

Will Life Without Parole Follow the Path of the Death Penalty?

This is an updated and abridged version of “The Beginning of the End for Life Without Parole?,” an article by Michael M. O’Hear that appeared in the *Federal Sentencing Reporter*. The full text of the original article is available at www.jstor.org/stable/10.1525/fsr.2010.23.issue-1. O’Hear is professor of law and associate dean for research at Marquette University Law School.

Across the past generation, the United States has quietly embarked on an extraordinary experiment in criminal punishment, filling its prisons with unprecedented numbers of inmates who can expect to spend the rest of their lives behind bars. By 2008, more than 41,000 inmates were serving sentences of life without possibility of parole—more than triple the number from just 16 years earlier. In part, this reflects the more general trend of increased severity in American sentencing. The “LWOP” story, however, also features its own unique dynamics. For instance, many states have adopted the LWOP sentencing option at the urging of death-penalty opponents, who view LWOP as a more humane alternative to capital punishment.

Whatever has caused legislatures increasingly to authorize LWOP and judges increasingly to impose it, the effects of this experiment will be felt for a very long time. Many of those serving LWOP sentences today will still be in prison many years—even decades—from now, consuming an ever-increasing share of corrections resources as they age and their health-care needs grow.

A number of recent developments, however, raise questions about whether LWOP might be entering a period of decline. Most dramatically, the Supreme Court declared LWOP unconstitutional for most juvenile offenders in May 2010, possibly inaugurating an era of more-meaningful constitutional limitations on very long sentences. More quietly, many cash-strapped states have been developing new early-release programs in order to reduce corrections budgets, some of which hold out hope even for LWOP inmates. Additionally, increasing international criticism of LWOP may put pressure on the United States to curtail its own use of the sentence. Finally, the slow but steady decline of the American death penalty may also diminish support for LWOP. Let’s consider each of these four developments in more detail.

New Constitutional Limitations

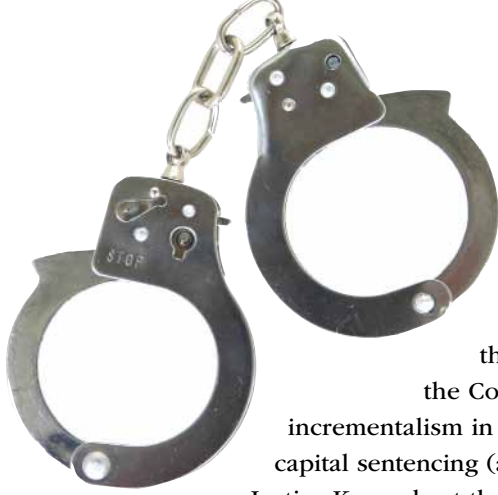
Graham v. Sullivan, the Court’s new juvenile LWOP decision, seems to strengthen the Eighth Amendment prohibition on disproportionately harsh sentences. In recent years, the Court has been quite active in using the proportionality requirement as a basis for regulating capital punishment. On the other hand, in *noncapital* cases, the Court has generally treated the proportionality requirement as so undemanding as to be nearly meaningless. In *Graham*, however, the Court for the first time employed its more rigorous capital sentencing methodology to evaluate the constitutionality of a noncapital sentence.

To defendants facing LWOP, what seems potentially quite beneficial about the *Graham* shift is the ability to draw on the body of precedent that has grown up around the capital-sentencing jurisprudence, which makes a variety of strong categorical distinctions for purposes of determining who can and cannot be executed—for example, distinctions between minors and adults, between homicide and other offenses, between the mentally retarded and the mentally fit, and between those with major and minor roles in the offense. Indeed, the first two of these distinctions were crucial in *Graham* itself, as the Court banned LWOP for minors who have committed nonhomicide offenses.

Based on the reasoning of *Graham*, a colorable constitutional argument against LWOP would seemingly apply in any case in which any two of the protected categories were present—for example, a mentally retarded minor who committed homicide, or a mentally retarded adult who committed an offense other than homicide, or a minor who was convicted of felony-murder but did not have a substantial role in the offense. Moreover, *Graham* can be expected to spur a growing number of Eighth Amendment challenges in noncapital cases, which might result in judicial recognition of new categorical distinctions, such as between violent and nonviolent offenses, between first-time offenders and recidivists, and among the various degrees of mens rea. If courts start to give Eighth Amendment significance to more of the distinctions that have long been recognized in criminal codes as bearing on offense severity, one could imagine the emergence of a truly robust set of Eighth Amendment restrictions on the use of LWOP.

In the end, though, *Graham* seems unlikely to provoke a dramatic expansion of Eighth Amendment protections in the near term. None of the recent personnel changes on the Supreme Court seem likely to alter the Court’s longstanding balance of power when it comes to the Eighth Amendment. Standing in the center of an evenly divided Court, Justice Kennedy’s views govern in this area. It is no accident that he authored the majority opinion in *Graham*, and nothing in that opinion indicates that Kennedy regrets his earlier opinion in *Harmelin v. Michigan*—an opinion that marked a crucial turning point in the early 1990s away from rigorous Eighth Amendment review of noncapital sentences.

In truth, the Court took on an easy target in *Graham*: Juvenile LWOP inmates were less than 5 percent of all LWOP inmates nationally, and only a



dozen states held more than 30 of them. *Grabam* thus calls to mind the Court's modest incrementalism in addressing capital sentencing (again, with Justice Kennedy at the helm), where the Court has targeted only practices that are relatively uncommon, leaving states with nearly unlimited discretion to execute adult murderers.

