenders who were released in 2012, homicide was the most serious offense they committed in 0.8% of instances.<sup>193</sup> The cohort that committed the greatest portion of these were offenders who had previously been imprisoned for homicide (1.8%), versus the next highest being for those first imprisoned for robbery (1.5%) then assault (0.8%).<sup>194</sup>

The reason that there are less recidivist homicide offenders probably relates to the fact that they “age out of crime” more so than other offenders.<sup>195</sup> The data showed that the median time served for murder/nonnegligent manslaughter was 150 months and that those who served less than the median time were much more likely to be arrested within five years (46.8% versus 29.2%).<sup>196</sup> Reoffending rates were age-dependent. Eighty-one percent of prisoners age 24 or younger at release were arrested within five years of release, compared to 61% of those age 40 or older.<sup>197</sup>

Thus, approximately 13% (40.3% multiplied by 32.4%) of first degree/negligent homicide offenders will commit another violent offense within five years of been released from prison.<sup>198</sup> This is a significant number, especially given that median prison terms served by these offenders is twelve and a half years and hence most of these offenders are relatively old at the point of release—entailing that there would have been a far higher recidivism rate if the protection stemming from the long prison term was removed.

The conclusions from the above analysis are strengthened when ten-year recidivism trends are assessed. In September 2021, the BJS released a report analyzing recidivism trends of prisoners ten years after release from 2008. This was across 24 states. The data examined 73,600 released prisoners to represent the approximately 409,300 state prisoners released during this period.<sup>199</sup> The overall re-offending rate was again high. Sixty-six percent of the released prisoners were arrested within three years, and 82% were arrested within five years.<sup>200</sup> More than half (61%) of offenders returned to prison within ten years for a parole or probation violation or a new

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<sup>192</sup> *Id.* at tbl.12.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at tbl.11; *see also* John L. Anderson, *Recidivism of Paroled Murderers as a Factor in the Utility of Life Imprisonment*, 31 CURRENT ISSUES CRIM. JUST. 255–68 (2019) (finding similar findings for recidivism rates in Australia).

<sup>195</sup> NELLIS, *supra* at note 59.

<sup>196</sup> *Id.* at tbl.14.

<sup>197</sup> *Id.*

<sup>198</sup> *See also* Matt DeLisi et al., *Who Will Kill Again? The Forensic Value of 1st Degree Murder Convictions*, 1 FORENSIC SCI. INT’L: SYNERGY 11, 12 (2019).

<sup>199</sup> BUREAU OF JUST. STAT., *RECIDIVISM OF PRISONERS RELEASED IN 24 STATES IN 2008: A 10-YEAR FOLLOW-UP PERIOD (2008–2018)*, at 1 (2021); *see also* U.S. SENT’G COMM’N, *RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010*, at 2 (2021).

<sup>200</sup> BUREAU OF JUSTICE STATISTICS, *supra* note 199, at 1.

sentence.<sup>201</sup> Inmates who had committed a homicide offense comprised 1.8% of released prisoners, and another 24.5% had committed a violent offense,<sup>202</sup> and 76.7% of violent offenders were arrested within five years. This group included 7,100 homicide offenders (4,700 for murder/non-negligent manslaughter and 2,400 for negligent manslaughter).<sup>203</sup>

Homicide offenders reoffended at a lower rate—their arrest rate was 57.4% after ten years (and was similar for both categories of homicide offenses).<sup>204</sup> Thus, 60% of negligent homicide offenders will reoffend within ten years, with 56.1% of murder/non-negligent offenders reoffending with this time.<sup>205</sup> Again, the most illuminating aspect of the recidivism data relates to re-arrest for violent offenses. For all released offenders, the most serious offense committed was a violent offense in 39.6% of instances.<sup>206</sup> The offenders who were most likely to be arrested for such offenses were those initially sentenced for violent offenses (44.2%), compared to those sentenced initially for drug offenses (34.8%).<sup>207</sup> For offenders who were released in 2008, homicide was the most serious offense they committed in 1.2% of instances.<sup>208</sup> The cohort that committed the greatest portion of these were offenders who had previously been imprisoned for homicide: 2.3% versus the next highest being for those first imprisoned for assault (2.2%) then robbery (1.9%).<sup>209</sup>

Thus, while in absolute terms slightly more than half of homicide offenders commit another violent offense when released within ten years, they are the category of offenders who are most likely to commit a violent offense and also the group most likely to commit another homicide. Thus, if these offenders are kept in prison for life, thousands of violent crimes and many homicides will be prevented. This means that there is some utility in sentencing violent offenders, and in particular, those convicted of murder to very long terms of imprisonment. The utility would be increased if we could better identify the cohort of homicide offenders who are most likely to commit violent offenses.

The existing evidence suggests that there are no validated techniques which can accurately predict which offenders are likely to commit a serious crime in the future.<sup>210</sup> Offenders who have committed serious violence and sex offenses are

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at tbl.2.

<sup>203</sup> *Id.* at tbl.5.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at tbl.10.

<sup>207</sup> *Id.* at tbl.12.

<sup>208</sup> *Id.* at tbl.10.

<sup>209</sup> *Id.* at tbl.11.

