

# CONVERGING PUNISHMENTS, DIVERGING PROTECTIONS

LIFE SENTENCES, HUMAN RIGHTS,  
AND COMPARATIVE LAW IN SPAIN  
AND THE UNITED STATES

PABLO SARTORIO

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## Chapter three

# Life sentences in the United States: from rehabilitation to mass incarceration

SUMMARY: 3.1. HISTORICAL TRAJECTORY OF LIFE SENTENCING IN THE U.S.. 3.1.1. *Enlightenment Influences and the Rehabilitative Ideal*. 3.1.2. *The Rise of the Punitive Turn and Decline of Indeterminate Sentencing*. 3.1.3. *From the War on Drugs to the Era of Mass Incarceration*. 3.1.3.1. *The Rockefeller Laws and the Nothing Works Doctrine*. 3.1.3.2. *The 1994 Crime Bill and Three-Strikes Laws*. 3.1.4. *Recent Trends and Sentencing Reform Efforts*. 3.1.4.1. *The Contemporary Landscape of Life Sentencing*. 3.2. LEGAL FRAMEWORK OF LIFE SENTENCES. 3.2.1. *Life With and Without Parole: Formal and Functional Definitions*. 3.2.2. *De Facto Life Sentences: Scope and Legal Treatment*. 3.2.3. *Federal Statutory Authority and Sentencing Enhancements*. 3.2.3.1. *Death-Results and Hazardous-Activities Provisions*. 3.2.3.2. *Drug Trafficking*. 3.2.3.3. *Repeat Offender and Sentencing Enhancement Statutes*. 3.2.3.3.1. *Violence and Firearms Offenses*. 3.2.3.3.2. *Offenses Related to Children*. 3.2.4. *The Role of Federal Sentencing Guidelines*. 3.2.4.1. *Guidelines Structure and Judicial Discretion*. 3.2.4.2. *Alternative Paths to Life Sentences*. 3.3. OPPORTUNITIES FOR RELEASE: MECHANISMS AND LIMITATIONS. 3.3.1. *Parole Across Federal and State Systems*. 3.3.2. *Clemency and Commutation Practices*. 3.3.3. *Barriers to Release and Post-Sentence Supervision*. 3.4. CONSTITUTIONAL SAFEGUARDS AND EIGHTH AMENDMENT JURISPRUDENCE. 3.4.1. *The Eighth Amendment and the Proportionality Principle*. 3.4.1.1. *Historical Evolution and Foundational Doctrines*. 3.4.1.2. *Proportionality Standards Before Graham*. 3.4.1.2.1. *Proportionality Standard in Capital Cases*. 3.4.1.2.2. *Proportionality Standards in Non-Capital Cases*. 3.4.1.3. *Graham v. Florida and the Prohibition of LWOP for Juveniles*. 3.4.1.3.1. *Diminished Responsibility and Individual Culpability*. 3.4.1.3.2. *Penological Objectives and Rehabilitation*. 3.4.1.3.3. *Doctrinal Significance for Life Sentencing: Individualized*

Sentencing and Retroactivity. 3.4.2. *Appellate Review and Procedural Safeguards*. 3.5. CLOSING REMARKS.

The present chapter is intended to provide an in-depth contextual explanation of life imprisonment in the US, to demonstrate how tough-on-crime policies have made life sentences a central feature of penal legislation, and to identify the factors that contribute to the US having the largest number of life prisoners worldwide. It examines the case law on Eighth Amendment challenges to life sentences, it draws comparisons to the death penalty, and it underscores the relationships between doctrines that enable shifts in penal philosophy to spread across domains. In *Graham*, Justice Stevens wrote that “[p]unishment that did not seem cruel and unusual at one time may, [considering] reason and experience,... be [so] at a later time.”<sup>1882</sup> Whether progress will bring about the abolition of life sentences<sup>1883</sup> remains to be seen. The lessons from costly and long-lasting failures may prove beneficial if they prevent the adoption of penal policies with similar consequences.<sup>1884</sup>

This chapter focuses on life sentences at the federal level because the federal prison system is the largest<sup>1885</sup> and the most homogenous in the US. In several ways, the federal system serves as a model for states.<sup>1886</sup> Furthermore, the United States Sentencing Commission (USSC) has a significant influence on federal sentencing policy because it develops and updates the sentencing guidelines (Guidelines). It collects data on sentencing practices, and it leads research initiatives.<sup>1887</sup> The study also examines state systems to illustrate different approaches to life sentences and other punishments. To that end, this chapter overviews the offenses that can result in a life sentence and the statutory guidance that establishes the rationale behind and the conditions of their imposition.<sup>1888</sup> Finally, the chapter addresses the constitutional safeguards, principles, and doctrines that set the boundaries of life sentences, as well as the future of that punishment in the US.

1882. *Graham*, *supra* note 1334 at 85; CPT 25th Report, *supra* note 87 at ¶ 69 (noting the death penalty repeal as an EU membership requirement).

1883. *Öcalan* (No. 2), *supra* note 350 at ¶ 10 (Pinto de Albuquerque, J., partly dissenting).

1884. E. Bazelon, If Prisons Don’t Work, What Will?, *NYT*, Apr. 9, 2019 (Calling U.S. incarceration policy “America’s biggest mistake in the last 50 years.”); Brandariz García, *supra* note 899 at 214 (the American experience reveals flaws in harsh sentence-focused crime prevention).

1885. See tbl. 2 E. A. Carson, Prisoners in 2019, *BUREAU JUST. STAT.* 1, 4–5 (2020).

1886. A. Romero & M. Holden, A New Beginning for Criminal Justice Reform, *POLITICO Mag.* (Jul. 7, 2015).

1887. U.S. SENT’G GUIDELINES MANUAL 4–12 (2021).

1888. Tonry, *supra* note 37 at 1.

### 3.1. HISTORICAL TRAJECTORY OF LIFE SENTENCING IN THE U.S.

The number of life-sentence offenders has skyrocketed globally. It was estimated to be at 536,000 in 2014.<sup>1889</sup> Nearly one in three of them is serving life in the US.<sup>1890</sup> This development was “an unprecedented event in the history of the US and ... of liberal democracy,”<sup>1891</sup> according to Garland. The US, the most renowned incarcerator in the world,<sup>1892</sup> is also recognized as the land of liberty.<sup>1893</sup> U.S. punishments vary widely, ranging from a day of incarceration to the death penalty.<sup>1894</sup> In 2019, the US had 1.4 million prisoners,<sup>1895</sup> and approximately 6,410,000<sup>1896</sup> offenders were under the authority of the criminal justice system.<sup>1897</sup> The annual cost of running this industry has almost reached \$90 billion.<sup>1898</sup> Many states spend more on incarceration than on educating the young.<sup>1899</sup>

Despite more than three decades’ worth of empirical evidence showing that lengthier sentences have no effect on recidivism, the US incarcerates the highest number of individuals for the longest periods of time.<sup>1900</sup> Prisoners who are serving life without parole (LWOP) or sentences that they cannot

1889. P. Brennan & J. Garman, Incapacitation and Sentencing, in Routledge handbook of corrections in the United States 24, 25–26 (O. Hayden Griffin & V. Woodward eds., 2018); Nellis, *supra* note 885 at 26.

