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## Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States

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# Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States

Michelle Miao\*

## ABSTRACT

*On the basis of fifty-four elite interviews<sup>1</sup> with legislators, judges, attorneys, and civil society advocates as well as a state-by-state data survey, this Article examines the complex linkage between the two major penal trends in American society during the past decades: a declining use of capital punishment across the United States and a growing population of prisoners serving “life without the possibility of parole” or “LWOP” sentences. The main contribution of the research is threefold. First, the research proposes to redefine the boundary between life and death in relation to penal discourses regarding the death penalty and LWOP. LWOP is a chronic and latent form of ultimate punishment that strips life of its most valuable existential character. Second, the findings explore the connection between the rise of LWOP and the nationwide campaign against capital punishment. It explains that the abolition campaign normalized and accentuated LWOP as a symbolic substitute for the death penalty. The research reveals the thorny ethical and moral dilemmas facing anti-death penalty activists at the forefront of the abolitionist movement. Third, this Article demonstrates that the judicial use of LWOP and capital punishment at the state level does not support the claim that the expansion of LWOP caused a decline in capital punishment. In sum, LWOP has not merely been employed as a penal punishment for the United States’ most incorrigible criminal offenders—it has also been used as a strategic instrument to reshape American penal politics.*

INTRODUCTION .....	174
I. THE LINKAGE BETWEEN THE DEATH PENALTY AND LWOP .....	177
a. <i>Regulating Capital Punishment and the Rise of LWOP</i> .....	178
1. The Concept of an Alternative Punishment: Replace or Reinvent? ....	180

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<sup>1</sup> Elite interviewing or elite interview refers to a methodology to study elite members of society in superior positions in a given field or arena in society, be it business or politics. The field of study in this project involves criminal justice and law. See generally VICTOR JUPP, *Elite Interviewing*, in THE SAGE DICTIONARY OF SOCIAL RESEARCH METHODS (2006); Jeffrey M. Berry, *Validity and Reliability Issues In Elite Interviewing*, 35 PS: POL. SCI. & POL. 679 (2002); David Richards, *Elite Interviewing: Approaches and Pitfalls*, 16 POL. 199 (1996).

II. ABOLITIONISTS' AMBIVALENT ATTITUDES TOWARDS LWOP .....	186
A. <i>Moral Ambivalence and Denial</i> .....	187
B. <i>Harsh Politics of the Abolition Campaign</i> .....	1899
III. MAPPING THE LANDSCAPE OF LIFE AND DEATH: THE GEOGRAPHY OF CAPITAL PUNISHMENT AND LWOP .....	196
A. <i>LWOP as a Substitute for the Death Penalty</i> .....	198
B. <i>LWOP Operates Alongside the Death Penalty</i> .....	199
1. States Where an Inverse Correlation Between LWOP and Capital Punishment Sentences Exists .....	200
2. No Correlation Between LWOP and Capital Punishment Sentencing Trends	204
3. A Proportional Correlation Between LWOP and Death Sentences .....	205
C. <i>LWOP Enacted and Retained Before the Abolition of the Death Penalty</i> ..	207
D. <i>A Brief Summary: Measuring Punitiveness</i> .....	210
CONCLUSION.....	214
APPENDIX .....	215
Table 1: Correlation Between LWOP and Capital Punishment Trends in Twenty-One Dual-mode States .....	215
Table 2: The Makeup of LWOP Sentences in Pennsylvania (1992-2014).....	216
Table 3: The Death Sentences, Executions and LWOP Population in 50 States...	217
Figure 1: Dual-Mode State Subgroup 1 .....	218
Figure 2: Dual-Mode State Subgroup 2 .....	218
Figure 3: Dual-Mode State Subgroup 3 .....	219
Figure 4: Dual-mode State Subgroup 4 .....	219
Figure 5: North Carolina LWOP and Capital Punishment Historical Trends .....	220
Figure 6: Scatter Plot for Relative Difference Between LWOP and Capital Punishment Trends in North Carolina (1995-2014) .....	220
Figure 7: Scatter Plot for Relative Difference Between LWOP and Capital Punishment Trend in Texas (2005-2014) .....	221
Figure 8: Texas LWOP and Capital Punishment Historical Trends .....	221
Figure 9: Florida LWOP and Capital Punishment Historical Trends .....	222
Figure 10: Average LWOP and Capital Punishment Sentences in New York .....	222
Figure 11: Average LWOP and Capital Punishment Sentences in New Jersey ...	223

## INTRODUCTION

In 2015, the Dzhokhar Tsarnaev trial sparked controversy throughout New England and the country. By a unanimous jury verdict, the defendant was sentenced to death by lethal injection for his role in the 2013 Boston Marathon bombing.<sup>2</sup> This decision to impose the ultimate punishment contravened the majoritarian (57%) public opinion in Boston, which supported LWOP over the death penalty.<sup>3</sup> A front-page *New*

<sup>2</sup> Scott Malone & Elizabeth Barber, *Boston Marathon Bomber Tsarnaev Sentenced to Death for 2013 Attack*, REUTERS (May 15, 2015, 6:03 AM), <https://www.reuters.com/article/us-boston-bombings-trial/boston-marathon-bomber-tsarnaev-sentenced-to-death-for-2013-attack-idUSKBN00012G20150515>.

<sup>3</sup> Brian MacQuarrie, *In Globe Poll, Most Favor Life Term for Dzhokhar Tsarnaev*, BOSTON GLOBE (Sept. 16, 2013), <http://www.bostonglobe.com/metro/2013/09/15/most-boston-residents-favor-life-without-parole-for-tsarnaev-convicted-poll-shows/Ur6ivWIUiYcPEZLXBAPhDL/story.html>.

*York Times* report revealed that many of Boston's residents believed life in prison for one so young (twenty-one years-old at trial) would be "a fate worse than death."<sup>4</sup> Criminal justice professionals also considered the practical difference between capital punishment and LWOP to be marginal: Tsarnaev would spend the rest of his life in prison awaiting either his execution or a natural death.<sup>5</sup>

"Will he die of a heart attack in his cell aged 60, of old age at 80, or will he be executed? The only thing that's certain is that he will never breathe free air again," said George Kendall, a New York lawyer with three-decades of experience in capital cases.<sup>6</sup> A survivor of the Boston Marathon bombing, Meghan Zipin, spoke to the press after Tsarnaev gave his first public statement in June 2015, saying that she was about to go home to her husband to do yoga and eat pizza, in contrast with Tsarnaev's future under perpetual incarceration. "I am the one who is alive. The defendant, he's already dead."<sup>7</sup>

These observations pose an interesting dilemma. On the one hand, given the choice, LWOP remains commonly perceived as a more lenient and humane alternative to the death penalty.<sup>8</sup> This is exactly why abolitionists, including Sister Helen Prejean, a Roman Catholic nun and prominent opponent of the death penalty, testified on behalf of Tsarnaev to try to persuade jurors to sentence him to LWOP instead.<sup>9</sup> This led to an odd situation where, on the other hand, the defense assured jurors at the sentencing phase that Tsarnaev would be in constant danger within the prison—where it is a badge of honor among inmates to "go after" someone who has murdered a child.<sup>10</sup> Also, the defense characterized prison conditions under LWOP as extremely brutal: Tsarnaev would spend twenty-three hours per day in solitary confinement.<sup>11</sup> It seems, paradoxically, that a life in prison may not be worth living. Viewed in this light, capital punishment is not uniquely severe compared with its supposedly "lesser" evil twin.

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<sup>4</sup> Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), <https://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html>.

<sup>5</sup> From 1988 to 2018, despite the Attorney General authorizing the government to seek the death penalty against 516 capital defendants and the federal government taking to trial cases involving 301 defendants, only three executions took place. See *Current Statistics re Use of Federal Death Penalty*, FED. DEATH PENALTY RESOURCE COUNS., <https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017> (last visited July 30, 2018).

<sup>6</sup> See Nicky Woolf & Ed Pilkington, *Boston Marathon Bomber Unlikely to Be Executed—Even If Jury Votes for Death*, THE GUARDIAN (Apr. 27, 2015), <https://www.theguardian.com/world/2015/apr/27/boston-marathon-dzhokhar-tsarnaev-death-penalty> ("[W]ith a nationwide shortage of injection drugs caused by an international boycott by pharmaceutical companies . . . Tsarnaev's fate would likely remain uncertain.").

<sup>7</sup> Alan Yuhas, *Boston Marathon Bomber Dzhokhar Tsarnaev: 'I am Guilty and I am Sorry'*, THE GUARDIAN (June 24, 2015), <http://www.theguardian.com/us-news/2015/jun/24/dzhokhar-tsarnaev-boston-marathon-bombing-survivors-speak>.

<sup>8</sup> See, e.g., Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 158, 175–76 (2008) [hereinafter *Opening a Window or Building a Wall?*].

<sup>9</sup> Scott Malone & Elizabeth Barber, *Boston Marathon bomber Tsarnaev Sentenced to Death for 2013 Attack*, REUTERS (May 15, 2015), <https://www.reuters.com/article/us-boston-bombings-trial/boston-marathon-bomber-tsarnaev-sentenced-to-death-for-2013-attack-idUSKBN0O012G20150515>.

<sup>10</sup> *Id.*

<sup>11</sup> Katherine Q. Seelye, *Tsarnaev Expressed Sympathy for Boston Bombing Victims, Sister Helen Prejean Says*, N.Y. TIMES (May 11, 2015), [http://www.nytimes.com/2015/05/12/us/sister-helen-prejean-says-tsarnaev-shows-remorse-for-boston-bombing.html?\\_r=0](http://www.nytimes.com/2015/05/12/us/sister-helen-prejean-says-tsarnaev-shows-remorse-for-boston-bombing.html?_r=0).

The Tsarnaev dilemma conforms with a national pattern. As national and state level opinion polls show, majoritarian support for the death penalty declines considerably when LWOP is offered as an alternative.<sup>12</sup> Considering the status of American public opinion on capital punishment, one realizes that lowered public faith in capital punishment in the United States has gradually been replaced by an increasing confidence in LWOP as a humane and morally-sustainable sentencing alternative.<sup>13</sup> This has been true in almost every death penalty case in state and federal jurisdictions.<sup>14</sup>

Yet, if a person spending the rest of his or her life under irreducible incarceration does not have the comparable retributive, incapacitating, and deterrent capacities as the death penalty, how can it function as a replacement to capital punishment? If LWOP is as harsh as the death penalty as a penal sanction, why do abolitionists—who espouse humane values in their efforts to bring an end to the practices of the death penalty—embrace such an alternative? While it is understandable that abolitionists endorse LWOP to empower their causes and strengthen public approval given that LWOP is not plagued by the many notorious problems haunting death penalty practices for centuries,<sup>15</sup> it seems that the abolition strategy, couched in the language of human decency and dignity, is self-contradictory.