<sup>210</sup> See Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 12 (1983). It is possible to predict that offenders who have a long history of minor offending will recidivate but it is almost not economically viable to imprison offenders with this

sometimes termed “dangerous offenders;”<sup>211</sup> however, a detailed study in the 1990s noted that we are poor at identifying which of these offenders will reoffend: predictive techniques “tend to invite overestimation of the amount of incapacitation to be expected from marginal increments in imprisonment.”<sup>212</sup> In relation to homicide offenders in particular, there has been some work that promises to assist in better identifying likely recidivists. Thus, it has been noted the homicide offenders who are most likely to commit other homicides on release are those who committed a felony-related homicide; were incarcerated at a young age; had a financial motive for their crime, and a history of violent offending.<sup>213</sup>

Predictions of recidivism can now be somewhat more nuanced with the use of “risk and needs assessments.”<sup>214</sup> Risk and needs assessment tools rely on a technique called “structured professional judgment.”<sup>215</sup> They assess the risk of offenders reoffending and identify needs of those offenders that, if met, would lower their probability of recidivism.<sup>216</sup> These instruments measure a defendant’s chances of reoffending by factoring in a number of static and dynamic variables.<sup>217</sup> Research suggests that, while risk and needs assessment tools are not always accurate, the best instruments can predict re-offending with 70% accuracy—which is much higher than the accuracy rate of courts and probation officers making independent judgements.<sup>218</sup> Given the

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profile. See Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 179 (2012) (noting that imprisonment is costly).

<sup>211</sup> There is no generally accepted definition of this term, but a suitable definition is “the repetitively violent criminal who has more than once committed or attempted to commit homicide, forcible rape, robbery, or assault.” Simon Dinitz & John P. Conrad, *Thinking About Dangerous Offenders*, 10 CRIM. JUST. ABSTRACT 99, 99 (1978); see also Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SEC. RSCH. 317, 325 (2011) (citing the same definition of “dangerous offender”).

<sup>212</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 86 (1995).

<sup>213</sup> Marieke Liem et al., *Criminal Recidivism Among Homicide Offenders*, 29 J. INTERPERSONAL VIOLENCE 1, 14–15 (2014), [https://www.researchgate.net/publication/259809249\\_Criminal\\_Recidivism\\_Among\\_Homicide\\_Offenders](https://www.researchgate.net/publication/259809249_Criminal_Recidivism_Among_Homicide_Offenders).

<sup>214</sup> Christopher Slobogin, *Risk Assessment*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 196, 202 (Joan Petersilia & Kevin R. Reitz eds., 2012).

<sup>215</sup> *Id.* at 203–05.

<sup>216</sup> NATHAN JAMES, CONG. RSCH. SERV., R44087, *RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM*, 1–2 (2015).

<sup>217</sup> Pari McGarraugh, *Up or Out: Why “Sufficiently Reliable” Statistical Risk Assessment Is Appropriate at Sentencing and Inappropriate at Parole*, 97 MINN. L. REV. 1079, 1091–92 (2013).

<sup>218</sup> Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203, 212 (2010) (Moreover, risk assessment tools are generally more accurate than predictions based solely on clinical judgment); see D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 12–13

accuracy of risk and needs assessment tools, they are increasingly being used in probation<sup>219</sup> and parole determinations.<sup>220</sup> They, however, are used far less frequently in the sentencing process.<sup>221</sup>

However, there is considerable scope for their accuracy to be improved. They have also been criticized for entrenching discriminatory integers into their methodology.<sup>222</sup> This latter concern is not necessarily insurmountable. However, for it to be remedied it is important that the tools are transparent in that they identify each consideration that is used to predict an offender's risk of recidivism, and they explicitly exclude immutable traits such as race, or at least "ensure that individuals are not treated differently on the basis of membership in a protected class."<sup>223</sup> The continuous evaluation and refinement of these tools can further assist in removing any prejudice arising from their use.<sup>224</sup>

A good example of a sophisticated risk assessment tool is the instrument used to implement the First Step Act.<sup>225</sup> The U.S. Department of Justice (DOJ) has developed the Prisoner Assessment Tool Targeting Estimated Risk and Needs program.<sup>226</sup> A key feature of the tool is that it includes static factors, such as criminal history, but also integers that are dynamic, such as the behavior of offenders during their period of incarceration.<sup>227</sup> The tool contains fifteen factors in total (eleven of which are dynamic; the remaining four are static).<sup>228</sup> The algorithm expressly aims to be racially

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(2006); William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta Analysis*, 12 PSYCHOL. ASSESSMENT 19, 25 (2000).

<sup>219</sup> Latessa & Lovins, *supra* note 218, at 205.

<sup>220</sup> *Id.*

<sup>221</sup> See PAMELA M. CASEY ET AL., NAT'L CTR. FOR ST. CTS., USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 13 (2011).

<sup>222</sup> Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 295 (2020).

<sup>223</sup> *Id.* at 291.

<sup>224</sup> *Id.* at 297.

<sup>225</sup> OFF. ATT'Y GEN., U.S. DEP'T JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM (2019), [https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system\\_1.pdf](https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf).

<sup>226</sup> *Id.* at iv.

<sup>227</sup> *Id.* at 26.

<sup>228</sup> OFF. ATT'Y GEN., U.S. DEP'T JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS – UPDATE 10, 10–11 (2020), <https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf> (Dynamic factors include drug treatment while incarcerated and education score; static factors include age at time of assessment and criminal history).

neutral.<sup>229</sup> The tool involves undertaking a risk and needs assessment of all prisoners; improving the needs assessment system; bringing the earned time credit system into operation; making the workflow automatic; and bringing into effect policies that incite prisoners to participate in programs that can reduce their risk of reoffending and thus maximize their chances of early release.<sup>230</sup> To ensure that the tool achieves its objectives, it is subject to continual updating and re-validation.<sup>231</sup>

Thus, progress is being made in relation to enhancing the fairness and accuracy of risk and needs assessment tools; however, they are not at the level of sophistication that enables strong predictions to be made of the likelihood of future serious offending.

