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Life without Parole: America's New Death Penalty?

Edited by Charles Ogletree and Austin Sarat. New York: New York University Press, 2012. 352 pp. \$79.00 (cloth) ISBN 9780814762479, \$26.00 (paper) ISBN 9780814762486

The death penalty in the United States appears to be dying. In May of 2013, Maryland became the 18th U.S. jurisdiction to enter the “abolitionist” column. Since 2007, New York, New Jersey, Illinois, and Connecticut have each removed the penalty of “death” from their criminal statutes. In the fall of 2012, California (with the largest death row population in the nation) narrowly retained the death penalty with the failure of a state-wide ballot measure that would have replaced the penalty of death with the existing sentence of life without the possibility of parole (LWOP). Yet even with the failure of this proposition, no executions have been carried out in California since 2006 due to a court ordered moratorium on the method of lethal injection prescribed by state law.

But if we are truly on the road to death penalty abolition, as Charles Ogletree Jr. and Austin Sarat asked in a previous edited volume, where does this road lead?¹ Have we traded one form of death penalty for another? Have we swapped the possible death by execution for the perversely more certain death behind bars, or for the living death of long-term solitary confinement and prolonged isolation? This is not an abstract formulation: when Connecticut “abolished” the death penalty, the LWOP provision that replaced it requires inmates to be in their cells 22 hours a day and forbids contact visitations for the rest of their lives. As Ogletree and Sarat argue in their introduction, LWOP should be understood as a central part of our current punitive landscape, positioned “at (or near) the top of the punitive pecking order” (20). While it has been instrumental in replacing capital punishment, it also forces us to ask if “death really is different,” and to confront the possibility that LWOP “may well be the new capital punishment, with all of its baggage – but none of its process” (21). To that end, this volume brings together eight essays, each offering answers to the question, “Is LWOP the new death penalty?” The answer appears to be a qualified but definitive “yes,” and each chapter is worth the time to read carefully, as they singularly and collectively should trouble death penalty abolitionists and reforms who have embraced “life” as a paradoxical replacement for “death.”

Part I sets the “context” of LWOP sentencing, both normatively and descriptively. The opening essay by Josh Bowers, “Mandatory Life and the Death of Equitable Discretion,” begins by noting that LWOP is typically imposed as a *mandatory* sentence, removing any discretion from judges and juries. In this way, mandatory LWOP sentences are more similar to the death penalty under the English “Bloody Code” of the 17th–19th centuries than to contemporary capital sentences. Under the “Bloody Code,” execution was required for a relatively large number of crimes as *mandatory*. Yet because it was prescribed so widely and disproportionately, it was also imposed infrequently because juries would acquit guilty persons rather than impose harsh executions. In this way, Bowers provocatively notes, LWOP “is not so much the new death penalty as the old one” (26). If LWOP

1. Charles Ogletree and Austin Sarat, eds., *The Road to Abolition? The Future of Capital Punishment in the United States* (New York: New York University Press, 2009).

sentences are going to persist, they are surely worthy of the same levels of discretion and oversight currently afforded in capital cases. Bowers' essay frames the discussion productively beyond traditional normative analysis, demonstrating the mythic character of the "death is different" maxim. The contingent and specific material conditions of punishment matter a great deal and force us to confront the deeper central question that runs throughout the volume: what must we mean by "life" and "death" such that the one could be both exchanged for the other and yet remain qualitatively different?

If Bowers' essay makes the case that we should be suspicious of the "death is different" formulation and therefore attend to the lack of scrutiny and protections afforded to LWOP inmates, Jessica Henry's contribution, "Death-in-Prison Sentences: Overutilized and Underscrutinized," demonstrates just how wide our purview ought to be when considering "life" and "death." LWOP sentences are only one instance of the broader category of "death-in-prison" (DIP) sentences, in which the expected (if not certain) outcome is that an inmate will die in prison. Importantly, this includes many other sentences where parole may be technically available but practically impossible. This change in nomenclature is crucial for asking why it is that only *some* death sentences seem to count as "ultimate" or "irrevocable," and therefore worthy of heightened judicial scrutiny, oversight, and discretion. By identifying the key categories of capital *and non-capital* offenders likely to find themselves serving DIP sentences (for instance, "habitual" but not necessarily violent offenders and an alarming number of non-violent drug offenders), Henry identifies a clear pattern of arbitrariness and excessive punishment throughout the carceral regime. Arbitrariness and excess are the same problems that historically lead the Court to carefully manage capital punishment, and as such, call us to treat all DIP sentences with the same level of care and scrutiny.