During the past few decades, a growing, but still relatively thin, body of academic analysis<sup>16</sup> has posited that the ethical implications or the practical consequences of

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<sup>12</sup> See, e.g., Harold O. Wright, Jr. et al., *A Comparison of Uninformed and Informed Death Penalty Opinions: A Replication and Expansion*, 20 AM. J. CRIM. JUST. 57, 73–74 (1995); John K. Cochran & Mitchell B. Chamlin, *Can Information Change Public Opinion? Another Test of the Marshall Hypotheses*, 33 J. CRIM. JUST. 573, 577 (2005). (One of the primary points of the Marshall Hypothesis is that gains in knowledge about the death penalty should result in diminished death penalty support. Survey results indicate support for the second Marshall hypothesis when survey subjects were exposed to more info about LWOP. These include: (4) “The death penalty is more effective than life imprisonment without possibility of parole in protecting society from the future actions of those who have already committed capital crimes,” and (7) “Capital punishment is less expensive than alternative punishments such as life imprisonment without opportunity for parole.”). *Id.*

<sup>13</sup> See Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014), <https://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/>; David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment Without Parole*, GALLUP NEWS SERV. (June 2, 2004), <https://news.gallup.com/poll/11878/public-divided-between-death-penalty-life-imprisonment-without-parole.aspx>.

<sup>14</sup> Quinnipiac Univ. Poll, *U.S. Voters Back Supreme Court OK For Gay Marriage, Quinnipiac University National Poll Finds; Less Support For Death Penalty—Except For Terrorism*, QUINNIPIAC U. (June 1, 2015), <https://poll.qu.edu/national/release-detail?ReleaseID=2229>; Jessica Miller, *New Study of Utah’s Use of the Death Penalty Suggests Life Without Parole Costs Less, Prompts Another Call to Abolish Capital Punishment*, SALT LAKE TRIB. (Feb. 9, 2018), <https://www.sltrib.com/news/2018/02/09/new-study-of-utahs-use-of-the-death-penalty-suggests-no-surprise-that-life-without-parole-costs-less/>.

<sup>15</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008) (The death penalty is much costlier than life imprisonment with no parole; “The death penalty was rarely imposed in America, but its flaws result in widespread miscarriage of justice.”); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1738 (1998) (“The century’s history of race discrimination and the death penalty has been a tale of both denial and avoidance by both state and federal courts, by Congress, and by state legislatures.”).

<sup>16</sup> MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 231 (2006) [hereinafter GOTTSCHALK, *THE PRISON AND THE GALLOWS*] (“But a word of caution is in order. Just because the death penalty helped build the carceral state, we should not assume that the recent surge in abolitionism will help raze it . . . To nurture this sentiment, some promoters of

LWOP, lurking behind the mantra “death is different,”<sup>17</sup> have been under-scrutinized. Proponents of LWOP normally see LWOP and capital punishment as vastly different enterprises, while critics of LWOP believe the distinction between death by incarceration and death by lethal injection is a fragile and thin one. The relation between the two is an issue that lies at the heart of the abolitionist cause, despite having been long treated as of peripheral importance during debates on capital punishment.<sup>18</sup>

This Article draws its inspiration from and contributes to the research by investigating the connection (and disconnection) between the two forms of ultimate punishments based on empirical evidence. This Article is composed of three Parts. Part I briefly surveys the historical development of abolitionist movements since the early 1970s, juxtaposing the decline of capital punishment with the growth of LWOP laws and practices. In this context, Part I also considers the meaning of death and life. On the basis of elite interviews with fifty-four anti-death penalty advocates, Part II investigates the ambivalent attitudes held by abolitionists towards LWOP. As pointed out by Marie Gottschalk, our current understanding of LWOP as a form of penal punishment is incomplete without a thorough understanding of the movement to abolish the death penalty.<sup>19</sup> With the support of hand-collected official data, Part III maps out, state by state, various historical patterns in which capital punishment and LWOP are used across the country.

## I. THE LINKAGE BETWEEN THE DEATH PENALTY AND LWOP

To a certain extent, the controversy as to whether LWOP is an appropriate alternative to the death penalty can be viewed as a recent episode of a more general history of conflicting penological ideals and moral values. The recent changes in the

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the death penalty have promoted LWOP not as a compassionate alternative to death but as an equally tough—or even tougher—retributive moral sanction.”); LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 3–6 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); Marc Mauer et al., *The Meaning of “Life”: Long Prison Sentences in Context*, THE SENTENCING PROJECT 32 (2004), <https://www.sentencingproject.org/publications/the-meaning-of-life-long-prison-sentences-in-context/> (“Experience suggests that many persons sentenced to life in fact change substantially while in prison, both by expressing genuine remorse for their actions and engaging in programming and changed attitudes. In states that employ the death penalty, a sentence of life without parole is often viewed as a lesser alternative, but the scale of such sentences—33,633 such persons in prison today—suggests that these penalties are being imposed in a far broader range of cases.”); LEON SAUL SHELEFF (SHASKOLSKY), *ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT, PHYSICAL TORTURE* 17–18 (1989). Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006) [hereinafter Note, *A Matter of Life and Death*]; Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 607–11 (2007); Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 357–58 (2013) [hereinafter Gottschalk, *Sentenced to Life*]; Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 202 (2014)[hereinafter Steiker & Steiker, *The Death Penalty and Mass Incarceration*]; Julian H. Jr. Wright, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529 (1990).

<sup>17</sup> See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (holding that Harmelin’s LWOP sentence may have been cruel but was not constitutionally unusual “because of the qualitative differences between death and all other penalties”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

<sup>18</sup> SHELEFF, *supra* note 16, at 5.

<sup>19</sup> GOTTSCHALK, *THE PRISON AND THE GALLOWS*, *supra* note 16, at 230–33 (explaining that the abolitionist efforts to end the death penalty since the 1990s risk encouraging the expansion of LWOP as an equally harsh alternative).

field of the death penalty<sup>20</sup> are part of a much broader transformation of penal trends during which extreme punishments have been challenged, reduced, and, paradoxically, entrenched. As will be explained below, the reconfiguration of the machinery of death casts a broad and troubling shadow across the rest of the criminal justice regime.

### A. Regulating Capital Punishment and the Rise of LWOP

Since the early 1970s, judicial efforts aimed first at outlawing and then regulating the death penalty regime<sup>21</sup> precipitated a rise in LWOP statutes, a new era inaugurated by *Furman v. Georgia*.<sup>22</sup> Prior to *Furman*, judicial use of LWOP was rare.<sup>23</sup> In the early 1950s, for instance, “a death sentence [could] be commuted to life imprisonment in virtually all states, and in some at least (including Idaho, Illinois, Louisiana, New York, Oklahoma, and Texas), it [could] be directly commuted to less than life.”<sup>24</sup> Out of the six states that had abolished the death penalty by that time, only Maine and North Dakota foreclosed parole for life imprisonment.<sup>25</sup> And even this form of life sentence “without parole” presumably could be commuted to a fixed-term sentence.<sup>26</sup>

In contrast with the judicial outlawing of the death penalty by *Furman* and the subsequent four-year moratorium, LWOP has been adopted by a growing number of states. The need for an alternative to the death penalty to punish serious offenders, as well as a growing recognition of the finality of LWOP, made it an attractive option for those who found parole-eligible life imprisonment unpalatable.<sup>27</sup> In this sense, the short-lived death penalty moratorium delivered an opportunistic boost to the popularity of LWOP.<sup>28</sup> Indeed, twenty-six states enacted LWOP statutes in the 1970s and 1980s.<sup>29</sup>

<sup>20</sup> After its re-emergence in the United States in the 1970s, capital punishment has been reinvented but rarely produces executions. The combination of cumbersome legal process and its symbolic retention epitomizes a form of institutional ambivalence. See generally DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S PENALTY IN AN AGE OF ABOLITION (2010) [hereinafter GARLAND, PECULIAR INSTITUTION].

<sup>21</sup> Robert Weisberg, *Deregulating Death*, SUP. CT. REV. 305, 306 (1983).

<sup>22</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). *Furman* was considered by the Court alongside two other cases: *Jackson v. Georgia*, No. 69-5030; *Branch v. Texas*, No. 69-5031. The Court, in a 5-4 decision, held that the administration of the death penalty in these cases constituted cruel and unusual punishment and violated the Eighth and Fourteenth Amendments to the Constitution. *Furman* led to a de facto moratorium of the death penalty throughout the United States until capital punishment was reinstated in 1976 in *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>23</sup> See Wright, *supra* note 16, at 534; Note, *A Matter of Life and Death*, *supra* note 16, at 1840.

<sup>24</sup> Arthur Lewis Wood, *The Alternatives to the Death Penalty*, 284 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 63, 65 (1952).

<sup>25</sup> See *id.* at 66.

<sup>26</sup> See *id.*

<sup>27</sup> Wright, *supra* note 16, at 534; Note, *A Matter of Life and Death*, *supra* note 16, at 1841.

<sup>28</sup> I. Bennett Capers, *Defending Life*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?, (2012); John H. Culver & Chantel Boyens, *Political Cycles of Life and Death: Capital Punishment as Public Policy in California*, 65 ALB. L. REV. 991, 1011 (2001) (“Perhaps one of the more important factors in the reformulated death penalty policy, one that did not exist in the pre-*Furman* years, is the option of life in prison ‘without possibility of parole’ (LWOP) instead of death in capital sentencing (as provided for in the 1977 death penalty statute.”). See generally Ashley Nellis, *Tinkering With Life: A Look At The Inappropriateness Of Life Without Parole As An Alternative To The Death Penalty*, 67 U. MIAMI L. REV. 439 (2013) [hereinafter Nellis, *Tinkering With Life*].