Despite this, based on the crude recidivism data presented above, it is clear that a significant portion of murderers will commit violent offenses if released from prison, and this provides some basis for imposing life terms. This argument is not compelling given that the data also suggests that many murderers if released will not commit violent offenses if released. If more sophisticated risk and assessment tools are developed, it will strengthen the argument for life terms for murderers who are at high risk of reoffending.

We now inquire as to whether there are more compelling reasons for life terms for first-degree murderers. This involves an analysis of the principle of proportionality.

#### V. ARGUMENTS IN FAVOR OF LIFE IMPRISONMENT THAT DO WORK: THE PRINCIPLE OF PROPORTIONALITY

The strongest argument in favor of life sentences for murderers stems from the principle of proportionality. This principle has been used often to justify more lenient penalties,<sup>232</sup> but as we shall see, it can also be used to argue in favor of life terms.

The principle of proportionality has a strong philosophical justification.<sup>233</sup> The justification of the principle is grounded in the theories of punishment that underpin the sentencing system. Punishment focuses on the justification for state-imposed sanctions. Sentencing focuses on the manner in which these hardships are imposed. Thus, sentencing and punishment are inextricably linked, with punishment being the logical prior inquiry.<sup>234</sup> There are two main theories of punishment.

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<sup>229</sup> OFFICE OF THE ATTORNEY GENERAL, *supra* note 225, at 26.

<sup>230</sup> *See id.* at 71–83.

<sup>231</sup> *Id.*

<sup>232</sup> For a more extensive discussion of the proportionality principle, see Mirko Bagaric & Sandeep Gopalan, *Sound Principles, Undesirable Outcomes: Justice Scalia's Paradoxical Eighth Amendment Jurisprudence*, 50 AKRON L. REV. 301 (2017).

<sup>233</sup> *Id.*

<sup>234</sup> This is a point also noted by Herbert L. Packer, *Theories of Punishment and Correction: What is the Function of Prison?*, in Leonard Orlando JUSTICE, PUNISHMENT, TREATMENT: THE CORRECTIONAL PROCESS 183 (1973).

The theory which enjoys most contemporary support is retributivism.<sup>235</sup> There are different strands of retributivism, but they have three broad similarities.<sup>236</sup> The first common theme is that punishment should be reserved only for the blameworthy.<sup>237</sup> Thus, there should be a link between guilt, punishment, and subjective wrongdoing.<sup>238</sup> The second commonality is that punishing criminals is intrinsically desirable. Punishment does not need to be a means to a further end. It is justified even when “we are practically certain that attempts [to attain consequentialist goals, such as deterrence and rehabilitation] will fail.”<sup>239</sup> Finally, most retributive theories assert that the level of punishment that is imposed should commensurate within seriousness of the crime.<sup>240</sup> Hence, the proportionality principle is a defining aspect of most retributive theories.

The operation of the proportionality principle within retributivism is demonstrated by an overview of two influential retributive theories. The retributive theory which most centrally accommodates proportionalism is the *lex talionis* or the “eye for an eye, a tooth for a tooth” approach to punishment.<sup>241</sup> While expressly endorsing the proportionality principle, the theory does not provide guidance of how it should operate in the context of most offenses: “what penalty would you inflict on a rapist, a blackmailer, a forger, a dope peddler, a multiple murderer, a smuggler, or a toothless fiend who has knocked somebody else’s teeth out?”<sup>242</sup> While it has been suggested that the most tenable interpretation of the *lex talionis* theory is that the punishment and the crime should be approximately equivalent,<sup>243</sup> this still fails to provide insight into the manner in which the principle should be operationalized.

Proportionalism is also a key aspect of more contemporary and complex retributive theories, such as that proposed by Andrew von Hirsch.<sup>244</sup> He contends that the principal justification of punishment is censure—that is, to convey blame or

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<sup>235</sup> *Ewing v. California*, 538 U.S. 11, 30–31 (2003); see TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 15 (rev. ed., Pluto Press 1984); David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 L. & PHIL. 507 (1997).

<sup>236</sup> See, e.g., Anthony Duff & Andrew Von Hirsch, *Responsibility, Retribution and the “Voluntary”*: A Response to Williams, 56 CAMBRIDGE L.J. 103, 107 (1997).

<sup>237</sup> Jami L. Anderson, *Reciprocity as a Justification for Retributivism*, 16 CRIM. JUST. ETHICS 13, 13 (1997).

<sup>238</sup> *Id.* at 13–14.

<sup>239</sup> R.A. DUFF, *TRIALS AND PUNISHMENTS* 7 (1986).

<sup>240</sup> Anderson, *supra* note 237, at 17.

<sup>241</sup> Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. OF LEGAL STUD. 57, 61 (2008).

<sup>242</sup> JOHN KLEINIG, *PUNISHMENT AND DESERT* 120 (1973).

<sup>243</sup> C.L. TEN, *CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION* 152–53 (1987).

<sup>244</sup> ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 7 (1993).

reprobation to those who have committed a wrongful act.<sup>245</sup> Andrew von Hirsch believes that punishment has in fact two objectives: censure and deterring people from committing crime. In his view, proportionality is an integral aspect of punishment on the basis of the following three premises:

1. The State's sanctions against proscribed conduct should take a punitive form; that is, visit deprivations in a manner that expresses censure or blame.
2. The severity of a sanction expresses the stringency of the blame.
3. Hence, punitive sanctions should be arrayed according to the degree of blameworthiness (i.e. seriousness) of the conduct.<sup>246</sup>

Thus, proportionalism is the cornerstone underpinning many retributive theories. Absent this link, the legitimacy of the infliction of sanctions on offenders by the courts is undermined.