Yet as with the death penalty, LWOP sentences are imposed on a small (but growing) percentage of the entire carceral population: around 2 percent of total prisoners in the United States. But as Sharon Dolovich argues in "Creating the Permanent Prisoner," we would be wrong to regard LWOP as a punitive anomaly. Rather, LWOP "most effectively captures the central motivating aim of the contemporary American carceral system. LWOP promises permanent exclusion" (96). Dolovich argues that LWOP sentences reveal how the entire carceral system is predicated on exclusionary principle rather than a reintegrationist one, operating as the condition of possibility for treating *all* prisoners as irredeemable and unworthy of political inclusion. Nearly all prisoners will eventually leave prison, yet they will return to society far worse off socially, politically, and economically than when they entered. Degrading prison conditions, onerous parole and probation requirements, and the vast regime of collateral consequences that exclude and marginalize former prisoners are supported (and made possible) by the figure of the LWOP prisoner who can be locked up for their entire lives. To this end, Dolovich argues, the LWOP inmate plays a role similar to Agamben's *homo sacer*: a threshold figure that extends the logic of biopolitical sovereignty to the entire population of prisoners, rendering them as bare life, irredeemable and utterly excludable.

In contrast to Dolovich's analysis, which demonstrates how the normative terms of moral membership and evaluation are produced in part through punitive practices, Paul Robinson's essay, "Life without Parole under Modern Theories of Punishment," takes a more traditional approach. Invoking standard aims of punishment – utilitarian

conceptions of deterrence, incapacitation, and retributive desert – Robinson argues that LWOP is unjustifiable, ineffective, and counterproductive. Robinson’s essay is unique in the volume, skirting a direct engagement of the question of relationship between “life” and “death.” His conclusion, that LWOP sentences ought to be used far less, is in keeping with other contributors, but because he relies so heavily on ideal theory to guide his analysis, he unfortunately does not call for any rethinking of punishment more generally, or of LWOP specifically. It is, in this sense, the least compelling essay in the collection, and feels somewhat out of place given the critical readings of the other contributions.

Part II of the volume outlines the (bleak) prospects for reforming LWOP. I. Bennet Capers’s contribution “Defending Life,” is not only the most interesting essay of the volume, but also the most personal. Capers – a former federal prosecutor who handled capital cases – argues that our collective obsession with “the cult of death,” aided by a misdirected abolitionist impulse to simply replace “death” with “life,” has both diminished our ability to think critically (or even much at all) about LWOP sentences and exacerbated the racially disproportionate effects of criminal sentencing in the United States. Driven by abolitionist groups and defense attorneys, Capers argues, those who fought the strongest for LWOP sentences were far too willing to end the death penalty at “all costs” even if those costs included more life sentences and harsher sentences across the board. In fighting “for life” and “against death,” the actual conditions of what “life” entails have been swept under the rug, leaving the hopeless living death of LWOP both more common and more difficult to critique. Abolitionists focusing only on death row exonerations, for instance, ultimately reify a neat distinction between guilt and innocence, legitimizing the system itself rather than subjecting it to careful analysis. The ultimate effect, Capers rightly worries, is that the expansion of life sentences has allowed us to ignore race. In death penalty cases, given capital punishment’s overtly racist history and racially discriminatory application, we have become comparatively “vigilant” with respect to race because “death” is on the line. But the same is simply not true in the case of life sentences, where racially disproportionate sentencing is worse than it has ever been as Black and Latino men build entire “invisible cities” behind prison walls. By attending to the radical roots of “abolition” itself as a project of emancipation rather than the replacement of slave labor with some other form of labor, Capers makes a radical call to rethink the entire carceral regime, questioning our addition to incarceration and what we mean by punishment itself.