1890. Nellis, *supra* note 885 at 26.

1891. D. Garland, Mass Imprisonment: Social Causes and Consequences 1 (2001).

1892. H. Fair & R. Walmsley, World Prison Population List, INST. CRIME J. POL’Y RSCH. 18 (2021); T. Minton, L. Beatty & Z. Zeng, Correctional Populations in the United States, 2019 - Statistical Tables (2021); L. Maruschak & T. Minton, Correctional Populations in the United States, 2017-2018 (2020); R. Walmsley, World Prison Population List, INST. CRIME J. POL’Y RSCH. 1 (2018).

1893. van Zyl Smit, Turković, & Harcourt, *supra* note 544; P. Sartorio, Human Rights Behind Bars: Paying a Debt That Keeps on Growing, in Current issues on Human Rights., 159 (A. Sungurov et al. eds., 2019).

1894. van Zyl Smit, *supra* note 86 at 20.

1895. App. fig. B.1. U.S. Prison Population from 1995 to 2020; *see also* Cavadino & Dignan, *supra* note 65 at 50.

1896. This figure is from 2018; 2019 data was unavailable.

1897. J. Bellin, Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How It Can Recover (2023); D. Harding, J. Morenoff & J. Wyse, On the Outside: Prisoner Reentry and Reintegration 4 (2019); Stevenson, *supra* note 1 at 29.

1898. App. fig. B.5. Annual Prison Expenditure in US from 1995 to 2020; fig. B.6: U.S. Prisoners Cost from 1995 to 2020; *see also* E. Buehler, Justice Expenditures and Employment in the United States, 2017, BUREAU JUST. STAT. 1, 16 (2021).

1899. L. Gibson, Color and Incarceration, HARVARD MAG. 40, 42 (2019).

1900. R. Subramanian & R. Delaney, Playbook for Change? States Reconsider Mandatory Sentences, VERA INST. JUST. 28, 5 (2014).

outlast account for nearly 50% of the US life-prisoner population, which has surpassed 200,000.<sup>1901</sup> While the prison population has been declining since 2008, it is currently 20 times larger than it was in 1982.<sup>1902</sup> Despite widespread concerns, virtually nothing has been done to change the status quo.<sup>1903</sup> The relationship between the US and mass incarceration is the result of the implementation of poorly thought-out policies,<sup>1904</sup> resulting in an almost eightfold increase in the prison population between 1980 and 2013.<sup>1905</sup> Unfortunately, the increase did not end in that year.<sup>1906</sup> Federal prison admissions peaked in 2010, whereas the largest number of releases occurred in 2015. Those releases can be ascribed to a record number of pardons and commutations rather than to changes in legislation.<sup>1907</sup> Conversely, state admissions and releases have largely followed similar trends, with the former peaking in 2007 and the latter peaking in 2008 before decreasing to their lowest levels in 2012 and 2013, respectively. There has been little variation since then.<sup>1908</sup> This section analyzes the evolution of life sentences, a mainstay of the U.S. legal system since its inception,<sup>1909</sup> as well as the legislative process and the influence of penal populism.

### 3.1.1. ENLIGHTENMENT INFLUENCES AND THE REHABILITATIVE IDEAL

Incarceration terms that exceed the expected lifespans of prisoners predate the foundation of the US. They are a byproduct of alternative forms of punishment.<sup>1910</sup> Sentencing strategies in the American colonies were

1901. Nellis, *supra* note 17 at 10; *see also* app. B van Zyl Smit & Appleton, *supra* note 9 at 340–47.

1902. App. fig. B.1. U.S. Prison Population from 1995 to 2020; *see also* Trends in U.S. Corrections (2020); P. Baunach, 1984 Census of Adult State Correctional Facilities - Rationale and Issues for Inclusion 2 (1983).

1903. Tonry, *supra* note 37 at 1, 8.

1904. *See* app. fig. B.7. Prison Admissions and Releases in the US (Federal) from 2000 to 2019; fig. B.8. Prison Admissions and Releases in the US (State) from 2000 to 2019; tbl. B.1. Incarceration Rate in the US from 2000 to 2020.

1905. *See* Pfaff, *supra* note 25; Kleinfeld, *supra* note 14 at 939; Romero and Holden, *supra* note 1952; Whitman, *supra* note 4.

1906. Harding, Morenoff, and Wyse, *supra* note 1963 at 3.

1907. App. fig. B.7. Prison Admissions and Releases in the US (Federal) from 2000 to 2019; fig. B.9. Clemency Request, Granted, Denied, and No Action in the US from 1995 to 2022; *see also* Obama Administration Clemency Initiative, U.S. DEPT. OF JUST. (Jan. 12, 2015).

1908. App. fig. B.8. Prison Admissions and Releases in the US (State) from 2000 to 2019.

1909. van Zyl Smit, *supra* note 86.

1910. Leigey, *supra* note 90 at 151; van Zyl Smit, *supra* note 86.

inspired by the British and premised on severe punishments that involved public display<sup>1911</sup> rather than long-term or lifelong confinement.<sup>1912</sup> Public punishment, whether humiliating, painful, or lethal, had crime prevention rather than rehabilitation as its aim.<sup>1913</sup> Capital punishment became the preferred punishment for all offenses, whatever their seriousness.<sup>1914</sup> According to some researchers, the spread of capital punishment in the American colonies could have been related to the absence of the requisite infrastructure for long-term imprisonment.<sup>1915</sup>

In the 18th century, Beccaria's influence as a theorist of penal policy and penal reform transcended borders and continents.<sup>1916</sup> At the inception of the American republic, his thought was central to penal philosophies and principles.<sup>1917</sup> Beccaria believed in the deterrent power of life sentences and favored punishments that were proportionate and unambiguous.<sup>1918</sup> While Beccaria saw life sentences as more measured than capital punishment due to their public impact and lack of cruelty, his practical vision entailed setting punishments that would be so severe as "to make execution appear to be an act of mercy," which perplexed European reformers and became contentious in U.S. criminal policy.<sup>1919</sup> After independence, numerous states abandoned the death penalty.<sup>1920</sup> Beccaria's beliefs continued to influence criminal reform.<sup>1921</sup> For example, the Pennsylvania criminal code reform of 1786 restricted capital punishment to serious crimes, such as murder,

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1911. L. Friedman, *A History of American Law* 36–39 (4th ed. 2019) (colonists believed punishment's effectiveness relied on public display: they used pillories, hangings, and castration for crimes, harshly punished repeat offenders with branding, corporal punishment, and death, and executed conspirators with public beheadings. They also cut ears and toes to discipline enslaved people). V. Garcia, *History of Prisons*, in *Encyclopedia of Prisons & Correctional Facilities* 415, 416–17 (2005).

1912. *U.S. v. Scroggins*, 880 F.2d 1204, 1206–09 (1989) (noting that colonial sentencing avoided imprisonment, reflecting a belief in humanity's inherent depravity and the futility of rehabilitation); *see also* Hamilton, *supra* note 85 at 809.

1913. D. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford history of the prison: the practice of punishment in western society* 111, 122 (N. Morris & D. Rothman eds., 1995).

1914. Rothman, *supra* note 1979 at 113.

1915. Hamilton, *supra* note 85 at 809; van Zyl Smit, *supra* note 86 at 29; Rothman, *supra* note 1979 at 112.

1916. van Zyl Smit, *supra* note 86 at 7.

1917. Heffernan, *supra* note 104 at 65.

1918. Beccaria and Voltaire, *supra* note 105; Rome Statute, *supra* note 111 at 1158.

1919. van Zyl Smit & Appleton, *supra* note 9 at 4.