The other main theory of punishment is utilitarianism, which contends that while imposing hardship on offenders is undesirable due to the suffering it causes them, punishment is justified because the harm caused to offenders is outweighed by the "good" consequences stemming from punishment.<sup>247</sup> The good consequences stemming from punishment are traditionally thought to include community protection, deterrence, and rehabilitation.<sup>248</sup> While utilitarianism is no longer the leading theory of punishment, pragmatically, sentencing law still embraces these objectives.<sup>249</sup> A good illustration is federal sentencing law, which we discussed earlier. The objectives that the Federal Guidelines pursue are clearly utilitarian in nature. The Guidelines Manual relevantly states:

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.<sup>250</sup>

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<sup>245</sup> *Id.* at 9–10.

<sup>246</sup> *Id.* at 15. The same three premises were advanced by Ashworth and Von Hirsch several decades later in ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 135 (2005), with inconsequential changes to premise one.

<sup>247</sup> See Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTRALIAN J. OF LEGAL PHIL. 95, 95–144 (1999).

<sup>248</sup> See generally Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 134 (2000).

<sup>249</sup> This may still leave room for a more modest retributive approach to apply proportionality, which is termed "limiting retributivism." Richard Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 J. CONST. L. 39, 41–42 (2008). However, for reasons discussed below, this theory of proportionality (like all such theories) is unintelligible unless content is provided to the two limbs of the principle.

<sup>250</sup> U.S. SENT'G GUIDELINES MANUAL § 2D1.1(A) (U.S. SENT'G COMM'N 2021).

While proportionality is most commonly associated with a retributive theory of punishment, it also has a role within a utilitarian theory of punishment. Influential utilitarian philosopher Jeremy Bentham argued in favor of the proportionality principle on the basis that if crimes are to be committed, it is preferable that offenders commit less serious rather than more serious ones.<sup>251</sup> In his view, sanctions should be graduated commensurate with the seriousness of the offense so that those disposed to crime will opt for less serious offenses. In the absence of proportionality, potential offenders would not be deterred from committing serious offenses any more than minor ones, and hence would just as readily commit them. This argument is not persuasive; there is no evidence that offenders make comparisons regarding the level of punishment for various offenses.<sup>252</sup> Further, as we have seen, the weight of empirical evidence suggests that the theory of marginal deterrence is flawed. There is virtually no link between higher penalties and lower crime.<sup>253</sup>

However, there is an alternative basis for embedding proportionality into utilitarianism. It has been argued that proportionality is necessary to ensure that privileges and hardships are distributed roughly in accordance with the degree of merit or blame attributable to each individual.<sup>254</sup> Violations of this principle would place the criminal justice system into disrepute. Christopher Harding and Richard Ireland note that:

Proportion in punishment . . . is a widely found and deeply rooted principle in many penal contexts. It is . . . integral to many conceptions of justice and as such the principle of proportion in punishment seen generally acts to annul, rather than to exacerbate, social dysfunction.<sup>255</sup>

This is supported by a 1984 study of approximately 1,500 people living in Chicago regarding their attitude to the law. The study concluded that normative issues are linked with compliance with the law.<sup>256</sup> People do not merely obey the law because it is in their self-interest to do so; they also obey the law because they believe it is proper to do so.<sup>257</sup> Thus, the perception that the content of the law is fair and legitimate can make it more likely that laws will be observed. It follows that the proportionality principle is a seminal aspect of both major theories of punishment.

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<sup>251</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J. H. Burns & H.L.A. Hart eds., 1970) (1789); *see also* Frase, *supra* note 249, at 44–46.

<sup>252</sup> ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 32 (reprt. 1987).

<sup>253</sup> NATIONAL RESEARCH COUNCIL, *supra* note 29, at 139–40.

<sup>254</sup> This is similar to the concept of desert. However, unlike retributivist theories, it is based on forward-looking considerations.

<sup>255</sup> CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE, AND PRACTICE 205 (1989).

<sup>256</sup> TOM R. TYLER, WHY PEOPLE OBEY THE LAW 107 (1990).

<sup>257</sup> *Id.*

The pragmatic significance of proportionality is underlined by its role in the sentencing system. As we have seen, proportionality is also a core principle underpinning the Federal Sentencing Guidelines.<sup>258</sup> Further, a survey of state sentencing law by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to the prohibition of excessive penalties or treatment (an endorsement of proportionality),<sup>259</sup> and that twenty-two states have constitutional clauses which prohibit cruel and unusual penalties, including eight states with a proportionate-penalty clause.<sup>260</sup>

The Supreme Court has also held that the principle is incorporated within the Eighth Amendment's prohibitions against cruel and unusual punishment.<sup>261</sup> The Court first considered the concept of proportionality in the context of the Eighth Amendment in *Weems v. United States*. The case's syllabus noted that:

In interpreting the Eighth Amendment, it will be regarded as a precept of justice that punishment for crime should be graduated and proportioned to the offense . . . . What constitutes a cruel and unusual punishment prohibited by the Eighth Amendment has not been exactly defined, and no case as heretofore occurred in this court calling for an exhaustive definition . . . . The Eighth Amendment is progressive, and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice . . . .<sup>262</sup>

The Supreme Court next considered the concept of proportionality as a component of the Eighth Amendment in *Robinson v. California*.<sup>263</sup> Justice Douglas stated:

A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishment." (citation omitted). So may the cruelty of the method of punishment, as, for example, disemboweling a person alive. (citation omitted). But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.<sup>264</sup>

The role of proportionality in the context of the Eighth Amendment was further elaborated upon in *Solem v. Helm*, where the offender had been punished with

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<sup>258</sup> See U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, Policy Statement (U.S. SENT'G COMM'N 2018).