<sup>29</sup> See Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, THE SENTENCING PROJECT 1, 3 (2013) [hereinafter Nellis, *Life Goes On*]. According to the interviews conducted by the author of this Article with Department of Correction (DoC) personnel across the United States, New Mexico did not have LWOP until 2009, the same year when the death penalty was abolished in that state. Virginia abolished parole for felonies committed on or after January 1, 1995, so it was in the

At least three states—Alabama, Illinois, and Louisiana—enacted LWOP through state legislation in direct response to *Furman*.<sup>30</sup>

The growing salience of LWOP was further entrenched after *Gregg v. Georgia*<sup>31</sup> reinstated the death penalty. The availability of LWOP mollified media-amplified concerns for public safety under regimes with the possibility of parole. Reinvigorated abolitionism promoted LWOP to sway public opinion towards abolition, and, in particular, to pacify the common fear over the lack of a “sure way of keeping the streets safe from certain convicted killers”<sup>32</sup> in the prospect of future capital punishment repeal. The editor of *American Lawyer*, an abolitionist and proponent of LWOP, opined in the August 1987 issue that the death penalty was “never acceptable” but argued passionately against parole for murders.<sup>33</sup> Citing Jack Murphy’s murder of two women while on parole in Florida, he insisted that eliminating parole for lifers was the “real issue.”<sup>34</sup> He wrote: “Many leading abolitionists have ardently supported LWOP” and “uncritically accepted LWOP as a viable alternative to the death penalty, thus helping to legitimize the wider use of a sentence that has many features in common with capital punishment.”<sup>35</sup>

In addition to its incapacitating function, LWOP’s proponents deemed it an effective deterrent and retributive instrument to serve justice, without incurring the cost of taking a human life.<sup>36</sup> Towards the late 1980s, opinion polls provided an additional nuance, offering LWOP as an alternative after survey results exposed the attitudes of the general public<sup>37</sup> and legislators<sup>38</sup> toward capital punishment. The catchy message, which began to circulate in media, scholarship, and policy advocacy, was that resistance to abolition decreases considerably if LWOP is offered as an “adequate” and readily available alternative.<sup>39</sup> Highlighting the malleability of public opinion in this way

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1990s when LWOP was introduced into legislation. New Jersey had one LWOP prisoner in 1989, and its LWOP statutes were enacted in the 1980s. Similarly, in Minnesota, LWOP statutes were passed in 1989. Therefore, my state groups vary from Nellis’s report. The conclusion, however, stays the same, which is that the 1970s and 1980s saw the unprecedented growth of LWOP statutes.

<sup>30</sup> *Opening a Window or Building a Wall?*, *supra* note 8, at 175–76. The interviews conducted by the author in 2015 with state DoCs have found that both Hawaii and Arkansas were also among this group of states. LWOP was enacted in Arkansas in 1973 and Hawaii in 1972.

<sup>31</sup> 428 U.S. 153, 195 (1976). The case is one of the five cases along with *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), in which the Court reaffirmed the constitutionality of the use of the death penalty in the United States in extremely serious criminal cases where the death penalty is appropriately and carefully employed.

<sup>32</sup> James Alan Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 513 (1990).

<sup>33</sup> *Common Ground*, 15 HUM. RTS. 5 (1987-1988).

<sup>34</sup> *Id.* at 5-6.

<sup>35</sup> LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 259 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); Gottschalk, *Sentenced to Life*, *supra* note 16.

<sup>36</sup> Appleton & Grøver, *supra* note 16, at 603.

<sup>37</sup> Fox, *supra* note 33, at 514, n.63; Hans Zeisel & Alec M. Gallup, *Death Penalty Sentiment in the United States*, 5 J. QUANTITATIVE CRIMINOLOGY 285, 285–87 (1989). See generally Kevin M. O’Neil et al., *Exploring the Effects of Attitudes Toward the Death Penalty on Capital Sentencing Verdicts*, 10 PSYCHOL. PUB. POL’Y AND L. (2004).

<sup>38</sup> See Marla Sandys & Edmund F. McGarrell, *Attitudes Toward Capital Punishment Among Indiana Legislators: Diminished Support in Light of Alternative Sentencing Options*, 11 JUST. Q. 651, 660 (1994).

<sup>39</sup> See, e.g., David Von Drehl, *The Death of the Death Penalty: Why the Era of Capital Punishment Is Ending*, TIME (June 8, 2015), <http://time.com/deathpenalty/>; *The Case Against the Death Penalty*, ACLU (2012), <https://www.aclu.org/other/case-against-death-penalty>; Marie Gottschalk, *The Politics of the Death Penalty*, 7 PERSPECTIVES ON POLITICS 925 (2009).

partially shifted public attitudes away from capital punishment. Nonetheless, this strategy also entrenched moral ambivalence over the penal nature of LWOP. Towards the end of the twentieth century, the “throwing away the key” movement<sup>40</sup> became a constituent component of the abolitionist cause.<sup>41</sup> Today, LWOP is an essential part of state sentencing structures in all states but Alaska.<sup>42</sup>

The number of prisoners serving life imprisonment in recent years has risen to an unprecedented level: 159,520 people in prison are serving a life sentence, and among them, 49,081 are subject to LWOP.<sup>43</sup> According to the statistics collected from state correctional authorities, this number had climbed to 50,801 by 2015.<sup>44</sup> Out of every 100,000 residents in the United States, sixteen people are serving LWOP.<sup>45</sup> LWOP exists both as an alternative to the death penalty in retention states<sup>46</sup> and as a replacement of the death penalty in abolitionist states. The ascendancy of LWOP has had a significant impact on the size of the American prison population and the structure of the American penal regime. It is against this backdrop that this Article seeks to illuminate, on the basis of quantitative analysis and scores of qualitative interviews, some of the complexities and dilemmas inherent in the penal transition of the past few decades.

### 1. The Concept of an Alternative Punishment: Replace or Reinvent?

LWOP is a widely-accepted alternative to what is perceived as the most serious penalty—death. The concept of an alternative connotes meanings of comparability and exchange<sup>47</sup>—an alternative must be equivalent to, but not merely identical with, that which it seeks to replace. Presumably, what makes LWOP an *adequate* alternative to the death penalty is that its maximum level of finality and punitiveness matches that of the death penalty. Meanwhile, as an alternative preferred over the death penalty by abolition advocates, LWOP possesses certain comparative advantages which make it a *better* choice for abolition advocates. As the battle against capital punishment is couched in the language of “evolving standards of decency”<sup>48</sup> in maturing American society, the alternative should ideally carry benevolent traits which conform with

<sup>40</sup> *Common Ground*, *supra* note 33, at 5–6.

<sup>41</sup> See Note, *A Matter of Life and Death*, *supra* note 16, at 1838–39.

<sup>42</sup> Alaska legislation offers mandatory 99-year sentence for certain enumerated crimes, a type of ‘virtual life sentence’ under which the prisoner will likely die in prison long before reaching their parole-eligibility or release dates. See, e.g., AS 12.55.125(a)(1)-(5) (Murder 1 crimes carried a mandatory 99-year sentence); also, under Alaska’s “three strikes” law, a person convicted of a Class A felony who previously had been convicted of two or more “most serious felonies” is also subject to a mandatory 99-year sentence (“Most serious felonies” is defined in AS 12.55.185(10) and included: Arson 1, Sex trafficking 1 under AS 11.66.110(a)(2), Online enticement of a minor under AS 11.41.452E, any Unclassified or Class A felony proscribed under AS 11.41, or any Attempt, Conspiracy to commit, or Criminal solicitation of an Unclassified felony proscribed under AS 11.41).

<sup>43</sup> Nellis, *Life Goes On*, *supra* note 29, at 1.

<sup>44</sup> See *infra* Table 3.

<sup>45</sup> The population estimate as of July 1, 2015 was 321,039,839. See U.S. Census Bureau, Population Division, *Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2017*, CENSUS.GOV.

<sup>46</sup> A retention state is a state which retains the death penalty in law or in practice.

<sup>47</sup> A definition of ‘alternative’ as a noun is “the other or remaining course; an alternative option; a thing available in place of another.” See ‘Alternative’, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/5803?redirectedFrom=alternative> (last visited July 4, 2016).

<sup>48</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that executions of the intellectually disabled are unconstitutional) (“Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we therefore conclude that such punishment is excessive . . .”) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

important values such as human dignity, constitutional rights, and the protection of the sanctity of human life.

Condemning the death penalty is relatively straightforward. Finding an alternative that is humane, effective, and adequate, however, is a challenge. This is what Haines called “the alternatives minefield.”<sup>49</sup> The idea of finding an alternative to the death penalty is not a novel or contemporary pursuit. In fact, the concept originated from the very historical onset of the abolitionist movement. For instance, it was suggested by Beccaria—the utilitarian penal philosopher who spearheaded the abolitionist movement—that the death penalty needs to be replaced by perpetual penal servitude:

It is not the intensesness of the pain that has the greatest effect on the mind, but its continuance... The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others, than the continued example of a man deprived of his liberty...reduced to that miserable condition for the rest of my life. A much more powerful preventive than the fear of death.<sup>50</sup>

Beccaria admitted, paradoxically, that the alternative of penal slavery, which he proposed to replace the death penalty, was equally cruel, if not more painful than the death penalty.<sup>51</sup> The main benefit for adopting such an alternative was, arguably, its utility and effectiveness—that is, being more painful than the death penalty, penal slavery would provide a greater deterrence. This was indeed an odd stance for a liberal scholar and renowned abolitionist who was motivated to reject the death penalty because of humanistic ideals. Beccaria’s inconsistency was criticized by Sellin, who believed that the invention of a penal punishment worse than death subjects the prisoners to “a prolonged death penalty.”<sup>52</sup> As execution does away with all pain, despair, and fear, absolute life imprisonment reinforces and perpetuates this suffering in the minds of the prisoner. This may be why Tallack concluded that irreducible life imprisonment is not a real substitute for capital punishment; rather, it is a *form* of capital punishment. Whole-life terms inflict prolonged injury “upon the spiritual and mental powers, extended over many years” and are “as real as execution of death, but by slow operation, as the more visible and instantaneous deprivation of life.”<sup>53</sup>

Interestingly, abolitionists worldwide have accorded great importance to the effectiveness of alternative punishment in facilitating the abolition process but ignore the humanistic values it promises. For instance, Sir Waltee Croftox stated, before the Capital Punishment Royal Commission of 1865, that the due consideration of abolishing capital punishment “entirely depends upon our having, in our secondary punishments, an effective substitute provided.”<sup>54</sup> In contemporary America, some proponents of LWOP argued that prison conditions under the LWOP regime should be

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<sup>49</sup> HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA*, 1972-1994 135 (1999).