1920. Rothman, *supra* note 1979 at 114.

1921. Garcia, *supra* note 1977 at 417.



arson, rape, and treason,<sup>1922</sup> and instituted forced hard labor in public as a punishment for minor offenses.<sup>1923</sup> While those punishments were typical of Beccaria's framework, disdain prompted the authorities to move chain gangs away from the view of the public.<sup>1924</sup> Life sentences gained traction because of efforts to curtail and, in some cases, to eradicate capital punishment.<sup>1925</sup> For instance, the Walnut Street Jail in Philadelphia, which had served as a pre-trial holding facility since 1773, was converted into a state prison for long-term incarceration.<sup>1926</sup> The Philadelphia system was not cruel, but it employed solitary confinement on health grounds and for its purported rehabilitative benefits.<sup>1927</sup> That practice also resulted in lower staffing needs and a lower incidence of escapes.

Many thinkers who were fascinated by Beccaria's concept of life sentences developed innovations in the American criminal justice system. Those innovations arguably caused the system to exhibit the very harshness that Beccaria decried. Physician and reformer Benjamin Rush, an opponent of the death penalty,<sup>1928</sup> argued that the life imprisonment and the isolation that it entails would deter criminal behavior. Prisons would also reform prisoners.<sup>1929</sup> The perfect deterrent would entail remote confinement of indeterminate duration, alterations in the intensity of punishment, the manipulation of behavior through changes in labor, light, and human presence, and the use of fear to overwhelm the offender and the community.<sup>1930</sup> Rush believed that the resultant introspection would culminate in a moral shift away from criminality.<sup>1931</sup> Two jail models were developed. Under the Auburn approach, prisoners were isolated only at night. The Pennsylvania model relied on permanent solitary confinement for life sentences.<sup>1932</sup> Charles Dickens, who visited the Eastern State Penitentiary in 1842, saw the prevalent usage of solitary confinement as cruel and inhumane.<sup>1933</sup> He thought that

1922. Heffernan, *supra* note 104 at 66; Rothman, *supra* note 1979 at 114.

1923. Seeds, *supra* note 108 at 312; Roberts, *supra* note 99 at 77.

1924. Heffernan, *supra* note 104 at 66.

1925. van Zyl Smit, *supra* note 86 at 29–30.

1926. D. Brazzell et al., From the Classroom to the Community: Exploring the Role of Education during Incarceration and Reentry, *URBAN INST.* 57, 13 (2009).

1927. Banks, *supra* note 1186 at 178; Roth, *supra* note 100 at 289; Garcia, *supra* note 1977 at 417.

1928. Hunt, *supra* note 98 at 45.

1929. B. Rush, *An Enquiry into the Effects of Public Punishments upon Criminals and upon Society* 6 (1787); Seeds, *supra* note 108 at 312.

1930. Rush, *supra* note 1995 at 7–8; *see also* Seeds, *supra* note 108 at 313.

1931. Rush, *supra* note 1995 at 16.

1932. Cervelló Donderis, *supra* note 103 at 84; Roberts, *supra* note 99 at 78; Garcia, *supra* note 1977 at 418.

1933. *See* I Dickens, *supra* note 73 at 233–70; *see also* Roth, *supra* note 100 at 289.



"this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the [sic] body."<sup>1934</sup> A government inquiry was launched in 1865, driven by concerns about inadequate and overcrowded facilities, prisoner health, ventilation issues, and widespread neglect.<sup>1935</sup> The subsequent 1867 Report on the Prisons and Reformatories of the US and Canada recognized that the prison system needed "careful and judicious revision."<sup>1936</sup> Wines and Dwight, who authored the report, examined sentences;<sup>1937</sup> disciplinary techniques,<sup>1938</sup> such as routine physical punishment;<sup>1939</sup> and practices,<sup>1940</sup> such as solitary confinement.

Wines and Dwight submitted their proposals to the National Congress on Penitentiary and Reformatory Discipline in 1870, which recognized that pain and fear led the incarcerated back to a "hardened and dangerous" life of crime.<sup>1941</sup> In response, prison officials promoted the Irish model, which had become popular in international penitentiary circles for its groundbreaking approach to correction and for emphasizing rehabilitation over the infliction of suffering.<sup>1942</sup> The new approach to reformation included religion, work, and education. Privileges were available for good behavior. It was thought that, if they were to be rehabilitated, offenders had to exercise some control over their incarceration, including over the quality and the duration of their confinement.<sup>1943</sup>

1934. I Dickens, *supra* note 73 at 239.

1935. Garcia, *supra* note 1977 at 418.

1936. E. C. Wines & T. Dwight, Report on the Prisons and Reformatories of the United States and Canada, Made to the Legislature of New York, Jan, 1867. 33 (1867).

1937. *Id.* at 269–81; *Id.* at 119–24 (minimum qualifications for prison officer); *Id.* at 248–65 (prison industries).

1938. Wines and Dwight, *supra* note 2002 at 134–84.

1939. *See Id.* at 166–67; *see also* D. Rothman, The Failure of Reform: United States, 1865-1965, in *The Oxford history of the prison: the practice of punishment in western society* 169, 173 (N. Morris & D. Rothman eds., 1995).

1940. Wines and Dwight, *supra* note 2002 at 108–16, 239–48.

1941. E. C. Wines, Principles of Penitentiary and Reformatory Discipline Suggested for Consideration by the National Congress, in *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, held at Cincinnati, Ohio, Oct 12-18, 1870. 548, 549 (1871).

1942. E. C. Wines, Declaration of Principles Adopted and Promulgated by the Congress, in *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, held at Cincinnati, Ohio, Oct 12-18, 1870. 541, 541 (1871); Garcia, *supra* note 1977 at 418.

1943. Roberts, *supra* note 99 at 80–81; Garcia, *supra* note 1977 at 418; G. Hubbell, Reformatory Discipline as Applied to Adult Criminals, in *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, held at Cincinnati, Ohio, Oct 12-18, 1870. 169, 172 (1871).

Ardent supporters of this novel strategy, such as the penologist Zebulon Brockway, proposed a change in the sentencing system. Brockway argued that indeterminate sentences<sup>1944</sup> are the most effective mechanisms for individualizing rehabilitation and for engaging prisoners.<sup>1945</sup> Brockway emphasized that the new regime would eliminate the possibility of arbitrary government interference.<sup>1946</sup> Sentences would depend only on the resolve of each prisoner and on proof of rehabilitation.<sup>1947</sup> Wines, who favored indeterminate sentences, claimed that reformation was most probable when prisoners could not predict their release date.<sup>1948</sup> This new focus marked a shift away from the notion that offenders are dangerous and must be isolated from society and towards an appreciation of their need for social support.<sup>1949</sup> According to Wines, unreformed prisoners would be incarcerated for life.<sup>1950</sup> A back-end release system would evaluate fitness for release on the basis of evidence of rehabilitation, monitor the actions of freed prisoners, and return them to prison if they broke the law.<sup>1951</sup> The concepts of a regime of indeterminate sentences, incentives for reformation, individualization, and an enforcement system resulted in an innovative approach to correction.<sup>1952</sup> However, when Brockway began testing the indeterminate model with the first batch of Elmira Reformatory prisoners,<sup>1953</sup> the problems that Wines

1944. Defining indeterminate sentences, E. Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. OF CRIM. L. & CRIMINOLOGY, 9 (1925).