<sup>259</sup> E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 154 (2008).

<sup>260</sup> *Id.*

<sup>261</sup> *Weems v. United States*, 217 U.S. 349, 385 (1910).

<sup>262</sup> *Id.* at 345–50 (syllabus).

<sup>263</sup> *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>264</sup> *Id.* at 676 (Douglas, J., concurring).

imprisonment for life without parole for the crime of uttering a no-account check.<sup>265</sup> Justice Powell, writing the majority opinion, noted that “[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that ‘amercements’ may not be excessive.”<sup>266</sup> He rejected the State’s contention that proportionality does not apply to imprisonment, pointing out that the:

[C]onstitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes “parallel limitations” on bail, fines, and other punishments . . . . It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common law principle incorporated into the Eighth Amendment clearly applied to prison terms.<sup>267</sup>

The Court went on to hold that Eighth Amendment proportionality analysis “should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”<sup>268</sup>

Applying its objective criteria, the Court found that the punishment imposed on Helm violated the Eighth Amendment.<sup>269</sup> However, proportionalism has rarely been invoked by the Court for striking down a sentence, especially in the context of the length of prison terms.<sup>270</sup> As noted by Richard Frase, “[o]f all the government measures subject to Eighth Amendment scrutiny, excessively long prison sentences seem to receive the least favorable treatment, and are governed by the most opaque standards.”<sup>271</sup>

#### A. *Reasons for Pragmatic Bypassing of the Principle*

The reason for lack of immersion of the proportionality principle in the sentencing system stems from the lack of rigor associated with the principle. There is no concrete

<sup>265</sup> *Solem v. Helm*, 463 U.S. 277, 281–82 (1983); *see also* *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (showing the role of proportionality in the context of the Eighth Amendment for death penalty cases).

<sup>266</sup> *Solem*, 463 U.S. at 284.

<sup>267</sup> *Id.* at 288–89.

<sup>268</sup> *Id.* at 292.

<sup>269</sup> *Id.* at 303. For further discussion regarding the Supreme Court’s analysis regarding the Eighth Amendment and proportionality, *see* Frase, *supra* note 249, at 49–53.

<sup>270</sup> In *Roper v. Simmons*, the Court held that it was unconstitutional to impose the death penalty on offenders who committed the offense when they were minors. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). However, this limitation was rooted in the nature of the penalty.

<sup>271</sup> Frase, *supra* note 249, at 63.

manner in which the hardship of the punishment can be matched to the severity of the crime. Jesper Ryberg observes that one of the key criticisms of proportionality is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”<sup>272</sup> He further notes that to give content to the theory, it is necessary to rank crimes, rank punishments, and anchor the scales.<sup>273</sup> The vague nature of proportionality is the reason that the Supreme Court has consistently declined to overturn crushing sentences. As noted by Richard Frase:

As is well known, the Court has been very reluctant to invalidate lengthy prison terms on Eighth Amendment grounds. Only one prisoner, in *Solem v. Helm*, has won such a claim in modern times. And in recent years the Court has upheld sentences of shocking severity—life without parole for a first-time offender charged with cocaine possession (admittedly, involving a very large quantity), and a mandatory minimum prison term of twenty-five years to life for the crime of shoplifting several golf clubs.<sup>274</sup>

The conceptual problems with proportionality are not, however, insurmountable. In essence, proportionality has two limbs: the seriousness of the crime and the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

One of us has argued elsewhere that there is one criterion that should be used to measure offense severity and the hardship of a sanction: individual well-being.<sup>275</sup> The type and degree of punishment imposed on offenders should cause them to have their well-being set back by an amount equal to that which the crime set back the well-being of the victim.

The main difficulty to this approach relates to mapping and calculating the notion of well-being. There is a degree of approximation involved in such an assessment. However, the level of accuracy in making such determinations is increasing. The concept of well-being is becoming so mainstream that, in some contexts, it is replacing or complementing conventional and widely-accepted economic indicia for evaluating human progress and achievement. The Organisation for Economic Co-operation and Development (OECD) has developed a “Better Life Index,” which attempts to set out and prioritize the matters that are most essential for human “well-being.”<sup>276</sup> The index

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<sup>272</sup> JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* 184 (2004).

<sup>273</sup> *Id.* at 185.

<sup>274</sup> See Frase, *supra* note 249, at 57.

<sup>275</sup> See Mirko Bagaric, *Injecting Content into the Mirage That is Proportionality in Sentencing*, 25 N.Z.U. L. REV. 411, 413 (2013). The approach has some similarity with the majority opinion of Justice Powell in *Solem v. Helm*, who stated that the seriousness of the offense is determined by harm caused and the defendant’s degree of culpability. *Solem v. Helm*, 463 U.S. 277, 293–94 (1983).

<sup>276</sup> *Create Your Better Life Index*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/#/1111111111> (last visited Oct. 2, 2021). These measures

lists eleven criteria for measuring life quality.<sup>277</sup> It allows nations to develop their social and economic priorities and has distinguished between responses from men and women. It is apparent that men and women have near identical priorities, ranging in descending order from life satisfaction, health, education, work-life balance, environment, jobs, safety, housing, community, income, and civic engagement.<sup>278</sup> In order to attain life satisfaction, key interests are the right to life, physical integrity, liberty, and the right to property.<sup>279</sup>

While relevant studies have not been conducted to provide insight into calculations of offense seriousness or sanction severity, two tentative conclusions can be made regarding the relevance of the studies to the concept of proportionality.