This is not to imply that Capers is optimistic about the prospects for reform. LWOP will not simply fade away without direct attention to the racial order, the *aporia* between life and death, and the confronting of well-intentioned “abolitionists” who have embraced LWOP as an improvement over capital punishment. Rachel Barkow and Mary Gottschalk are equally troubled about the prospects for reform in their respective contributions. In “Life Without Parole and the Hope for Real Sentencing Reform,” Barkow identifies how the courts have gone to great lengths to avoid taking on the role of “policing” sentencing regimes more generally, “cabin”-ing death penalty jurisprudence narrowly, and thus avoiding the difficult questions of proportionality that are always lurking in the background of LWOP cases. Barkow’s essay nicely summarizes the state of current LWOP jurisprudence, and more importantly, demonstrates how the Court has effectively established a “zero-sum” relationship between LWOP and the death penalty, which makes it

more difficult to extend the same level of scrutiny and protection to LWOP defendants. The prospects for “real” LWOP reform appear bleak, in large part because of how “successful” the death penalty abolitionist movement has been in promoting it. In the absence of comprehensive sentencing reform, Barkow argues, we have little reason to expect LWOP to recede either slowly or quickly.

Gottschalk largely concurs with this bleak outlook in “No Way Out? Life Sentences and the Politics of Penal Reform.” On her analysis, LWOP reflects a powerful intersection of overly punitive forces including the courts (who are unlikely, for the reasons Barkow identifies, to reduce the population of lifers), political leaders (who maintain strong support for harsh penalties and the war on drugs), and the public’s perception of “lifers” (primarily as habitual offenders, the “worst of the worst,” etc.). Of particular note in Gottschalk’s analysis is the way in which even successful sentencing reform can reinforce overly punitive attitudes. Attention to the plight of “three-strikers,” for instance, often comes at the expense of other lifers. As she notes, “Narrowly tailored arguments may win the release of individual lifers or certain categories of lifers but may worsen the odds of other lifers left behind” (242). In keeping with Barkow and Capers’s analyses, the only real hope for LWOP reform is as a part of a much larger sentencing reform movement. While some commentators have seen a possibility for decarceration as part of self-imposed austerity measures due to financial and fiscal crises plaguing states like California, Gottschalk rightly notes that decarceration costs money too, and it is just as likely that savings will come at the expense of reentry programs and prison conditions.

Jonathan Simon is not optimistic, but neither is he willing to wait for a complete end of the death penalty to begin a judicial attack on LWOP. In “Dignity and Risk: The Long Road from *Graham v. Florida* to Abolition of Life Without Parole,” Simon argues that taking on LWOP in the courts is necessary not only to spur a broader penal reform movement, but also to restore legitimacy to the U.S. criminal justice system. Simon argues that by looking outside of penal jurisprudence, we can find resources for successfully challenging LWOP. Specifically, Simon notes the emergence of a “dignity jurisprudence” found in case law surrounding end-of-life issues, mental health rights, and domestic partnership law. In each of these examples, Simon argues, the Court has identified the notion of “dignity” as a guiding principle. LWOP, he argues, reflects an understanding of “risk” that is driven by a victim-centered governmentality, and an eighth-amendment jurisprudence centered on dignity has the potential for resisting the logic of total incapacitation underlying LWOP justifications.

The replacement of the death penalty with LWOP underscores the limits of “reform” and the danger of “abolitionist” agendas that trade one kind of death for another. Unfortunately, the very groups dedicated to ending state killing have become invested in the expansion of DIP sentences, often ignoring resistance from death row inmates themselves (who risk losing legal representation and access to the courts if their sentences are converted). By embracing LWOP, we have collectively painted ourselves into a corner where we must either rethink our entire penal regime, or continue to ignore it at our own peril. We find ourselves in the place *already* identified by Michel Foucault (a figure notably absent throughout this volume) shortly before France abolished capital punishment in 1981: “By maintaining, in one form or another, the category of individuals to be definitively eliminated (through death or imprisonment), one easily gives oneself the

illusion of solving the most difficult problems: correct if one can; if not, no need to worry, no need to ask oneself whether it might be necessary to reconsider all the ways of punishing: the trap door through which the ‘incurrigible’ will disappear is ready.”²

Life without parole: America’s New Death Penalty is indispensable reading not just for death penalty scholars and activists, but also for those concerned with mass incarceration, the “New Jim Crow,” neoliberal penalty, sentencing reform, and the theory and philosophy of punishment. These essays challenge us to think beyond replacement penalties, to think instead about the penalties themselves, and above all, as Capers argues, to “imagine an abolitionist movement predicated on the notion that there is something fundamentally and morally wrong with how we punish” (183). Any abolitionist project that falls short of that imperative, I would argue, is not worthy of the name.

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2. Michel Foucault, “Against Replacement Penalties,” in *Power*, ed. James Faubion, *The Essential Works of Michel Foucault, 1954–1984* (New York: The New Press, 2000), pp. 460–461.