1945. Zebulon Brockway, *The Ideal of a True Prison System for a State*, in *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, held at Cincinnati, Ohio, Oct 12-18, 1870. 38, 55 (1871); J. Petersilia & J. Threatt, *Release from Prison*, in *The Encyclopedia of Corrections* 1, 1 (2017); Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 66; Pifferi, *supra* note 139 at 60–61.

1946. Brockway, *supra* note 2011 at 55–56.

1947. Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 65; Roberts, *supra* note 99 at 81; Garcia, *supra* note 1977 at 418.

1948. Lawrence Friedman, *Crime And Punishment In American History* (1994).

1949. van Zyl Smit & Appleton, *supra* note 9 at 10; Pifferi, *supra* note 143 at 336–37.

1950. E. C. Wines, *The Present Outlook of Prison Discipline in the United States*, in *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, held at Cincinnati, Ohio, Oct 12-18, 1870. 15, 19 (1871).

1951. A. G. Byers, *District Prisons under State Control for Persons Convicted of Minor Offenses: Size, Organization, and Discipline Suited to Them*, in *Transactions of the National Congress on Penitentiary and Reformatory Discipline*, held at Cincinnati, Ohio, Oct 12-18, 1870. 219, 230 (1871); Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 65; Hamilton, *supra* note 85 at 828; Pifferi, *supra* note 139 at 61.

1952. Petersilia and Threatt, *supra* note 2011 at 2. Rothman identified two flaws: judges lacked criminology expertise, and stakeholders were assumed to favor rehabilitation in their discretion. Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 66.

1953. The prisoners were first-time offenders aged 16–30, classified into three grades with privileges they could earn or lose. See Pifferi, *supra* note 139 at 62; J. Petersilia, *Parole*,

and Dwight foresaw began to manifest.<sup>1954</sup> Penalties under New York law were not genuinely indeterminate.<sup>1955</sup> While officials enjoyed a significant discretion, the offenders' knowledge that their punishments would be of limited duration ran contrary to the underlying rehabilitative theory. Despite these flaws, concepts such as classification systems and privileges were implemented successfully in other jurisdictions.<sup>1956</sup> Introducing indeterminate sentences to the federal criminal system and the establishment of federal parole at the turn of the century<sup>1957</sup> meant that rehabilitation took center stage.<sup>1958</sup> That system entailed indeterminate sentences, individualized treatment, and parole supervision.<sup>1959</sup>

Statutes provided for permissible sentences within a specified range, giving District Court judges a broad sentencing discretion<sup>1960</sup> and granting similar powers to parole officials.<sup>1961</sup> According to some, little guidance was available.<sup>1962</sup> The rationale behind indeterminate sentences was that offenders had to be cured of their criminal tendencies.<sup>1963</sup> Correctional rehabilitation programs could help prisoners to abide by the law.<sup>1964</sup> Offenders remained

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in *Encyclopedia of Prisons & Correctional Facilities* 666, 677 (2005); J. Stone, *Elmira Reformatory*, in *Encyclopedia of Prisons & Correctional Facilities* 286, 286–88 (2005).

1954. Stone, *supra* note 2019 at 286; Rothman, *supra* note 2005 at 174.

1955. Sentences ranged from one year up to the max term allowed when life sentences were not authorized. Rothman, *supra* note 2005 at 174.

1956. Pifferi, *supra* note 139 at 62–63.

1957. Offenders sentenced to one year+ federally had a chance for release. See *An Act to Parole United States Prisoners, and for Other Purposes*, ch. 387, 36 STAT. 819, 819–21 (1910); P. Hoffman, *History of the Federal Parole System*, U.S. Parole Comm'n 1, 6 (2003).

1958. W. Berry, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L. J. 1051, 1063 (2015).

1959. Binder & Notterman, *supra* note 130 at 5; Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 67; Tonry, *supra* note 37 at 2.

1960. M. Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America*, 47 CRIME & JUST. 119, 121 (2018).

1961. B. Newton & D. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1169–1170 (2017); Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 67; Travis, Western, and Redburn, *supra* note 107 at 71–72.

1962. K. Reitz, *The “Traditional” Indeterminate Sentencing Model*, in *The Oxford handbook of sentencing and corrections* 270, 278 (J. Petersilia & K. Reitz eds., 2012); M. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29 (1972); see also Lindsey, *supra* note 2010 at 9.

1963. D. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* 56–61 (Rev. ed. 2002).

1964. M. Kurlychek & J. Kramer, *The Transformation of Sentencing in the 21st Century*, in *Handbook on sentencing policies and practices in the 21st century* 19, 19 (C. Spohn &

incarcerated until rehabilitated.<sup>1965</sup> Allocating exclusive authority over release decisions to probation officers was not always harmful because their proximity to the incarcerated equipped them with accurate and recent information.<sup>1966</sup> Prisoners who were not rehabilitated, however, were liable to serve life sentences irrespective of their original punishment.<sup>1967</sup> Indeterminate sentences meant offenders had to overcome their criminal tendencies with resilience and the assistance of the state.<sup>1968</sup> However, the influence of law-and-order ideology, which focused on categorizing offenders as incorrigibles<sup>1969</sup> to justify their perpetual incarceration, resulted in a grim development in the history of penal policy. Despite these concerns, indeterminate sentences remained a part of federal sentencing policy until the late 20th century. Their elimination had long-lasting consequences.<sup>1970</sup>

By the 1970s, the steady rise in crime and drug use had fueled criticism of indeterminate sentencing,<sup>1971</sup> which frequently resulted in vastly different penalties being imposed on similarly situated offenders,<sup>1972</sup> and its rehabilitative effectiveness began to be questioned.<sup>1973</sup> Some criticized the availability of early parole<sup>1974</sup> and advocated tough-on-crime strategies.<sup>1975</sup> Public trust in elected officials, particularly those who favored release,

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P. Brennan eds., 2020); C. Haney, *Demonizing the "Enemy": The Role of "Science" in Declaring the "War on Prisoners,"* 9 CONN. PUB. INT. L. J. 185, 192 (2010); Frankel, *supra* note 2028 at 31.

1965. See Cavadino & Dignan, *supra* note 65 at 51.

1966. Tonry, *supra* note 37 at 3.

1967. D. Thompson, *Indeterminate Sentencing*, in *Encyclopedia of Prisons & Correctional Facilities* 468, 468 (2005).

1968. K. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in *Sentencing and sanctions in western countries* 222 (2001).

1969. Thompson, *supra* note 2033 at 468.

1970. Rothman, Cullen, and Lero-Jonson, *supra* note 24 at p 67 (some states keep indeterminate sentences, but the trend favors determinate ones).

1971. Tonry, *supra* note 37 at 3; see also Berry, *supra* note 2024 at 1059. van Zyl Smit, *supra* note 86 at 49.

1972. Kurlychek & Kramer, *supra* note 2030 at 21; M. Tonry, *Doing Justice, Preventing Crime* 20 (2020).

1973. E. Ruhland & E. Rhine, *The Continuing Leverage of Releasing Authorities: Findings from a National Survey*, ROBINA INST. CRIM. L. & CRIM. JUST. 56, 9 (2016); T. Palmer et al., *Insights from Ted Palmer: Experimental Criminology in a Different Era*, 8 J. Experimental Criminology 103, 107 (2012).