First, property offenses—which deprive victims of wealth as opposed to diminishing their personal security—are overrated in terms of their seriousness. Wealth has a far smaller impact on personal happiness than a range of other factors,<sup>280</sup> and hence, the criminal justice system should view these offenses less seriously. The main situation where property offenses make a significant adverse impact on victims is where they result in the victim living in a state of poverty. The second conclusion that follows from the above analysis is that offenses that imperil a person’s sense of security, or otherwise negatively affect a person’s health and capacity to lead a free and autonomous life, should be punished severely.

These conclusions are supported by studies that assess the impact of different forms of crime on victims. In relation to other offenses, the available data suggests that victims of violent crime and sexual crime have their well-being more significantly set back than for other types of crime.<sup>281</sup> Victims of property crimes likewise suffer reduced levels of well-being but at generally less pronounced rates than victims of

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are designed to be more informative than economic statistics, especially in the form of Gross Domestic Product (GDP).

<sup>277</sup> *Id.*

<sup>278</sup> Mirko Bagaric, *Proportionality in Sentencing: The Need to Factor in Community Experience, Not Public Opinion*, in *POPULAR PUNISHMENT: ON THE NORMATIVE SIGNIFICANCE OF PUBLIC OPINION* 76, 90 (Jesper Ryberg & Julian V. Roberts eds., 2014).

<sup>279</sup> This is the trend of information emerging from the following works and extensive research data in these works. *See, e.g.*, TIM KASSER, *THE HIGH PRICE OF MATERIALISM* (2002); DAVID G. MYERS, *THE PURSUIT OF HAPPINESS* (1992); Martin E. P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 *AM. PSYCH.* 5 (2000). The results of these studies are summarized in Mirko Bagaric & James McConville, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 *DEAKIN L. REV.* 1 (2005). For related readings, see this same edition of the Deakin Law Review, which is a thematic edition regarding the link between law and happiness research.

<sup>280</sup> *Money Can't Buy Happiness*, *AM. PSYCH. ASS'N* (June 14, 2011), <http://www.apa.org/news/press/releases/2011/06/buy-happiness.aspx>.

<sup>281</sup> *See generally* Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 *J. TRAUMATIC STRESS* 189 (2010).

sexual and violent crime.<sup>282</sup> Homicide offenses involve the irreversible destruction of life and hence cause the most harm of any form of crime.

The other side of the proportionality equation—measuring punishment severity—is less contentious. Ryberg contends that this is because of the underlying belief that the “answer is pretty straightforward” as imprisonment is clearly the harshest disposition.<sup>283</sup> Imprisonment is the harshest commonly applied sanction because, as previously discussed, it has a severe impact on the well-being of offenders.<sup>284</sup>

The final problem regarding proportionality is how to match the severity of the punishment to the seriousness of the offense. In light of the above discussion, this is relatively straightforward. The type and degree of punishment imposed on offenders should set their well-being back in an amount equal to that which the crime set back the well-being of the victim.<sup>285</sup>

The above approach assesses both the hardship of punishment and the severity of crime as they relate to well-being. This enables at least a crude match to be made, which stems from a number of premises. The crime which causes the most damage to victims is homicide. The form of homicide which is the most serious is murder, given that this is the form of killing which has the highest level of moral culpability. The most serious sanction is imprisonment and the harshest form of this is life imprisonment. Thus, on this crude matching life imprisonment is appropriate unless there is a reason to the contrary.

As noted above, prison is a harsh disposition that causes considerable hardship to offenders. This is especially true when the incidental deprivations are also factored into the calculus. The hardship is obviously exacerbated by long terms of imprisonment and most of all by life terms. The level of suffering caused by a life term prison term is so significant as to be crushing. Yet, it is less hurtful than the suffering inflicted on a victim of homicide. Victims of such acts are subjected to the greatest harm possible, in the form of the destruction of their lives and hence ability to undergo any future experiences. The principle of proportionality commands that a harsh penalty be imposed for offenders who deliberately kill others. No other response is capable of acknowledging the intrinsic value of life and devastation arising from the loss of life. An argument that life imprisonment is too severe a punishment for murderers is only tenable if the sole or main reference point is the plight of the offender. Proportionality does not permit this one-sided, blinkered approach.

Thus, life imprisonment for murder is an appropriate and in fact necessary sanction. However, it is plausible that some adjustments are necessary to this

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<sup>282</sup> See Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 155–56 (1998).

<sup>283</sup> RYBERG, *supra* note 272, at 102.

<sup>284</sup> See *supra* Part II.