<sup>50</sup> Cesare Bonesana di Beccaria, *An Essay on Crimes and Punishments*. By the Marquis Beccaria of Milan. With a Commentary by M. de Voltaire. The Fourth Edition 105–6 (4th ed. London: Printed for E. Newberry, at the Corner of St. Paul’s Church Yard 1785).

<sup>51</sup> *Id.*

<sup>52</sup> Thorsten Sellin, *Beccaria’s Substitute for the Death Penalty*, in *CRIMINOLOGY IN PERSPECTIVE: ESSAYS IN HONOR OF ISRAEL DRAPKIN* 3–10 (Shima F. Landau & Leslie Sebba eds., 1977).

<sup>53</sup> WILLIAM TALLACK, *PENOLOGICAL & PREVENTIVE PRINCIPLES* 160 (2d ed. 1896).

<sup>54</sup> *Id.* at 159.

made harsher than they already are to qualify as a sufficient replacement for the death penalty.<sup>55</sup>

Yet, to offer such a cruel alternative to capital convicts undermines the attainment of the very object desired by abolition advocates. As my interview data in Part II demonstrates, removing capital punishment law and practices from retention jurisdictions has been treated as the ultimate goal for liberal penal reform, the achievement of which may allow a comparably harsher punishment to be engineered and installed into the penal system absent careful scrutiny.<sup>56</sup> Hence, the alternative to the death penalty may be pronounced as a reconstructed form of the death penalty, after a painstaking process of dismantling and remaking the old regime.

One of the interviewees in this Article—an abolitionist campaigner—was a sibling of an executed offender.<sup>57</sup> She recalled her brother’s experience of being forced to choose between the death penalty and LWOP, recounting that “[h]e said that he would rather die than be incarcerated for a whole life.” Since then, she said:

I always tell people that when inmates are sentenced to LWOP they really are sentenced to death. Most people assumed that they made it and live on in prison but rarely people would understand what [it] means to lose all freedom and privileges, to live hopelessly and to be forgotten unless they are personally subject to such an experience.<sup>58</sup>

She also observed that, in her experience, it is more difficult for people to empathize with LWOP: “I knew about 85% of the victims’ families who witnessed the execution process rejected the death penalty but none opposed LWOP.”<sup>59</sup>

It is at this point that Americans may want to take a step back and ask: if the current practice of capital punishment in America is as inefficient, discriminatory, arbitrary, expensive, malfunctioning, and cruel as opponents and critics claim,<sup>60</sup> why would any alternative form of punishment, with an equivalent level of gravity and finality, cure all the existing problems? Why do critics of the death penalty fail to give LWOP the same amount of careful consideration and scrutiny? According to Derrida, “[a] state power . . . is marked by the right of life and death over the citizen, by the power of deciding, laying down the law, judging and executing the order at the same time as the condemned one.”<sup>61</sup> The death penalty is commonly viewed as qualitatively distinguishable from all other forms of punishment under which the prisoner has the chance to live, no matter how harsh the prison conditions are and how long the imprisonment is. Indeed, this view of the death penalty as unquestionably unique was part of the Supreme Court’s death penalty jurisprudence.<sup>62</sup>

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<sup>55</sup> Michael McCann & David T. Johnson, *Rocked but Still Rolling: The Enduring Institution of Capital Punishment in Historical and Comparative Perspective*, in *THE ROAD TO ABOLITION? THE FUTURE OF CAPITAL PUNISHMENT IN THE UNITED STATES* 169, 139–80 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

<sup>56</sup> See discussions *infra* in Part II.

<sup>57</sup> Interview with a family member of a convicted inmate executed in Ariz. (Jan. 14, 2015).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See Wright, *supra* note 12.

<sup>61</sup> JACQUES DERRIDA, *THE DEATH PENALTY* 5 (Geoffery Bennington et al. eds., Peggy Kamuf trans., 2013) (1999-2000).

<sup>62</sup> As the following cases demonstrate, while the recent spate of Court decisions regarding juveniles serving LWOP may suggest that the “death-is-different” jurisprudence starts to chip away, the division still holds true in the vast of majority of cases concerning adult defendants. See, e.g., *Montgomery v.*

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.<sup>63</sup>

But what is the essential nature of the death penalty that makes it so special? A first possible argument lies in its finality. This conception may be rejected for two reasons. First, an LWOP sentence offers a more certain prospect than the death penalty. In comparison with the death penalty, the sentencing phase in LWOP cases is followed by an almost immediate “execution” of the sentence. Capital defendants receive far more attention and have relatively more remedies available in the post-trial process.<sup>64</sup> In contrast, LWOP prisoners are often invisible. One interviewee explains the different situations in capital and LWOP cases:

In Florida, once someone receives the death sentence and is sent to the death row, he automatically gets a public defender provided by the state to appeal his sentence. If the same person gets LWOP, then he is done. The state does not offer public defense. If the LWOP defendant, who is normally poor and disadvantaged, wants to appeal, he has to use his own resources.<sup>65</sup>

Another anti-death penalty advocate who supported a few states’ abolitionist initiatives reflected on the status of LWOP:

People who have been sentenced to LWOP are those most forgotten, least cared about and least thought of in this country. Nobody really spends any time thinking about the plight of LWOP-sentenced people. Normally we just don’t give a damn. Who cares about the abuses inflicted on LWOP prisoners which amount to physically and psychological torture? I am talking about the general scenario of course. The situation behind the bars begs very disturbing questions about who we are as a people and what kind of society we have.<sup>66</sup>

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Louisiana, 136 S. Ct. 718, 736 (2016) (holding that *Miller v. Alabama* applies retroactively on state collateral review); *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that the Eighth Amendment’s prohibition against cruel and unusual punishment forbids mandatory life sentences without the possibility of parole for juvenile homicide offenders); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (holding that the Eighth Amendment’s prohibition against cruel and unusual punishments forbids sentence of life in prison without the possibility of parole for a non-homicide juvenile offender crime).

<sup>63</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

<sup>64</sup> See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1149 (2009); Note, *A Matter of Life and Death*, *supra* note 16, at 1853.

<sup>65</sup> An interview with an anti-death penalty advocate (Jan. 22, 2015). Fla. Stat. § 27.7001 (2018) (“Legislative intent and findings.—It is the intent of the Legislature to create part IV of this chapter, consisting of §§ 27.7001-27.711, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state”); FLA. R. Crim. P. 3.112(a) (“Minimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases.”).

<sup>66</sup> Interview with a former abolitionist activist in Tex. (Jan. 20, 2015).

Second, the finality argument is tied to the irrevocability of execution vis-à-vis imprisonment. Comparing the attributes of the death penalty and LWOP requires a rethinking of the binary opposition of living (or life) and death. Can one characterize living as mere physical existence or biological processes? As inflicting death means taking away life, is it correct to assume that only the deprivation of vital human organs from performing their self-sustaining functions within a relatively short span of time may constitute infliction of death?

Leon Sheleff, for instance, rejects a simplistic view of life. He insists that a human life involves richer meanings than mere survival and existence: “A human life involves the unique development of a personality, creativity, liberty, [and] unfettered social intercourse.”<sup>67</sup> He further posits that “[i]t is precisely a liberal society’s emphasis on the nature and quality of . . . each individual life, and not on mere physical existence, that gives to life imprisonment an emotional meaning and ideological connotation that spells out unique severity.”<sup>68</sup>

In this sense, the boundary between life and death is blurred. One can argue that stripping life of its most valuable existential characters—attaining social acceptance, enjoying interpersonal relations with family and friends, gaining the autonomy to choose what groups to associate oneself with—renders one’s living lifeless. Accordingly, death may be defined broadly as not only including the irreversible cessation of the vital processes that sustain us but also the dispossession of the basic meanings and minimum quality of human life. For life cannot be reduced to biological functions such as breathing and brain activities; neither can it be translated into mere animalist instincts. Immanuel Kant presented his critique on the issue in *The Metaphysics of Morals*:

I cannot deny all respect to even a vicious man as a human being; I cannot withdraw at least the respect that belongs to him in his quality as a human being, even though by his deeds he makes himself unworthy of it. So there can be disgraceful punishments that dishonor humanity itself . . . such punishment more painful than loss of possessions and life to one who loves honor.<sup>69</sup>

If one looks beyond the oversimplified life–death division, one may find it odd to exempt the death penalty from the penal field to which it is itself an integral part. Both the death penalty and LWOP are killings by the state. Under the former form of punishment, death is attained by the relatively speedy methods of lethal injection,<sup>70</sup> electric chair, hanging, shooting, stoning, etc. The other is a chronic process of dying achieved in perpetual incarceration under the supervision of the state and deprivation of almost all autonomous choices essential to the formation and maintenance of personhood. Death can come in various forms, and there are several ways that it can be ambiguous and latent. LWOP is an example of this ambiguous death. It is not only the

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<sup>67</sup> SHELEFF, *supra* note 16, at 138.

<sup>68</sup> *Id.* at 53–54.

<sup>69</sup> IMMANUEL KANT, *The Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 580 (Mary J. Gregor trans., 1999).

<sup>70</sup> Here, the comparison is made between executions and LWOP. It is worthwhile to note, however, that lethal injection, which appears the most humane method may turn out to be cruel and depraving. *See, e.g.,* Arthur v. Dunn, 137 S. Ct. 725, 734 (2017) (Sotomayor, J., dissenting from denial of certiorari) (“Condemned prisoners, like Arthur, might find more dignity in an instantaneous death rather than prolonged torture on a medical gurney”).

death of one's membership of the civil community but also the deprivation and severe impairment of psychological and mental attributes.