1974. F. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, 43 *Criminology* 1, 6 (2005).

1975. Kurlychek & Kramer, *supra* note 2030 at 21; B. Western, *Homeward: Life in the Year after Prison* 157 (2018).

dwindled, and demands for participative governance intensified.<sup>1976</sup> When Nixon declared his war on drugs,<sup>1977</sup> the argument for indeterminate terms and rehabilitation fell out of favor.<sup>1978</sup> Although proportionate punishments were popular, differing notions of proportionality emerged. Some claimed that the punishment had to be commensurate to the crime<sup>1979</sup> and that determinate sentences with parole conditions were less likely to become disproportionate over time than indeterminate ones.<sup>1980</sup> Similarly, Judge Marvin Frankel contended that society and the criminal justice system could not restrict an offender's freedom on the basis of a promise of rehabilitation that the state could not fulfill.<sup>1981</sup> A finding of dangerousness, according to Frankel, was a matter for the courts.<sup>1982</sup> Relying on a parole agency to assess rehabilitation or dangerousness was said to be arbitrary, unlawful, and unfair.<sup>1983</sup> Frankel regarded proportionality as fundamental.<sup>1984</sup> In his opinion, unfettered, unquestioned, and unearned discretion was routinely exercised without adequate care, guidance,<sup>1985</sup> or justification,<sup>1986</sup> resulting in an arbitrary system in which sentences depended on the eccentricities of judges rather than on rules.<sup>1987</sup>

1976. In a climate of fear and rising crime, punishments had to be clear, effective, and socially condemnatory. See A. Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 *FED. SENT'G REP.* 27, 28 (2010); see also M. Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *CRIME & JUST.* 65, 67 (2009); Pratt, *supra* note 34.

1977. G. Peters & P. Woolley, Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control, *The American Presidency Project* (Jun. 17, 1971).

1978. Western, *supra* note 2041 at 157; Tonry, *supra* note 37 at 174; Travis, Western, and Redburn, *supra* note 107 at 321; see also Cavadino & Dignan, *supra* note 65 at 53 (noting law-and-order rhetoric's central role in right-wing politics since the 1960s to counter civil rights).

1979. Cutiño Raya, *supra* note 139 at 25; Petersilia and Threatt, *supra* note 2011 at 4; Lappi-Seppala, *supra* note 49 at 320–21.

1980. C. Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners,"* 114 *W. VA. L. REV.* 373, 384 (2012).

1981. Frankel, *supra* note 2028 at 34.

1982. *Id.* at 29 (noting prison and parole boards' broad authority to release deemed no longer a threat without needing to justify decisions).

1983. M. Frankel, *Criminal Sentences: Law without Order* 86 (1973); Frankel, *supra* note 2028 at 38.

1984. Kurlychek & Kramer, *supra* note 2030 at 21; Tonry, *supra* note 2026 at 122–23.

1985. See generally Frankel, *supra* note 2049; Frankel, *supra* note 2028 at 41, 46; J. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped* Sentencing Then and Now: Judicial Perspectives on Judicial Perspectives, 29 *FED. SENT'G REP.* 226, 226 (2016).

1986. K. Reitz, *Sentencing*, in *The handbook of crime & punishment* 542, 548 (M. Tonry ed., 2007).

1987. See generally S. Greenhouse, Marvin Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81, *NYT*, Mar. 5, 2002.

Frankel proposed that an independent national body study sentencing, corrections, and parole, draft regulations based on studies, and lead legislative efforts.<sup>1988</sup> Legislatures, in his view, lacked the expertise and time to discharge these responsibilities.<sup>1989</sup> He was eager to ensure that sentencing criteria would be codified, account for policy-justified variables, and reflect a cohesive purpose. Specific and structured tests would enable judges to measure every case against the same standards.<sup>1990</sup> Frankel argued that a court, if its goal is to rehabilitate, must understand the treatment needs of offenders, their psychological and sociological makeup, the available means within the criminal justice system, and the locations at which treatment is available.<sup>1991</sup> Frankel emphasized that the dangers of combining unfettered discretions with indeterminate sentences were substantial enough to warrant change. Although Frankel hoped sentences would be meaningful and not overly punitive, according to Rakoff, the resultant system yielded harsher and longer terms.<sup>1992</sup> In 1973, the prison population was nearly 205,000, with 96 of every 100,000 individuals imprisoned.<sup>1993</sup> Frankel's critique undermined indeterminate sentences, their rehabilitative focus, and judicial discretion fatally, and a Supreme Court opinion would soon usher in a new approach to criminal justice. As noted previously, life sentences, particularly ones that provide for no possibility of release, were widely available but seldom used.<sup>1994</sup> This situation changed dramatically when, in *Furman v. Georgia*, the U.S. Supreme Court held that the death penalty statutes of Texas and Georgia were unconstitutional because they violated the Eighth and Fourteenth Amendments when applied arbitrarily and in a manner that harmed minorities, such as African Americans and the indigent, disproportionately.<sup>1995</sup> Justices Brennan and Marshall, two of the judges in the majority, held that the death penalty was unconstitutional in all cases because other available punishments served a similar function.<sup>1996</sup> The remaining justices limited their analysis to the statutes that were in dispute. Justice White, who agreed with Brennan and

1988. Frankel, *supra* note 2028 at 51; Tonry, *supra* note 1349 at 4; Garland, *supra* note 42 at 58–59.

1989. Tonry, *supra* note 1349 at 4.

1990. Frankel, *supra* note 2028 at 45. Frankel proposed using grades for criminal history and offense severity to set sentences objectively.

1991. Frankel, *supra* note 2028 at 49–50.

1992. Rakoff, *supra* note 2051 at 226.

1993. S. Minor-Harper, *State and Federal Prisoners, 1925-85* 2 (1986).

1994. van Zyl Smit, *supra* note 86 at 54.

1995. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

1996. *Id.* at 292.



Marshall, acknowledged that capital punishment is distinct from other punishments.<sup>1997</sup> Remarkably, Justice Brennan stated “life imprisonment is a misnomer today,”<sup>1998</sup> emphasizing that “[r]arely, if ever, do crimes carry a mandatory life sentence without [the] possibility of parole.”<sup>1999</sup> Therefore, death penalty statutes were narrowed in scope to prevent future constitutional challenges.<sup>2000</sup> Officials became more interested in the next best alternative, which was life sentences.<sup>2001</sup>

### 3.1.2. THE RISE OF THE PUNITIVE TURN AND DECLINE OF INDETERMINATE SENTENCING

In reaction to *Furman*, Georgia limited the set of offenses that were punishable by the death penalty and required that one of 10 aggravating conditions be proven beyond reasonable doubt at trial for capital punishment to be imposed.<sup>2002</sup> Those amendments were tested in *Gregg v. Georgia* and *Woodson v. North Carolina*, which were decided on the same day. Guilt and sentencing are bifurcated in capital cases in Georgia.<sup>2003</sup> Troy Gregg had been sentenced to death in 1973 on two charges of armed robbery and one of murder.<sup>2004</sup> He appealed, claiming a violation of the Eighth and the Fourteenth Amendment. Given the severity of capital punishment and its retributive and deterrent purposes, the Court recognized that certain conditions might justify such sentences and refused to prohibit them altogether.<sup>2005</sup> Gregg’s capital punishment was neither cruel nor unusual, and his execution would not offend the Eighth or the Fourteenth Amendments.<sup>2006</sup>

1997. *Id.* at 310–14 (White, J., concurring); *Gregg v. Georgia*, 428 U.S., 188 (referencing *Furman*’s recognition that “death is different”).