<sup>285</sup> This is in keeping with the approach of some other theorists. Von Hirsch asserts that an interests analysis, similar to the living standard analysis he adopts for gauging crime seriousness, should be used to estimate the severity of penalties. Andrew Von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 34–35 (1991). Ashworth states that proportionality at the outer limits “excludes punishments which impose far greater hardships on the offender than does the crime on victims and society in general.” ANDREW ASHWORTH, SENT'G AND CRIM. JUST. 97 (2d ed. 1995).

approach. This stems from the need for consistency in sentencing, which is most strongly reflected in the parity principle that requires offenders who commit the same crimes to be subjected to the same punishment. This principle can be undermined considerably in the case of life terms as a result of the significant deviations in age of the offenders. A life term for 20-year-old can result in a 60-year prison term, whereas for a 65-year-old offender, it is 15 years. In order to provide some limits to this disparity, life terms should have a nominal period of 30 years. However, this needs to be treated seriously such that the default position is that offenders should not be released after this period until and unless they present no risk to the community of reoffending. This needs to be accommodated in two ways. The first is via a positive rating on a risk and needs assessment tool, and secondly, for the rest of their lives, they should be subjected to electronic monitoring and sensor surveillance.<sup>286</sup>

The reform proposal also accommodates the principle that very young offenders are less culpable than adults because their cognitive state is not as well developed and they are more amenable to rehabilitation. Moreover, the U.S. Supreme Court has held that mandatory life terms for juveniles are unlawful.<sup>287</sup> However, life terms are lawful for homicide offenses, so long as they are not mandatory.<sup>288</sup> According to the Supreme Court in *Roper v. Simmons*, juveniles lack the ability to reason, have less impulse control, and are more susceptible to peer pressure, which, in turn, makes them less culpable than adults.<sup>289</sup> Similarly, in *Graham v. Florida*, a 16-year-old was convicted of attempted armed robbery and armed burglary for which he was sentenced to life without parole.<sup>290</sup> But the Supreme Court overturned the conviction, noting the fundamental differences between adults and children.<sup>291</sup> According to the Court, juvenile actions are less likely to demonstrate negative moral character, which supports better rehabilitation outcomes.<sup>292</sup> In *Miller v. Alabama*, the Court held that the child's education and status as a juvenile should be taken into account in sentencing decisions.<sup>293</sup> The Court had three scientific reasons for this decision: children lack maturity, which can make them reckless and impulsive; children "are more vulnerable . . . to negative influences and outside pressures"; and a child's moral character is not completely developed like an adult's, indicating that a child's actions

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<sup>286</sup> See Mirko Bagaric et al., *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 396–405 (2021).

<sup>287</sup> *Miller v. Alabama*, 567 U.S. 460, 479 (2012); see also Melissa Quinn, *Supreme Court Declines to Put New Limits on Juvenile Life-Without-Parole Sentences*, CBS NEWS (Apr. 22, 2021, 12:29 PM), <https://www.cbsnews.com/news/united-states-supreme-court-juvenile-life-without-parole-sentences/>.

<sup>288</sup> See JOSH ROVNER, SENT'G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW (2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole>.

<sup>289</sup> *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

<sup>290</sup> *Graham v. Florida*, 560 U.S. 48, 57 (2010).

<sup>291</sup> *Id.* at 82.

<sup>292</sup> *Id.* at 68.

<sup>293</sup> *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

are not likely to be “evidence of irrebuttable depravity.”<sup>294</sup> And in *J.D.B. v. North Carolina*, the Court held that juveniles have a different perception of the criminal justice system than adults, and for this reason, they may be easily influenced by police and their environments, making them more vulnerable and less apt to understand the legal system as an adult would.<sup>295</sup> Most recently, in *State v. Haag*, the Supreme Court of the State of Washington held that a 46-year minimum term amounts to a de facto life sentence and hence was unconstitutional.<sup>296</sup>

#### VI. CRUELTY: IMPLICATION OF MAIN ARGUMENT AGAINST LIFE SENTENCES: ABOLITION OF LIFE TERMS FOR ALL OTHER OFFENSES

The main argument against life sentences is that they diminish the hope of freedom and hence are cruel. They are in fact harsher than they seem because there are numerous incidental pains of imprisonment that go beyond the mere deprivation of liberty. Adam Gopnik has noted that prisons also inflict numerous other forms of suffering on offenders,<sup>297</sup> including restrictions to goods and services;<sup>298</sup> a ban on sexual relationships and the ability to reproduce;<sup>299</sup> a severe limitation on the capacity to engage in family relationship;<sup>300</sup> and exposing them to an increased risk of sexual and physical victimization<sup>301</sup> (in excess of 70,000 prisoners are raped in America annually). Once released from prison, there are ongoing hardships in the form of a

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<sup>294</sup> *Id.* at 471 (citing *Roper*, 543 U.S. at 569–70).

<sup>295</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 271–77 (2011).

<sup>296</sup> *State v. Haag*, 495 P.3d 241, 251 (2021).

<sup>297</sup> Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 22 2012), <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america#:~:text=Why%20do%20we%20lock%20up%20so%20many%20people%3F&text=A%20prison%20is%20a%20trap,the%20most%20part%2C%20nothing%20happens>.

<sup>298</sup> GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 67–68 (1st Princeton Classic ed. 2007).

<sup>299</sup> *Id.* at 70; see also Robert Johnson & Hans Toch, *Introduction*, in *THE PAINS OF IMPRISONMENT* 17 (Robert Johnson & Hans Toch, eds., 1982).

<sup>300</sup> Mirko Bagaric et al., *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 *CARDOZO L. REV.* 1663, 1667, 1699 (2017).