Margaret Radin's analysis on the irrevocability of death versus imprisonment reveals that human instincts regard the former as clearer and stronger, as death contains irreversible deprivations of physical attributes integral to complete personhood.<sup>71</sup> This may be because most people's concept of death gives emphasis to its momentariness. Under the death penalty, a defendant dies within seconds, minutes, or hours. Under the LWOP regime, a defendant spends months, years, or decades before he or she is eventually pronounced dead by prison authorities. Furthermore, this period of "living" under LWOP may be substantially shortened and death accelerated by inadequate medical support, inmate violence, or incarceration-induced suicides.<sup>72</sup> Thus, the death penalty is perceived to be irrevocable because of the abruptness and finality of the transition between life and death. Yet, "even one day in prison is irrevocable in the sense that all past events and their resultant effects on human beings are irrevocable."<sup>73</sup>

If death is re-conceptualized into a process of dying, rather than a state in which its victim is eventually put to rest, one may come to a different conclusion on the issue of irrevocability. Indeed, as Sheleff observed, "if it were possible to give someone a pill that instantly induced in her the physical and mental effects of having spent a lifetime in a cell, an irrevocable deprivation in the strong sense would probably have taken place."<sup>74</sup> In this sense, LWOP is not only the ultimate life imprisonment but also a form of irrevocable and ultimate punishment.

In addition to the finality argument, a second argument that the death penalty and LWOP do not contain sufficient similarities to warrant equivalent consideration is the relative severity of the death penalty vis-à-vis LWOP. Why is the ultimate punishment of death widely regarded as uniquely severe? Sheleff suggested that this may be explained by people's frightened fascination with instant death.<sup>75</sup> Understood on an abstract and intuitive level, death differs from a prolonged suffered living. Most people have an irrepressible urge to avoid death. In contrast with human beings' universal fear of dying and the unknown, it is believed that they also share the banality of basic living patterns (walking, talking, eating, and sleeping) with LWOP prisoners. People assume they understand the ultimate implications and everyday living experiences of irreducible life imprisonment. Yet by doing this, people tend to underestimate the severity of LWOP. People forget that almost all the autonomous choices that are part and parcel of their everyday lives are taken away from LWOP prisoners: what to eat, whom to talk to, when to sleep, and perhaps how to feel.

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<sup>71</sup> See Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1162–63 (1980).

<sup>72</sup> See R. H. Aday, *Aging Prisoners' Concerns Toward Dying in Prison*, 52 J. DEATH AND DYING 199, 206 (2006) ("two-thirds of the inmates who indicated they frequently felt unsafe in their current living environment exhibited significantly higher levels of death anxiety"). Nicholas Murdoch et al., *Depression in Elderly Life Sentence Prisoners*, 23 INT'L J. GERIATRIC PSYCHIATRY 957, 960 (2008) (nearly half of their sample of 121 inmates scored above the minimum score to be considered at least mildly depressed and 3% met the diagnostic criteria for severe depression); Alexander Smith, *Suicides Kill More Inmates than Homicide, Overdoses, Accidents Combined* (Sept. 4 2013, 1:07 PM), <https://www.nbcnews.com/news/us-news/suicides-kill-more-inmates-homicide-overdoses-accidents-combined-flna8C11072563>.

<sup>73</sup> Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1022 n.132 (1978).

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

<sup>75</sup> SHELEFF, *supra* note 16, at 57.

Moreover, views that the two forms of extreme punishment—LWOP and the death penalty—are qualitatively different may lie in the unique ways they exert their respective impact on the prisoner. The death penalty and whole life terms are divided between an “unusual” and “natural” death, with the former directly caused by external factors—such as lethal drugs, bullets, and electric chairs—while the latter is induced by internal causes—such as heart failure, cancer, or self-inflicted suicide, which may be indirectly induced by harsh prison conditions, lack of medical resources, and prison violence. The fact that a death is faster and unnatural does not necessarily indicate a higher degree of gravity.

Lastly, the death penalty, as it is administered today, still inflicts pain, despite the abolition of pre-execution bodily torture as seen in historical practices.<sup>76</sup> In contrast, imprisonment in general, and LWOP in particular, punishes “the soul.”<sup>77</sup> The consequences of LWOP are latent, incremental, and invisible. The difference between how the punishment is inflicted to impact the prisoner may explain why the death penalty is generally perceived to be harsher. Once again, this divergence is not sufficient to define the singular extremity of the death penalty. In sum, the distinction between the death penalty and LWOP on the issue of finality, irrevocability, and severity is blurry at best, particularly given that many condemned prisoners spend the rest of their lives on death row awaiting the final outcome of appeals.

## II. ABOLITIONISTS’ AMBIVALENT ATTITUDES TOWARDS LWOP

In most states, the rising popularity and growing expansion of LWOP has roots in the anti-death penalty movement.<sup>78</sup> As a result, in order to fully understand the linkage between capital punishment and LWOP, one needs not only to conduct theoretical analysis at the macro level (as in the previous Part I) but also assess the issue based on empirical evidence.<sup>79</sup>

Marie Gottschalk has warned about the extent to which one attributes the proliferation of life sentences to the abolition movement.<sup>80</sup> She observed that abolitionists “could not have done much to stem the punitive stampede in the immediate wake of *Furman* as states rewrote their death penalty statutes and began to rethink life sentences.”<sup>81</sup> In general, although agreeing that one needs to be careful about not jumping to a wholesale judgment, this Article demonstrates that most of the anti-death penalty advocates were aware of possible ramifications of adopting the political *quid pro quo* of the death penalty.<sup>82</sup> An attorney who practiced in Arizona and Texas explained that: “both [LWOP and capital punishment] are death sentences. You are done once convicted. I do not believe that there is much difference in terms of the

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<sup>76</sup>*Id.*; Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 816 (2008).

<sup>77</sup> SHELEFF, *supra* note 16, at 68–70, 376.

<sup>78</sup> See Ross Kleinstuber et al., *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19 U. PA. J.L. & SOC. CHANGE 185, 206 (2016); Gottschalk, *Sentenced to Life* *supra* note 16, at 373.

<sup>79</sup> This Part’s focus on the death penalty abolition does not contradict the observation in Part III that there remain huge varying patterns across states regarding how precisely, and to what extent, the abolitionist forces might have legitimized and strengthened the institution of LWOP. See discussion *infra* Part III.

<sup>80</sup> See Gottschalk, *Sentenced to Life*, *supra* note 16, at 373.

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

<sup>82</sup> See *infra* cited interview responses.

severity of the sentences and the impact on my clients.”<sup>83</sup> The legitimization of LWOP in many states was not the outcome of lack of foresight or knowledge, but painful concessions and pragmatic calculation.

### *A. Moral Ambivalence and Denial*

In Part II, the role of anti-death penalty advocacy in the expansion of LWOP will be explored on the basis of responses from fifty-four in-person and telephone interviews conducted from 2014 to 2015. Based on interviews with advocates and activists across the country, groups of abolitionists are variably composed of politicians, legal professionals, intellectuals, civil society advocates, religious leaders, and communal volunteers. Rather than a homogeneous camp, this group of individuals holds vastly different personal beliefs, political agendas, and moral and religious values. The interviewees are also deeply divided on the thorny issues of whether and to what extent the use of LWOP should be encouraged and endorsed. What united them was their shared desire to advance America’s death penalty debate. The interview responses suggest widespread ambivalence, suspicion, and even hostility among opponents to the death penalty when confronted with questions regarding the connection between the legitimization of LWOP and the campaign against capital punishment. Generally speaking, the interviewees hold three types of attitudes: 1) an opposition to both capital punishment and LWOP; 2) a mixture of acceptance and moral ambivalence about the legitimacy of LWOP; and 3) a denial of the connection between capital punishment and LWOP.

First, an extremely small minority group of interview respondents voiced their opposition to both capital punishment and LWOP. Few LWOP opponents were outspoken about the negative ramifications of LWOP among abolitionists. One campaigner who was interviewed was an exception. He openly acknowledged that:

Many abolitionists who want to abolish the death penalty say we should replace death sentences with a bloodless method of ‘life without parole’. This has become our default alternative to the death penalty, the fallback position we instantly offer without understanding what ‘life without parole’ really means. People are reluctant to confront important issues such as how this alternative fits in with our larger values of humanity and justice.<sup>84</sup>

Other respondents in this minority group spoke about their own reservations and skepticism towards using LWOP as leverage to win the political battle against the death penalty. A civil society organization member in Florida said there were many people who were against capital punishment but who also felt strongly against LWOP because LWOP is emotionally debilitating for prisoners.<sup>85</sup> Respondents who expressed their disagreements with the proliferation of LWOP call it “a slower form of [a] death sentence,” “death in incarceration,” and a “bloodless execution.” An attorney from New Mexico believed that the utility of LWOP lies in its function to “get rid of the people who are threats to society. It plays on people’s fear and provides the society with a quick fix but [is] not the final solution.”<sup>86</sup>

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<sup>83</sup> Interview with a criminal defense lawyer from Tex. (Dec. 12, 2014).

<sup>84</sup> Interview with an anti-death penalty advocate working at a national-level civil society organization. (Dec. 6, 2014).

<sup>85</sup> Interview with member of a civil society organization from Fla. (Jan. 22, 2015).

<sup>86</sup> Interview with a public defender from N.M. (Dec. 12, 2014).

The second attitude also challenges the commonly held assumption that people who oppose the death penalty are satisfied with the substitution of LWOP.<sup>87</sup> Most anti-death penalty advocates show a blend of varying degrees of doubts about the legitimacy of LWOP. A civil society leader in Kansas, for example, said:

I personally think LWOP is also a cruel and unusual punishment by itself, my own idea, along with [the] death penalty too. But if you [are sentenced] not to die, there is a chance evidence could develop over time and you could be released sometime. The problem is getting a lawyer or someone to look into it. And the present status of that is not very good for folks *who* serve very long sentences.<sup>88</sup>

It seems that the deep division sown among members of anti-death penalty advocacy organizations lingered during the battle against capital punishment and even after the dust had settled for abolition. A civil society organization leader who played a key role in Maryland's repeal of the death penalty said:

We never had an official position to support LWOP. Some board members endorsed LWOP and others [did] not. Thus we, as an organization, did not want to take a position. All we need to do is to educate [the] legislature that LWOP existed . . . We do not have to support it or promote it. I understand that LWOP is a form of the death sentence in prison but you cannot fight LWOP and the death penalty at the same time. Politically it is just unrealistic.<sup>89</sup>

The ambivalence towards LWOP may be justified by a strategy to prioritize the short-term goal of fighting the death penalty and reserving the possibility to revisit and reconsider the problematic aspects of LWOP in the long run. An advocate who was involved in the state of Washington's battle against capital punishment admits that:

I do not oppose LWOP in its entirety... [t]here is a general feeling among our supporters that, to oppose the death penalty, we need to take an incremental approach. We should first oppose the death penalty and then address issues with LWOP. There are people who support abolition but won't sign on [to] the campaign because they oppose using LWOP as the universal alternative... [t]hey feel that if we do it wrong the first time, it will stay wrong.<sup>90</sup>

Second, abolitionists in the post-repeal states, however, do not necessarily feel the urgency to tackle LWOP issues for various other reasons. An advocate from New Mexico believed that turning away from LWOP would be "a betrayal of the victims' family who supported our abolitionist cause. It is bad enough that we have not been able to offer the restitution package we promised to them . . . [s]ticking to LWOP is the least that we can do."<sup>91</sup> Another advocate believed that many other issues on the criminal justice agenda—such as drug crimes, mental health treatment for offenders,

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<sup>87</sup> The general public in America accepts abolition of the death penalty due to the availability of LWOP. *See, e.g.*, Wright, *supra* note 12.