1998. *Furman*, *supra* note 2061 at 302 n.54 (Brennan, J., concurring).

1999. *Id.* (Brennan, J., concurring).

2000. Berry, *supra* note 2024 at 1060–61 (contrast between careful capital punishment laws and the hasty post-*Furman* life sentence rollout).

2001. M. Leigey & D. Schartmueller, The Fiscal and Human Costs of Life Without Parole, 99 PRISON J. 241, 242 (2019); C. Lerner, Life without Parole as a Conflicted Punishment, 48 WAKE FOREST L. REV., 1115 (2013) (besides raising insecurity, *Furman* boosted life sentence support).

2002. *Gregg*, *supra* note 2063 at 162–63.

2003. *Id.* at 158.

2004. Georgia’s Supreme Court invalidated Gregg’s aggravated-robbery penalties as unusually harsh and due to jury errors treating murders and robberies as concurrent aggravators but upheld his capital murder sentences. *See Id.* at 161–62.

2005. *Id.* at 183–87.

2006. Cavadino & Dignan, *supra* note 65 at 55 (the death penalty’s return caused hundreds of executions and 3,000+ inmates by 2003).

The Court granted *certiorari* in *Woodson* to determine whether the mandatory application of the death penalty was unconstitutional. Woodson and Waxton had been sentenced to death for a robbery-related first-degree murder.<sup>2007</sup> The North Carolina statute, like its Georgia counterpart, provided the jury with a discretion to prescribe capital punishment or life incarceration for the most heinous offenses.<sup>2008</sup> The Court highlighted the troubled relationship between mandatory capital punishment and juries. Jurors would refuse to impose the death penalty or would only impose it grudgingly. The social implications of the practice were also mentioned.<sup>2009</sup> The Court also remarked on the obstinacy and ingenuity with which some states drafted Constitution-compliant statutes in order to retain capital punishment.<sup>2010</sup> First, the North Carolina statute violated the constitutional requirement to administer punishment that is fair and restrained by civilized standards of human dignity rather than cruel and unusual.<sup>2011</sup> Second, it failed to address the unfettered-discretion issue from *Furman* because it made the punishment mandatory.<sup>2012</sup> Third, the statute treated all first-degree murders equally, with no opportunity to consider mitigating circumstances.<sup>2013</sup> Because the Court viewed death as different, it concluded that the mandatory death penalty was unconstitutional.<sup>2014</sup>

Justices Brennan and Marshall concurred in *Furman*<sup>2015</sup> and *Woodson*<sup>2016</sup> but dissented in *Gregg*,<sup>2017</sup> citing the “developing standards of decency” passage from *Furman* to oppose capital punishment in all cases. Brennan’s reading of the *Furman* opinion referred to capital punishment as a practice, not just to the decision-making process behind it.<sup>2018</sup> According to him, the decision to abolish the death penalty reflected social progress. Death was said to be a cruel and unusual punishment because it deprived the condemned of all humanity.<sup>2019</sup> Evidence had shown that capital punishment did not achieve

2007. *Woodson v. North Carolina*, 428 U.S. 280, 284 (1976).

2008. *Id.* at 285.

2009. *Id.* at 292–93.

2010. *Id.* at 298–99.

2011. *Id.* at 301–02.

2012. *Id.* at 303.

2013. *Id.* at 303–04.

2014. *Id.* at 305.

2015. *Furman*, *supra* note 2061; *Id.* at 257–306 (Brennan, J., concurring); *Id.* at 314–74 (Marshall, J., concurring).

2016. *Woodson*, *supra* note 2073 at 305–06 (Brennan, J., concurring).

2017. *Gregg v. Georgia*, 428 U.S. 227, 227–41 (1976) (Brennan, J., and Marshall, J., dissenting).

2018. *Gregg*, *supra* note 2063 at 228.

2019. *Id.* at 229–30.



its purported deterrent or retributive goals.<sup>2020</sup> The Eighth Amendment required punishment to accord with the principle of human dignity, a condition that capital punishment did not meet due to its disproportionate character.<sup>2021</sup> Once *Furman* had eliminated capital punishment and shifted the focus away from rehabilitation, life imprisonment became an appealing sanction for heinous offenses.<sup>2022</sup>

### 3.1.3. FROM THE WAR ON DRUGS TO THE ERA OF MASS INCARCERATION

#### 3.1.3.1. The Rockefeller Laws and the *Nothing Works* Doctrine

The next period in the development of penal policy was characterized by a shift from rehabilitation toward an exponential increase in the use of life sentences, particularly for non-homicidal offenses.<sup>2023</sup> The futility of rehabilitation had been emphasized before the 1960s. For example, the Rockefeller drug laws penalized mere possession of drugs as severely as second-degree murder, with a mandatory minimum of 15 years to life.<sup>2024</sup> Two authors spearheaded the campaign against this clinical approach to incarceration. Morris did not contend that correctional rehabilitation programs were unsuccessful but rejected rehabilitation as a pretext for detention, noting that indeterminate sentences undermine voluntary participation in rehabilitative programs.<sup>2025</sup> Martinson's 1974 *Nothing Works*<sup>2026</sup> was a damning indictment of rehabilitation.<sup>2027</sup> It asserted that, "with few and isolated exceptions," rehabilitation has only a marginal effect on recidivism.<sup>2028</sup> *Nothing Works* gained nationwide acclaim, causing the systematic dismantling of correctional treatment programs and precipitating

2020. *Id.* at 233, 236–38.

2021. *Id.* at 240.

2022. A. Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, SENT'G PROJECT 34, 4 (2013).

2023. The Facts of Life Sentences, *supra* note 17 at 3; van Zyl Smit, *supra* note 86 at 51–52.

2024. J. Q. Wilson, *Thinking about Crime* 121–22 (2013); M. Gray, *A Brief History Of New York's Rockefeller Drug Laws*, *Time*, Apr. 2009.

2025. S. Chanenson & M. Miller, *Morris Norval Ramsden (1923–2004)*, in *Encyclopedia of Prisons & Correctional Facilities* 608, 609 (2005).

2026. Martinson reviewed 231 prison rehab studies from 1945 to 1967. Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 71.

2027. I. Rivera Beiras, *La cuestión carcelaria: historia, epistemología, derecho y política penitenciaria* 301 (2nd ed. 2008); D. Lipton, R. Martinson & J. Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975).

2028. R. Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *The Public Interest*, Spring 1974, at 22.

a shift in sentencing policy, which came to prioritize justice, certainty, and uniformity.<sup>2029</sup> Martinson's work equipped the opponents of rehabilitation and indeterminate sentences with new scientific tools,<sup>2030</sup> dealing a severe blow to the previous regime.<sup>2031</sup>

Psychologist and researcher Ted Palmer took issue with Martinson's findings and reanalyzed the studies that Martinson had evaluated. His discoveries called Martinson's conclusions into question.<sup>2032</sup> First, while Martinson recorded "just a few isolated" events, Palmer noted that over 48% of rehabilitative programs in Martinson's sample had yielded beneficial results.<sup>2033</sup> Second, the purpose of Martinson's study was to identify a single therapy that worked for all prisoners rather than to analyze rehabilitative programs that would be useful to prisoners with comparable characteristics.<sup>2034</sup> Third, the data that Martinson had used to determine what worked for prisoners might have yielded a multitude of findings.<sup>2035</sup> At its core, Martinson's results showed that the glass was half empty.<sup>2036</sup>

*Nothing Works* was important because its arguments were timely and because authorities and lawmakers were seeking support in their campaign against rehabilitation.<sup>2037</sup> Validity mattered little in that pursuit.<sup>2038</sup> After considering Palmer's findings, Martinson retracted his initial conclusions and admitted that correctional treatment had rehabilitative qualities.<sup>2039</sup> However, his work had accomplished the goal of mustering support for determinate sentences.<sup>2040</sup> Despite Palmer's results, the supporters of a strict approach to crime understood the importance of Martinson's assault on rehabilitation.<sup>2041</sup> Criminal justice researcher John Q. Wilson valued the

2029. Kurlychek & Kramer, *supra* note 2030 at 26; Tonry, *supra* note 37 at 3; Nellis, *supra* note 2088 at 4; Garland, *supra* note 42 at 109.