<sup>301</sup> *Id.* at 1667. See National Standards To Prevent, Detect, and Respond to Prison Rape, 77 *Fed. Reg.* 37,105, 37,111 (June 20, 2012) (to be codified at 28 C.F.R. pts. 115, 121) (“The RIA concludes that in 2008 more than 209,400 persons were victims of sexual abuse in prisons, jails, and juvenile facilities, of which at least 78,500 prison and jail inmates and 4,300 youth in juvenile facilities were victims of the most serious forms of sexual abuse, including forcible rape and other nonconsensual sexual acts involving injury, force, or high incidence.”).

reduction in their life expectancy<sup>302</sup> and reduced employment prospects and level of earnings.<sup>303</sup>

Prison can also have negative consequences on the families of inmates. Incarceration significantly increases the chances of divorce<sup>304</sup> and often leads to the children of offenders experiencing considerable difficulties.<sup>305</sup> A report by David Murphey and P. Mae Cooper found the children of inmates experienced a greater number of traumatic life events, emotional problems, and difficulties at school.<sup>306</sup> Similarly, Fondacaro et al. noted that “[p]arental incarceration is more specifically associated with an increase in child aggression, problem behavior, delinquency, arrests, and limited educational attainment.”<sup>307</sup> Thus, it follows the prison is a harsh sanction, and any recommendation which involves the use of imprisonment must factor these additional burdens into the calculus.

The harshness of prison has been used as a basis for some commentators to argue against life terms. Thus, it has been argued that life terms are “*de facto* alternative for states that abolish the death penalty.”<sup>308</sup> LWOP sentences further “retain many of the worst conditions of confinement . . . as well as still effectively sentencing the prisoner to death. It is in almost every way a death row.”<sup>309</sup> Life sentences are “unnecessarily punitive and often disproportionately used for low-level, non-violent crimes.”<sup>310</sup> Although one of the goals of imprisonment is rehabilitation, life sentences go “directly against this aim, by removing the prospect of rehabilitation and thereby undermining the right to human dignity.”<sup>311</sup>

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<sup>302</sup> Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 482 (2011).

<sup>303</sup> NATIONAL RESEARCH COUNCIL, *supra* note 29, at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 13.

<sup>304</sup> NATIONAL RESEARCH COUNCIL, *supra* note 29, at 277.

<sup>305</sup> DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN? 1–2 (Oct. 2015), <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

<sup>306</sup> *Id.* at 2.

<sup>307</sup> Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 711 (2015).

<sup>308</sup> Stephen Lurie, *The Death Penalty Is Cruel. But So Is Life Without Parole.*, NEW REPUBLIC (June 16, 2015), <https://newrepublic.com/article/121943/death-row-crueler-and-more-unusual-penalty-execution>.

<sup>309</sup> *Id.*

<sup>310</sup> Katie Reade, *Life Imprisonment: A Practice in Desperate Need of Reform*, PENALTY REFORM INT’L BLOG (June 11, 2018), <https://www.penalreform.org/blog/life-imprisonment-a-practice-in-desperate-need-of/>.

<sup>311</sup> *Id.*

While it is incontestable that life terms are harsh, it is equally incontestable that deliberately killing another person is a horrendous act. And hence this does not negate that view that the proportionality principle requires life terms for first-degree murderers. However, the suffering that is manifest from imprisonment does entail that life terms should not be imposed for other crimes. No other criminal act causes a degree of suffering similar to that stemming from a life term. Thus, life terms should be abolished for all other offenses.

#### VII. CONCLUDING REMARKS

Life prison terms are harsh. They do not deter other offenders from committing serious offenses. They offer a degree of protection to the community from the further commission of violent offenses by offenders. However, most offenders who serve very long prison terms do not again commit serious offenses and, hence, in relation to any particular offender, it cannot be said that they need to be imprisoned for life in order to protect the community. This will remain the situation until and unless predictive reoffending techniques are developed which can distinguish, with a high degree of confidence, offenders who will commit further serious offenses from those who will not. Despite this, there is a sound argument for imposing life terms for a small category of offenders.

The principle of proportionality is the main guiding determinant regarding the severity of punishment that should be imposed on offenders. This is so, irrespective of which theory of punishment is adopted. To preserve the integrity of the criminal justice system, the severity of the crime should be matched by the harshness of the penalty. There is no precise methodology for matching these variables. However, in relation to the extremes of criminal behavior and punishment, it is possible to make informed observations regarding the objective and relative calibration of certain crimes and punishments. To this end, there is no question that homicide offenses are the most serious crimes in our system of law. They involve the destruction of life. This is unfixable, final, and tragic. The most serious homicide offenses are those which involve the intentional destruction of life. The culpability and loss that follows from the commission of a murder must be met with a very harsh penalty in order to acknowledge the gravamen of the damage and sanctity of human life. Anything less than this undermines the severity of the crime and the importance of the right to life.

Apart from the death penalty, the harshest sanction in our system of law is imprisonment. Life imprisonment is the most severe form of this sanction. It is a stern punishment, depriving inmates of that which is meaningful in their lives. There is no doubt that it causes considerable suffering for people. The suffering is in fact more than is manifest from the deprivation of liberty and includes the increased risk of becoming a victim of sexual violence, reduced life, and the near-total negation of family relationships. Thus, the pain is immense. Yet, in order for it to reflect the suffering and damage inflicted on others, there is no other manner in which to achieve an appropriate calibration. The suffering stemming from life imprisonment is lasting but not as definitive and deep as the total destruction of life. There can be no doubt that on the basis of the principle of proportionality, life imprisonment is not harsh a sanction for murder. Given that prison has a temporal aspect, 50 years' imprisonment is obviously more severe than 15 years' imprisonment. Thus, to inject some degree of uniformity in this regard, a nominal term of years should be equated to life. To this end, we suggest that it should mean a minimum of 30 years. Offenders should only be released at this point if a risk and needs assessment tool deems them to be at negligible risk of reoffending. No other offense types should be met with life imprisonment, and

typically the penalties for most offenses that currently result in prison should be markedly lowered.