<sup>88</sup> Interview with a civil society organization leader from Kan. (Feb. 12, 2015).

<sup>89</sup> Interview with a member of a civil society organization leader from Md. (Jan. 24, 2015).

<sup>90</sup> Interview with an abolition advocate from Wash. (Jan. 22, 2015).

<sup>91</sup> Interview with an anti-death penalty activist from N.M. (Jan. 10, 2015).

and police violence—warrant more immediate attention.<sup>92</sup> According to that advocate, LWOP is not one of these urgent issues.<sup>93</sup> Similar comments were received from respondents in other states that recently abolished the death penalty, such as Maryland and Connecticut.

Third, a group of interviewees denied any sort of connection between the abolition movement and the rise of LWOP.<sup>94</sup> These respondents were, again, a minority in the cohort of advocates who were interviewed. An experienced civil society advocate said:

I've never seen people who oppose the death penalty support LWOP. It is not an issue you can link to the abolitionist campaign. The expansion comes from other sources, not the abolition movement. For instance, three-strike laws, and sentencing enhancement measures . . . Well, at most, abolition publicized the availability of LWOP. But it already exists. There is nothing that we have done to create the situation.<sup>95</sup>

A criminal attorney who served on Illinois Governor George Ryan's Commission on Capital Punishment prior to the state's repeal of the death penalty exhibited a “death is different” mindset. This tunnel vision limits like-minded people from considering the death penalty as a part of the organic whole of the criminal justice regime.<sup>96</sup> He said, “I oppose the death penalty because it is a ridiculous, useless, unnecessary, expensive and disorienting punishment. The people who oppose the death penalty want the second worst punishment to get rid of the death penalty, isn't that obvious?”<sup>97</sup> He further elaborated, “Don't ask me, I do not know who those people are but they all want LWOP. LWOP is an entirely different question [from the death penalty].”<sup>98</sup>

### *B. Harsh Politics of the Abolition Campaign*

The moral dilemma that abolitionists face today carries heavy political baggage. Sociologist Herbert Haines asked: “To have any credibility in a crime-weary society, must abolitionists advocate specific alternatives to the death penalty in cases of first-degree murder—in particular, incarceration for life without the opportunity for parole?”<sup>99</sup> What remains unclear is why abolition advocates promote LWOP, despite their incredulity and discomfort with it.

LWOP is no less prone to abuse and errors than capital punishment. In many states, LWOP is wildly disproportionate to the criminal offenses it sanctions.<sup>100</sup> It has been widely used today regardless of its utility in producing the socially beneficial goals

<sup>92</sup> Interview with a criminal defence attorney from N.M. (Jan. 28, 2015).

<sup>93</sup> Interview with a criminal defence attorney from N.M. (Jan. 28, 2015).

<sup>94</sup> See interview quotes, *supra* notes 66–67.

<sup>95</sup> Interview with a civil society leader from Cal. (Nov. 21, 2014).

<sup>96</sup> See *supra* note 10.

<sup>97</sup> Interview with a criminal defence attorney from Ill. (Dec. 19, 2014).

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

<sup>99</sup> HAINES, *supra* note 49, at 118.

<sup>100</sup> See, e.g., Rachel E. Barkow, *Life without Parole and the Hope for Real Sentencing Reform*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 16, at 210 (“The real problem with LWOP is not what makes it unique from other sentences but the danger it shares with all sentences: it is in some cases a disproportionate sentence, just as life with the availability of parole is disproportionate in some cases and terms of years are disproportionate in others.”); Ashley Nellis, *Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 28 (2010) (“people of color also represent a disproportionate share of LWOP sentences”).

of deterrence and incapacitation.<sup>101</sup> As Jeffery Fagan pointed out, there is ample evidence from a few states that LWOP is used far more often than are death sentences in capital cases.<sup>102</sup> The net-widening effect<sup>103</sup> in the use of LWOP, nonetheless, has not been acknowledged by most respondent abolitionists. A general assumption shared by abolitionists was that there is an exchange of one execution for one LWOP sentence. While that might be the case in some states like New Mexico, where capital punishment and LWOP are extremely infrequent, there are varying degrees of a net-widening effect in jurisdictions that use LWOP either along with or in replacement of the death penalty. Yet this fact is rarely taken into account by abolitionists. Empirical data will be provided to illustrate this point in detail in Part III.

Another common myth is that the rise in LWOP will proportionally decrease the use of the death penalty.<sup>104</sup> For instance, an experienced attorney heading a nonprofit litigation law firm in North Carolina voiced this belief, stating that:

We know from data that, as states enacted LWOP sentences, death sentence rates went down. That decline is probably not entirely due to LWOP, but it seems a likely contributing factor. I believe that [the use of capital punishment declines due to LWOP enactment] is generally true across states, but definitely bears out in North Carolina.<sup>105</sup>

However as shown in Part III, North Carolina seems to be an outlier rather than a trendsetter because data shows an inverse relationship between death and LWOP sentences. In some states, a correlation exists between the use of capital punishment

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<sup>101</sup> See Mauer et al., *supra* note 16, at 4 (explaining that LWOP sentences have been employed in a way that is excessive from deterrence and public safety perspectives. Lifers have very low rates of recidivism, including for murder. “For example, in Michigan, 175 persons convicted of murder were paroled between 1937 and 1961; none committed another homicide and only four were returned to prison for other offenses.”).

<sup>102</sup> Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 270 (2006).

<sup>103</sup> See Andrew Ashworth & Mike Redmayne, *THE CRIMINAL PROCESS* 174 (2010) (explaining that the concept of net widening refers to the widening of the ‘net’ of penal control so that people who previously do not belong to the groups of targets offenders are dragged into the net of criminal process). The term has also been used to describe the expansion of noncustodial sanctions (as alternatives to imprisonment) which inadvertently drew more offenders into the criminal justice system and therefore expand the reach of penal punishment. See ROGER MATTHEWS, *DOING TIME: AN INTRODUCTION TO THE SOCIOLOGY OF IMPRISONMENT* 138–39 (2nd ed. 2009); Maeve McMahon, ‘*Net-Widening*’: *Vagaries in the Use of a Concept*, 30 BRIT. J. CRIMINOLOGY 121, 149 (1990). Here I refer to the fact that penal reform leading to the declining use of the death penalty or full abolition may have inadvertently drawn offenders who previously would not be subject to the death penalty into the prosecution and conviction of LWOP. See Editorial, *The Misuse of Life Without Parole*, N.Y. TIMES (Sept. 12, 2011), <https://www.nytimes.com/2011/09/13/opinion/the-misuse-of-life-without-parole.html>.

<sup>104</sup> See Carol S. Steiker & Jordan M. Steiker, *Graham Lets the Sun Shine In: The Supreme Court Opens a Window Between the Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT’G REP. 79, 79 (2010) (“[T]he contemporary effort to reduce the use of the death penalty has depended significantly on the widespread adoption of life- without- parole (LWOP) sentences, and it is clear that many inmates who would not have received death sentences now languish under LWOP sentences as a result of death penalty reform efforts.”).

<sup>105</sup> Email from a capital litigator from N.C. (Jan. 6-7, 2015).

and LWOP.<sup>106</sup> In others, there is an absence of any correlation between the two.<sup>107</sup> Even in North Carolina, admittedly, it remains unclear whether one can draw a causal link between the rise of LWOP and the decline in capital punishment. Many other factors may be significant contributors to the decline in death sentences, including the change of execution protocol, the increasing difficulty in obtaining drugs for executions, the discovery of innocence, and constitutional challenges, amongst others.<sup>108</sup>

Abolitionists support the use of LWOP as a substitute for the death penalty for at least three major reasons: cost, innocence, and politics. Various empirical studies show that LWOP is considerably less expensive than the death penalty.<sup>109</sup> This view was commonly shared among the interviewees. Second, as previously stated, a significant part of the abolition crusade relates to the presumable reversibility of LWOP vis-à-vis the death penalty. LWOP is believed to preserve a remote possibility that defendants will be able to be exonerated in the future if further evidence indicating innocence is discovered.<sup>110</sup> Existing evidence does not permit this assumption to be accepted.<sup>111</sup>

<sup>106</sup> These states include Arkansas, Georgia, Kentucky, Ohio, Pennsylvania, South Carolina, and Texas. For Arkansas and Pennsylvania, the data fits a statistical model indicating a proportional correlation between the death penalty and LWOP. An inverse correlation may be found in the rest of the states in this group. *See infra* Table 1.

<sup>107</sup> These states include Arizona, Colorado, Florida, Indiana, Kansas, Missouri, Montana, Nevada, North Carolina, Oregon, Utah, Virginia and Washington. *See infra* Table 1.

<sup>108</sup> *See* Baumgartner et al., *supra* note 15, at 9 (the possibility of errors in the administration of the death penalty and recent discoveries of innocence have led to historic shifts in public opinion and to a sharp decline in executions); Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 615–16 (2017) (explaining that the decline of executions since 1990s “does not reflect just one cause,” but include constitutional jurisprudence, resources, racial disparity and homicide rates); Mark Berman, *Why the U.S. Could See More Executions this Year*, WASH. POST (July 12, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/07/12/why-the-u-s-could-see-more-executions-this-year/?utm\\_term=.24cb400e11ff](https://www.washingtonpost.com/news/post-nation/wp/2017/07/12/why-the-u-s-could-see-more-executions-this-year/?utm_term=.24cb400e11ff) (explaining that part of the explanation for a potential increase in 2017 rests with changing execution protocol and the availability of lethal drugs).