Fiscal Pressures and New Opportunities for Early Release

Since 2000, at least 36 states have enhanced early-release options for prison inmates, largely as a result of fiscal pressures created by burgeoning prison populations. Against the recent backdrop of economic turmoil and stagnant government revenues, policymakers have found early release to be an attractive option, particularly to the extent that it can be implemented without obvious public-safety hazards. Thus, many early-release programs have focused on inmates who are elderly or seriously ill, nonviolent offenders, and offenders who complete designated educational or therapeutic programs.

Will such programs provide much benefit to LWOP inmates, perhaps even reintroducing the functional equivalent of parole through the back door? Although some of the new programs are designed to screen out the most serious offenders, others do make LWOP inmates eligible for release. In 2009, for instance, Wisconsin expanded the opportunities for LWOP inmates to petition for release on the basis of age and infirmity. However, the experience thus far in Wisconsin and many other states has been that officials, presumably fearful of another Willie Horton, have been far more conservative than anticipated in granting petitions for release. These experiences leave considerable doubt as to whether the new early-release programs are capable of making a significant, lasting difference in the size of prison populations, and the most serious offenders with the most severe sentences seem the most likely to see their petitions denied as a result of political concerns.

If current LWOP inmates are unlikely to see much benefit from the current fiscal crisis, perhaps budgetary pressures will at least slow the growth of the LWOP population at the front end by forcing the adoption

of sentencing reforms that preclude or discourage the imposition of life terms. Such reform, however, does not seem to be a particular legislative priority at present. Although many states have indeed adopted sentencing reforms in the past couple of years, the reforms generally focus on lower-end offenders—for instance, by eliminating mandatory minimums for drug-possession defendants.

Other states have recently created commissions or other new bodies that are charged with studying sentencing practices, and it is possible that such bodies will serve to focus attention on LWOP sentences. However, to the extent that immediate fiscal pressures continue to drive the sentencing policy agenda, LWOP reform is not likely to be a priority: Because any offenders who are diverted from LWOP are still likely to get very long sentences, any savings from front-end LWOP reforms will not be realized for many years—well beyond the time horizons of legislatures facing short-term crises.

Developments in International Law

It is possible that LWOP will soon be banned in Europe as a matter of international human rights law. To the extent that LWOP is increasingly seen abroad as inconsistent with established norms of humane punishment, the United States may come under pressure to abandon LWOP, much as it has faced pressure to do away with the death penalty.

It is far from clear, however, that the United States is responsive to such pressures. There seems not to be much of a domestic constituency for conforming American penal practices to international norms. Moreover, the fractured, federal structure of American government further diminishes the likelihood that the interest of the United States in maintaining its standing in the international community will have much effect on its penal practices: Whereas the federal government carries the nation's diplomatic responsibilities, the vast majority of criminal prosecutions are carried out in state courts under state law.

However, international developments will not necessarily prove wholly irrelevant to the future of LWOP in the United States. For instance, other nations may take LWOP-eligibility into account when deciding whether to honor American extradition requests, much as is sometimes done already with respect to death-eligible offenders. Moreover, the Supreme Court's recent Eighth Amendment cases, including *Grabam*, have routinely (if

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controversially) looked to international law for guidance. It is possible that a growing international consensus against LWOP will lead the Court to move a bit more quickly and aggressively in extending *Graham* to some classes of adult offenders.

Decline of the Death Penalty

The American death penalty seems in long-term decline. The number of people executed decreased nearly every year from 1999 through 2010, falling from 98 to 46 in that time. Likewise, the number of defendants sentenced to death decreased nearly every year from 1996 through 2009, falling from 315 to 112 (the smallest number sentenced to death in any year since 1973). Moreover, in the past four years, three states (Illinois, New Jersey, and New Mexico) have repealed the death penalty, while a fourth (Maryland) dramatically restricted the circumstances in which it can be imposed. As of this writing in spring 2011, an abolition bill has just been passed by one house in Montana.

It is not clear whether or how these developments will affect LWOP, but one can hypothesize at least two possible consequences. First, at the level of legislative policymaking, the decline of the death penalty may diminish the support of liberal reformers for LWOP as an alternative to capital punishment, and perhaps even lead some death-penalty abolitionists to refocus their

reform efforts on rolling back LWOP. Second, at the level of individual cases, the diminished availability of capital punishment (as a matter of law in some jurisdictions and a matter of practice in others) will reduce the pressure on some defendants to accept plea deals that will result in LWOP sentences.

At present, though, there seems no reason to think that either potential effect will have dramatic consequences for the frequency of LWOP sentences, at least in the near term. For instance, two states that recently abolished capital punishment (New Jersey and New Mexico) did not actually use it very much; nor does either state have a sizeable LWOP population. If death-penalty abolitionists continue to have their greatest success in such states, there is likely to be little resulting reduction in national LWOP rates.

Conclusion

Against a backdrop of intense fiscal pressure, an emerging international consensus against LWOP, and long-term decline in use of the death penalty, *Graham* may mark the end of the growth phase of LWOP. Indeed, although dramatic reductions in the LWOP inmate population seem unlikely any time soon, it is possible that LWOP will enter a period of slow decline that echoes the recent history of the death penalty.

Whether such a trend should be welcomed is a difficult question. It is hard to say that LWOP should always be regarded as an excessive penalty for murder, and the sentence may even sometimes be appropriate for a small number of other extremely serious violent crimes. On the other hand, in our great experiment with high-volume LWOP, we have clearly not been reserving LWOP exclusively for the “worst of the worst,” or even the “second worst” (as might be appropriate if death is assumed to be available for the very worst). If a declining trend in LWOP sentences results in fewer aged inmates spending their final years of life in prison for offenses whose gravity falls well short of murder, then such a trend would almost certainly be a positive development. ■