2030. See Cullen, *supra* note 2040 at 7; see also Garland, *supra* note 42 at 59.

2031. Tonry, *supra* note 37 at 13; Leigey, *supra* note 87 at 2.

2032. T. Palmer, Martinson Revisited What Works Questions and Answers about Prison Reform, 12 J. RSCH. CRIME & DELINQ. 133 (1975).

2033. *Id.* at 142; see also Cullen, *supra* note 2040 at 9.

2034. Palmer, *supra* note 2098 at 137–38; see also Cullen, *supra* note 2040 at 10.

2035. See Palmer et al., *supra* note 2039 at 108; see also Cullen, *supra* note 2040 at 10; Palmer, *supra* note 2098 at 150.

2036. Cullen, *supra* note 2040 at 9.

2037. Palmer et al., *supra* note 2039 at 106–07; Cullen, *supra* note 2040 at 6.

2038. Rothman, Cullen, and Lero-Jonson, *supra* note 24 at 71.

2039. R. Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform Symposium on Sentencing, Part II, 7 HOFSTRA L. REV. 243, 253–54 (1978); see also Kurlychek & Kramer, *supra* note 2030 at 20.

2040. See Newton and Sidhu, *supra* note 2027 at 1183; see also Tonry, *supra* note 37 at 174.

2041. J. Q. Wilson, "What Works?" Revisited: New Findings on Criminal Rehabilitation, PUB. INT. 3, 4 (1980).

unparalleled efficiency of incapacitation;<sup>2042</sup> the argument for rehabilitation, in his view, was too optimistic.<sup>2043</sup> Wilson maintained that deterrence reflects cost-benefit considerations, that rehabilitation is contingent on the willingness of the offender to participate in treatment, and that incapacitation ends criminal careers.<sup>2044</sup> As a result, Wilson advocated for mandatory minima and longer terms.<sup>2045</sup>

Given the rise in crime and drug use, the powerful calls for a uniform and equal justice-based system,<sup>2046</sup> and judicial antagonism to rehabilitation, Congress began revisiting policy.<sup>2047</sup> Tonry observed that while crime rates were increasing in most countries, only the US legislated harshly.<sup>2048</sup> Garland argued that the opponents of the rehabilitative process of punishment made a strong case against indeterminate sentences and did not anticipate the sharp turn<sup>2049</sup> towards incapacitation, the end of the decade-long suspension of the death penalty, and the beginning of a historical punitive lifetimes."<sup>2050</sup>

### 3.1.3.2. The 1994 Crime Bill and Three-Strikes Laws

The murder of two young women in California provided the final impetus for the proliferation of punitive laws in the early 1990s. Kimber Reynolds, 18, was shot and killed in June 1992 while resisting a robbery. The police killed the shooter in a gunfight and detained his accomplice, Douglas David Walker.<sup>2051</sup> Walker's criminal past meant that Kimber's parents, particularly her father, Mike Reynolds, were incensed when Walker pled guilty to robbery and received a nine-year sentence, with the accessory-to-murder charges dismissed. By 1993, the state of Washington had enacted a three-strikes-and-you-are-out statute,<sup>2052</sup> which punished habitual offenders with life in prison

2042. van Zyl Smit, *supra* note 256 at 10–11; Travis, Western, and Redburn, *supra* note 107 at 321.

2043. *See generally* J. Q. Wilson, Lock 'em up and Other Thoughts on Crime, NYT, Mar. 9, 1975.

2044. Binder & Notterman, *supra* note 130 at 7; Wilson, *supra* note 2090 at 133.

2045. Wilson, *supra* note 2109; van Zyl Smit, *supra* note 256 at 11 (highlighting the unprecedented impact of LWOP for the incorrigible).

2046. Binder & Notterman, *supra* note 130 at 6 (highlighting how opposition to judicial discretion fuels calls for sentencing uniformity).

2047. C. Seeds, Bifurcation Nation: American Penal Policy in Late Mass Incarceration, 19 PUNISHMENT & SOC. 590, 594 (2017).

2048. Tonry, Determinants of Penal Policies, 36 CRIME & JUST. 1, 2 (2007); Tonry, *supra* note 37 at 14.

2049. *See* Garland, *supra* note 42 at 71–72; *see also* Western, *supra* note 2041 at 179.

2050. Tonry, *supra* note 37 at 171.

2051. J. Gross, Drive to Keep Repeat Felons In Prison Gains in California, NYT, Dec. 26, 1993.

2052. Nellis, *supra* note 29 at 9.

after a third conviction,<sup>2053</sup> inspiring Reynolds to introduce the concept to California. His version was notably harsher, in that second-strike offenses carried twofold sentence enhancements.<sup>2054</sup> Furthermore, offenders would be required to serve at least 80% of their sentences before becoming eligible for parole.<sup>2055</sup> Third-strike offenders would face a mandatory 25-year term, which would be served consecutively in cases of multiple sentences.<sup>2056</sup> All felony-level offenses, regardless of their severity, would result in a strike.<sup>2057</sup> Despite his best efforts, Reynolds could not accumulate enough signatures to place Proposition 184 on the ballot.<sup>2058</sup> The 1993 abduction and murder of 12-year-old Polly Klaas, however, marked the start of a new chapter in American penal policy.<sup>2059</sup> Her assailant, Richard Allen Davis, had been a habitual offender since the age of 12 and had a history of committing violent crimes. The discovery of Klaas's body and the fact that Davis had served just half of a 16-year sentence galvanized support for Proposition 184,<sup>2060</sup> which became law in California.<sup>2061</sup> During the January 1994 State of the Union address, President Bill Clinton, who had met Polly's father, said, "repeat offenders who commit a third violent offense [should] be put away for good. Three strikes and you're out!"<sup>2062</sup> Despite Attorney General Janet Reno's warnings that it would turn prisons into "geriatric wards," life meant life to Clinton.<sup>2063</sup> Consequently, The Violent Crime Control and Law Enforcement Act (dubbed the 1994 Crime Bill) reflected a one-size-fits-all approach to crime.<sup>2064</sup> The sentencing provisions for over 60 felonies were revised to include the death penalty,<sup>2065</sup> and LWOP became mandatory

2053. F. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on Three Strikes in California* Essays, 28 PAC. L. J. 243, 244 (1996).