<sup>109</sup> Paradoxically, this lower cost may be because LWOP-sentenced prisoners have fewer opportunities to pursue appeals during post-conviction stages. *See* the discussion on cash cost savings on appeals and resentencing when defendants are not sentenced to the death penalty in North Carolina. Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, AM. L. AND ECON. REV. 1, 25 (2009). State-level studies consistently show the costs are higher under the death penalty than LWOP, primarily because of the due process requirement in capital trial. For instance, trial costs are 16 times greater in death penalty cases than in LWOP cases in Kansas. In California, the costs may drop from \$137.7 million to \$11.5 million a year if the death penalty were to be replaced by life without parole. The death penalty costs North Carolina nearly \$11 million more per year than replacing it with life imprisonment without parole. Florida would save \$51 million each year by punishing all first-degree murderers with life in prison without parole. *See* Connecticut Network to Abolish the Death Penalty, *Connecticut's Death Penalty is A Broken System* (2011), <http://www.cnadp.org/wp-content/uploads/2011/12/Briefing-Book-on-Connecticuts-Death-Penalty.pdf>; Amelia M. Inman & Millard W. Ramsey, Jr., *Putting Parole Back on the Table: An Efficiency Approach to Georgia's Aging Prison Population*, 1 J. MARSHALL L. J. 239, 250–51 (2008) (expressing concerns that the cost of housing LWOP prisoners has and will continue to grow with an increased population and aging).

<sup>110</sup> *See, e.g.*, J. Robert Lilly, *Counterblast: Death Penalty Resistance Revisited in the Post-Trust Era*, 52 HOW. J. CRIM. JUST. 108, 111 (2013) (“states that now give juries the option of using LWOP as a way to avoid sentencing/executing the innocent have seen a dramatic decrease in executions.”).

<sup>111</sup> *See* Nellis, *Tinkering With Life*, *supra* note 28, at 450 (“With few exceptions the weight of the discussion around innocence claims is focused on death sentences, despite the strong probability that some prisoners serving life sentences are also innocent.”); Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES (Oct. 5, 2005), <https://www.nytimes.com/2005/10/05/us/serving-life-with-no-chance-of-redemption.html> (“People on death row are provided with free lawyers to pursue their cases in federal court long after their convictions have been affirmed; lifers are not. The *pro bono* lawyers who work so aggressively to exonerate or spare the lives of death row inmates are not

Indeed, “the great majority of innocent defendants who are convicted of capital murder are neither executed nor exonerated but sentenced to prison for life, and then forgotten.”<sup>112</sup> Third, and most importantly, adopting LWOP is a politically safer way to eliminate the death penalty because endorsing LWOP as an alternative provides politicians and advocates with the cover they need to dismantle the regime of capital punishment.<sup>113</sup> This partly explains why, as one of the interviewees observed:

Plenty of clever, motivated people who are capable of coming up with creative ways of attacking capital punishment either are unwilling to acknowledge that the solution to the old problem itself is problematic by its very nature, or reluctantly accept the expansion of life-long incarceration despite varying degrees of reservations.<sup>114</sup>

In addition to the lack of homogeneity among abolitionists, substantial variation can also be found in abolitionist dynamics across different states. In states that already had LWOP on the books prior to abolition, replacing the death penalty statutes with LWOP was less controversial. In contrast, advocates in states that are attempting to enact or widen the use of LWOP as a political *quid pro quo* of abolition today may face a dilemma. Due to the way the abolition of the death penalty is enmeshed within American politics, they regret that they can do only little to win the battle against capital punishment without unnecessary casualties.

A few informed abolition activists are torn between promoting abolition and LWOP, while others struggled to stay neutral. A respondent believed that her personal belief against LWOP placed her in the minority:

The NCADP (National Coalition to Abolish the Death Penalty) basically accepts LWOP as an alternative because . . . you can never get abolition without it. So, when I served on that Board . . . I kept my mouth shut. But personally, I spoke out. I would say that my organization supports it as an alternative, but I do not. You cannot just think capital punishment or LWOP in isolation. If you look closer, you will find many reasons why capital punishment or LWOP does not make the society healthier or better.<sup>115</sup>

Another advocate from Texas said:

Compromise is very difficult to obtain. I am against the death penalty totally and personally. I would go back to the third option of life with parole for a 20-year period if possible. However, it is very difficult to reach a compromise with others who hold different opinions, especially when opponents are clearly outnumbered by proponents of LWOP. I

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interested in the cases of people merely serving life terms. And appeals courts scrutinize death penalty cases much more closely than others.”)

<sup>112</sup> Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 553 (2005).

<sup>113</sup> This is because, major arguments used by opponents to abolition, such as concerns for public security, retribution and deterrence, could be considerably weakened by the enactment of LWOP to incapacitate prisoners for the rest of their lives.

<sup>114</sup> Telephone interview with an anti-death-penalty advocate from Colorado who had worked for multiple anti-death penalty NGOs and devoted her time to the exoneration of innocent prisoners on the death row and under LWOP (Jan. 20, 2015).

<sup>115</sup> Interview with a leader of a national civil society organization (Dec. 18, 2014).

cannot insist on my position if I hope, simultaneously, to achieve a total moving away from the death penalty. I can agree that some people are too dangerous, but the majority of people in prison for LWOP will not be any threat to anybody. Such is the unfortunate cost of the campaign.<sup>116</sup>

Despite the adoption of a seemingly cheaper and safer alternative, the battle against capital punishment has not been easily or quickly won. When state legislative sessions are in full swing, the death penalty is squarely on the agenda.<sup>117</sup> In states that have yet to repeal the death penalty,<sup>118</sup> abolitionists may have already fought year after year to introduce repeal bills into state senates, offering politically palatable trade-offs.<sup>119</sup> For example, LWOP bills were repeatedly introduced in Kansas to promote abolition.<sup>120</sup> An advocate who was working closely with the legislative coalition to repeal the death penalty explained:

We tried to make sure ... [LWOP] doesn't [become part of the debate]. Because that is the key of the Bill... [t]hat replacing the death penalty with Life Without Parole is probably key to having support from a number of different communities. There are people... who... have experience in law enforcement, there are people who have views about crime and punishment... if our bill does not have a Life without Parole, they will not support it... It is the case that our bill needs to replace capital punishment with LWOP to make sure our proposal to be acceptable to the vast majority of the policy makers.<sup>121</sup>

In many states, underneath the majority's support for repealing the death penalty with LWOP are discounted objections and disagreements. A New Mexico state legislator stated that:

Some potential supporters (of the abolition legislative amendment)—the Republicans—said: you have got to make the switch; you have to make the deal; you can't just get rid of the death penalty; you have to exchange

<sup>116</sup> Interview with an abolition advocate from Tex. (Jan. 28, 2015).

<sup>117</sup> See, e.g., John F. Galliher Et Al., *AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY* (2002) (describing how states mounted efforts to abolish the death penalty and resist proposals of reinstating).

<sup>118</sup> To date, there are 29 states which retain the death penalty in the U.S. as of September 22, 2019. See *States with and without the Death Penalty—2019*, DEATH PENALTY INFORMATION CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Sept. 22, 2019); Summer Meza, *Washington State Rules Death Penalty Unconstitutional*, THE WEEK (Oct. 11, 2018), <http://theweek.com/speedreads/801772/elon-musk-announces-teslaquila>.

<sup>119</sup> For individual state legislative process, see, e.g., Alexander H. Updegrave & Dennis R. Longmire, *Systems Thinking, System Justification, and the Death Penalty: Thirty-Eight Years of Capital Punishment Legislation in Texas*, 3 CORRECTIONS 248–65 (2018); Khalilah Brown-Dean & Ben Jones, *Building Authentic Power: A Study of the Campaign to Repeal Connecticut's Death Penalty*, 5 POL., GROUPS, & IDENTITIES 321–42 (2017).

<sup>120</sup> Tim Carpenter, *Kansas Death Penalty Repeal Bill Surfaces in House Committee*, THE TOPEKA CAPITAL-JOURNAL (Feb. 13, 2017, 6:42 AM), <https://www.cjonline.com/news/local/2017-02-13/kansas-death-penalty-repeal-bill-surfaces-house-committee?start=14>; *Recent Legislative Activity*, DEATH PENALTY INFORMATION CTR. last visited Sept. 22, 2019), <https://deathpenaltyinfo.org/recent-legislative-activity> (“HB2167 would prospectively repeal the death penalty and replace it with life without possibility of parole.”).

<sup>121</sup> Interview with an abolition advocate from Kan. (Feb. 6, 2015).

it for life without parole. People from Amnesty International who were members of the coalition to repeal the death penalty were very unhappy about that. But, I have to say that, it was politically necessary.<sup>122</sup>

In New York, during the public hearings on the death penalty conducted by the Assembly Standing Committees on Codes, Judiciary, and Correction, an experienced criminal defense attorney testified that many of his convicted clients would prefer a death sentence over LWOP.<sup>123</sup> In other words, LWOP may not be the preferred choice by prisoners who are closely and directly impacted by the reform. Yet, it seems that sometimes abolitionists ensure that those voices are silenced so that legislative repeal would be eventless. A campaign leader who was closely involved in Connecticut's move away from the death penalty revealed that:

And within our movement, there are a small minority of people who say neither is acceptable, and they are not gonna accept either one.... But those people are not at the table in the discussions around the people are really passing death penalty legislation. We don't have them at the table because they are not in alignment with our thinking. Our thinking is that in order to get appeal, there is gonna to be the trade-off that accepting life without parole in an alternative to the death penalty.<sup>124</sup>

In Illinois, when a study was commissioned by Governor Ryan after declaring a moratorium on executions in 2000, a minority of commission members voiced their rejection of mandatory LWOP.<sup>125</sup> In Maryland, some experts opposed the majority's proposal of abolition because they believed that it was possible that defendants convicted of LWOP would not be entitled to the unique due process procedural safeguards afforded to capital offenders.<sup>126</sup> An advocate who used to work for the ACLU's capital punishment project and other anti-death penalty advocacy organizations said:

I never gave up on people; I always think that there is a possibility of rehabilitating just about anyone . . . I am in the minority of people even within the abolition movement. But the reality is... that the whole struggle to end executions and capital punishment is a political movement and the politics of the situation is such that if you want to sway the public, you have to give them something that is just as harsh as execution... And that is the way you come up with LWOP.<sup>127</sup>

While the process to swing public attention away from a single focus on the death penalty is relatively easy in some parts of the country, the battle is particularly bitter where states are hard line users of capital punishment. The refusal to enact LWOP in Texas, for many years, did not stem from a critical reflection on the irrationality of

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<sup>122</sup> Interview with a state legislator from N.M. (Jan. 17, 2015).