2054. CAL. PENAL CODE § 667(e)(1) (West 1994).

2055. Nellis, *supra* note 29 at 9; Gross, *supra* note 2117.

2056. CAL. PENAL CODE § 667(e)(2) (West 1994).

2057. D. Kieso, *Unjust Sentencing and the California Three Strikes Law 2* (2005).

2058. CAL. CONST. art. II § 8(b) (requiring 5% of the votes in the previous election for all candidates for governor).

2059. Roth, *supra* note 100 at 289.

2060. *See Ewing v. California*, 538 U.S. 11, 15 (2003).

2061. *See generally* D. Weintraub, "3 Strikes" Law Goes Into Effect, LA TIMES, Mar. 8, 1994.

2062. G. Peters & J. Wooley, William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, The American Presidency Project (Jan. 23, 1996); Gwen Ifill, STATE OF THE UNION: The Overview; Clinton Vows Fight for His Health Plan, NYT, Jan. 26, 1994.

2063. C. Cannon, Victim's Father Sold Clinton on Crime Bill, The Baltimore Sun, Mar. 21, 1994.

2064. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13701 (1984).

2065. Title VI permitted death or LWOP for offenders involved in continuing criminal enterprises (21 U.S.C. § 848) related to manufacturing, importing, or distributing

for offenders with at least two prior convictions who were convicted of a violent felony.<sup>2066</sup>

Washington was the first state to implement truth-in-sentencing laws in 1984, requiring prisoners who are convicted of violent offenses to serve 85% of their sentence before becoming eligible for parole.<sup>2067</sup> The Crime Bill introduced these principles across the country,<sup>2068</sup> consigning proportionality to history.<sup>2069</sup> According to Tonry, all offenses should trigger the same response.<sup>2070</sup> This practice was detached from proportionality and the notion of justice.<sup>2071</sup> The rules are based on political expediency rather than on a philosophy of punishment. American politics has long had its finger on the scales of justice. Sentencing policy provides criminal remedies for societal issues,<sup>2072</sup> a tendency that is aggravated by the relationships between elected officials, crime victims, and advocacy groups.<sup>2073</sup> Garland emphasized the critical role of victims as a prominent political force that can end careers.<sup>2074</sup> Lawmakers name statutes after victims.<sup>2075</sup> From a political standpoint, the

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substances. *See* Federal Death Penalty Act of 1994. PUB. L. NO. 103-322, §§ 3591-3593 108 STAT. 1959.

2066. Prior convictions may include violent felonies or serious drug offenses, such as homicide, sex crimes, abduction, robbery, or crimes punishable by 10+ years involving force. J. Harris, Memorandum to All United States Attorneys from Assistant Attorney General J. Harris on the Subject of the “Three Strikes” Law. (18 U.S.C. § 3559(c)), (1995). A serious drug offense means manufacturing, distributing, or possessing with intent to sell controlled substances. D. Berman, *The 1994 Crime Bill: Legacy and Lessons – Tough and Smart: Federal Sentencing Provisions of the 1994 Crime Bill*, 32 FED. SENT’G REP. 178, 178 (2020).

2067. Nellis, *supra* note 29 at 9; Tonry, *supra* note 37 at 4, 100; Berry, *supra* note 2024 at 1059.

2068. *See* 42 U.S.C. § 13703 (1994); *see also* Brennan and Garman, *supra* note 1955 at 30; Petersilia and Threatt, *supra* note 2011 at 7.

2069. Harding, Morenoff, and Wyse, *supra* note 1963 at 4.

2070. Tonry, *supra* note 37 at 175.

2071. *Id.*

2072. J. Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL’Y INITIATIVE 20, 4 (2017).

2073. Juanatey Dorado, *supra* note 889 at 135–36.

2074. Garland, *supra* note 42 at 11.

2075. N. Ghandnoosh, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences*, SENT’G PROJECT 15 (Jan. 31, 2017) (highlighting Marsy’s Law’s impact in tripling parole hearing wait times). Marsy’s Law (Victims’ Bill of Rights Act of 2008) amended California’s Constitution to grant crime victims 17 rights, including notification of offenders’ conviction, sentence, incarceration, and release. CAL. CONST. art. I § 28(b) (2008). Though adopted by 13 states, Montana’s Supreme Court recently ruled the law unconstitutional. *See* Montana Ass’n of Ctys. v. State by & through Fox, 389 Mont. 183, 204 (Mont. 2017); Pennsylvania League of Women Voters of Pennsylvania v. DeGraffenreid, 265 A.3d 207, 242 (Pa. 2021), and Kentucky; *Westerfield v. Ward*, 599

relationship between victims and offenders is antagonistic.<sup>2076</sup> Punishment policy is often an element of the competition between legislators and officials.<sup>2077</sup> For example, after the Crime Bill, Republican lawmakers vowed to pass the Taking Back Our Streets Act of 1995 if they reclaimed control of Congress.<sup>2078</sup> That bill would eliminate life imprisonment as an alternative to the death penalty, increase funding for the prosecution of capital cases, and generate finance for prison extensions.<sup>2079</sup> By the mid-1990s, mandatory minima and life sentences had become fixtures in the sentencing repertoires of all states.<sup>2080</sup>

Longer sentences and punitive tendencies have affected the prison population.<sup>2081</sup> Narcotics and violent-crime offenders contributed equally to the expansion of the prison population in the 1980s, 1990s, and the early 2000s. Between the 1990s and the 2000s, at least 65% of prisoners were violent offenders.<sup>2082</sup> By 2000, the prison population had increased to 1,381,892, with an imprisonment rate of 478 per 100,000.<sup>2083</sup> Western estimated that incarceration, which quadrupled in the three decades after 1970, reduced crime by less than 10% in the 1990s.<sup>2084</sup> Despite evidence that punitive policies such as mandatory minima and life sentences are poor investments, legislators continue to enact them and resist campaigns for their repeal, shifting responsibility to the courts.<sup>2085</sup> Tonry noted that the most punitive legislation was passed between the mid-1980s and the mid-1990s. The prison population grew even as crime decreased over the same period.<sup>2086</sup>

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S.W.3d 738, 752 (Ky. 2019); David R. Friedman & Jackie M. Robinson, Rebutting the Presumption: An Empirical Analysis of Parole Deferrals Under Marsy's Law, 66 STAN. L. REV. 173 (2014).

2076. Antón-Mellón & Antón Carbonell, *supra* note 1004 at 147; Stevenson, *supra* note 1 at 261; Juanatey Dorado, *supra* note 889 at 135; Garland, *supra* note 42 at 180.

2077. M. Schenwar & V. Law, Prison by Any Other Name: The Harmful Consequences of Popular Reforms 1–24 (2020).

2078. Berman, *supra* note 2132 at 180; P. Ditton & J. Wilson, Truth in Sentencing in State Prisons, BUREAU JUST. STAT 1 (1999).

2079. Taking Back Our Streets Act of 1995, H.R. 3, 104TH CONG. (1995).

2080. Tonry, *supra* note 37 at 3.

2081. Reitz et al., *supra* note 2 at 121; Hörnle, *supra* note 4 at 906.

2082. Pfaff, *supra* note 25 at 54.

2083. App. fig. B.4. Violent Crimes Rate in the US from 1990 to 2020; A. Beck & P. Harrison, Prisoners in 2000, BUREAU JUST. STAT., 1 (2001).

2084. Western, *supra* note 2041 at 178.

2085. Tonry, *supra* note 37 at 160–61.

2086. *See Id.* at 252; *see also* app. fig. B.1. U.S. Prison Population from 1995 to 2020.

# CONVERGING PUNISHMENTS, DIVERGING PROTECTIONS

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