<sup>123</sup> See JUDICIARY AND CORRECTIONS N.Y. ASSEMBLY STANDING COMMS. ON CODES, THE DEATH PENALTY IN NEW YORK: A REPORT ON FIVE PUBLIC HEARINGS ON THE DEATH PENALTY IN NEW YORK 19 (2005), <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>.

<sup>124</sup> Interview with an abolition campaign leader in Conn. (Dec. 22, 2014).

<sup>125</sup> See GEORGE H. RYAN, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 156 (2002).

<sup>126</sup> See MD. COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY 52–54 (2008).

<sup>127</sup> Interview with a former civil society advocate (Mar. 13, 2015).

getting rid of a small number of death sentences by permitting a wide use of LWOP, but from an assumption that LWOP was too lenient on offenders. When the Texas legislature approved LWOP in 2005 in the Criminal Justice Committee of the Texas Senate, only Rene Guerra, then-Hidalgo County District Attorney, testified in favor of it.<sup>128</sup> The Texas District and County Attorneys Association, along with two prosecutors representing two of Texas's largest urban counties (Tarrant and Harris), testified against it.<sup>129</sup> In the Texas House of Representatives, no prosecutor testified in committee in favor of the bill.<sup>130</sup> Even the Texas Criminal Defense Lawyers Association lobbyist opposed the bill.<sup>131</sup> This was all because it was believed that LWOP was unduly lenient.

It is in this context that the introduction of LWOP statutes has been viewed as a successful step towards abolition. A Texas state senator who said he was “especially proud” of Senate Bill 60, which created the life without parole option for capital defendants, explained:

The idea of offering life without parole to those convicted of a capital crime took several years, over multiple sessions, to take hold with my fellow legislators... I understood my colleagues' initial hesitation to support the measure, but I was very pleased once my fellow legislators were able to overcome this hesitation and pass the necessary legislation that reinforced the respect for the dignity of human life.<sup>132</sup>

In the unique political environment in Texas, the well-intended, courageous efforts made by politicians, judges, and progressive lawyers, led to two forms of death sentences: the quicker death of a capital execution and the slower death of LWOP. While the number of executions has dropped slightly, there has been a constant increase in the judicial use of LWOP. Many of these LWOP defendants are not entitled to the resources and enhanced procedural safeguards that would otherwise be available for them if they were tried under a capital proceeding.<sup>133</sup>

Abolition is no longer part of the broad strategy to overhaul the broken American criminal justice system.<sup>134</sup> It has ceased to be a criminal justice issue and, instead, has become part of the political process. As the fight against capital punishment ends up crashing against the stubborn reality in some states, the support for, or at least the tolerance of, the rise of LWOP is essentially a form of political pragmatism. LWOP has become the normalized, default alternative to the death penalty across the country. This is not because LWOP is more humane or effective but because it is a perfect compromise.

Compared with the death penalty, the heart of the issue of LWOP is its ability to sway and resonate with public sentiments in the new era of political discourse surrounding capital punishment. Its rise as a symbolic power as well as a functioning penal tool is the outcome of a fusion of two things: a tough-on-crime mindset<sup>135</sup> and

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<sup>128</sup> Email from a leading Texas death penalty attorney, to author (Jan. 29, 2015) (on file with author).

<sup>129</sup> *Id.*

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

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

<sup>132</sup> Email with a Texas state senator (Jan. 21, 2015) (on file with author).

<sup>133</sup> Interview with a capital litigator (Feb. 13, 2015).

<sup>134</sup> See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>135</sup> See *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?*, *supra* note 16, at 5 (“[C]onservative support for LWOP seems consistent with a tough-on-crime politics”).

the liberal rejection of the death penalty.<sup>136</sup> The political—rather than penal—logic that underpins the expansion and popularity of LWOP is that abolitionists need LWOP as rhetoric while tough-on-crime campaigners need it as a substantial punishment. LWOP allows juries, prosecutors, and elected officials to make political and symbolic statements about crime, and LWOP’s enactment and promotion provide a political theater for consumption by a range of actors.

An immediate concern flowing from this analysis is the possible difficulty of battling against LWOP in the future. Given the high-profile, positive publicity surrounding LWOP,<sup>137</sup> one may be concerned that, after the abolition of the death penalty, no concentrated attention is paid to this form of punishment and no energy can be harnessed by opponents to challenge its abuse. American exceptionalism<sup>138</sup> is not only reflected by its use of capital punishment, both functionally and symbolically, but also by its use of the alternative penal sanction to the death penalty.

### III. MAPPING THE LANDSCAPE OF LIFE AND DEATH: THE GEOGRAPHY OF CAPITAL PUNISHMENT AND LWOP

The uneven use of the death penalty across states and counties has been well documented by existing literature.<sup>139</sup> A capital defendant has a substantially greater chance of receiving the death sentence in Texas or other southern and border states than

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<sup>136</sup> See Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES (Oct. 2, 2005), <https://www.nytimes.com/2005/10/02/us/to-more-inmates-life-term-means-dying-behind-bars.html> (“The phenomenon [the growth of LWOP] is in some ways an artifact of the death penalty. Opponents of capital punishment have promoted life sentences as an alternative to execution. And as the nation’s enthusiasm for the death penalty wanes amid restrictive Supreme Court rulings and a spate of death row exonerations, more states are turning to life sentences.”).

<sup>137</sup> See, e.g., *The Misuse of Life Without Parole*, *supra* note 103 (“In capital cases, life without parole is a sound option. Public support for the death penalty, a barbarity that should be abolished in this country, plummets when life without parole is an alternative.”); Editorial, *Death Penalty Debate Finally Produces Useful Result*, USA TODAY (June 22, 2005) ([Life Without Parole] is “a fitting replacement, assuring severe punishment for the worst of crimes but with a safety valve to protect those falsely accused or wrongly sentenced”).

<sup>138</sup> “American Exceptionalism” refers to the phenomenon that some states in America retain the use of the death penalty while almost all advanced industrial societies have abolished it. See David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC’Y 347 (2005) (rejecting a cultural explanation of American exceptionalism and stating the causes for the retention is the peculiarity of American politics and institutions); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 130 (2002) (enumerating ten theories about the roots of American exceptionalism regarding capital punishment). For cultural perspectives on the persistence of capital punishment in the United States, see generally JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003); see generally FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003).

<sup>139</sup> GARLAND, *PECULIAR INSTITUTION*, *supra* note 20; Andrew Ditchfield, Note, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801, 801–02 (2007); Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 VAND. L. REV. 307, 308–09 (2010); Keith D. Harries, *Regional Variations in Homicide, Capital Punishment, and Perceived Crime Severity in the United States*, 70 GEOGRAFISKA ANNALER, SERIES B, HUM. GEOGRAPHY NO. 3 325, 328 (1988); William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1507 (2002); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006).

in other parts of the country.<sup>140</sup> A defendant is also more likely to be sentenced to death in one of the “sixty-six, or 2%, of the nation’s 3,143 counties, parishes, and boroughs” that account for more than fifty percent of all the death sentences imposed nationwide.<sup>141</sup>

Less is known about the geographical pattern and historical variation in the use of LWOP. However, just as capital punishment has its distinctive geography, so too does LWOP. The landscape of LWOP across the United States is extremely diverse. Regional variations in the statutory provisions and the judicial use of LWOP epitomize the attitudes of local penal authorities in utilizing extremely coercive penal power. While broad patterns of variations in LWOP across the country have been recognized by existing literature,<sup>142</sup> they are not well understood or studied. The absence of attention paid to the patterns in the use of LWOP and the factors associated with these varying patterns may be partly due to the constraints of available criminal statistics.

As of 2015, data collected from state-level Departments of Corrections suggest that the combined LWOP population in five states—Florida, Pennsylvania, Louisiana, California, and Michigan—accounts for over half of all LWOP sentences nationwide.<sup>143</sup> In fact, if federal correctional facilities were to be counted as state-level jurisdictions, those ranking within the top ten—including Florida, Pennsylvania, California, Louisiana, Federal, Michigan, Illinois, Alabama, Mississippi, and North Carolina—account for 72.3% of the national total.<sup>144</sup> What is still unknown is the county-level distribution of LWOP sentences.

More empirical investigation is needed for the status quo as well as historical changes of judicial use of LWOP over the past decades. As part of my empirical investigation, a state-by-state survey on the imposition of LWOP by state-level judicial authorities, juxtaposed with their varying approaches to the death penalty, provides the following interesting insights:

First, states that rank on the top of the execution list, such as Texas and Oklahoma, are not on the list of heaviest users of LWOP thus far.<sup>145</sup> Yet recent statistics demonstrate that both states have the sharpest increase in LWOP sentences and are making efforts to catch up with other heavy LWOP users.

Second, it is particularly intriguing that states that have long abolished the death penalty such as Michigan—the pioneer of abolition in the entire Western world<sup>146</sup>—and states that have maintained an active use of the death penalty—such as Florida are among those that incarcerate the largest number of prisoners for the rest of their natural lives.<sup>147</sup>

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<sup>140</sup> See James R. Acker, *The Death Penalty: An American History*, 6 CONTEMP. JUST. REV. 169, 178 (2003) (“Executions overwhelmingly remained a southern phenomenon.”); James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 282, 287 (1998); Steven F. Messner et al., *Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment*, 40 LAW & SOC’Y REV. 559, 561 (2006).

<sup>141</sup> James S. Liebman & Peter Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 264–65 (2011).

<sup>142</sup> See generally Nellis, *Life Goes On*, *supra* note 29.

<sup>143</sup> See *infra* Table 3.

<sup>144</sup> *Id.*

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

<sup>146</sup> See Eugene G. Wanger, *Michigan and Capital Punishment*, MICH. B.J. 38, 38 (2002), <https://www.michbar.org/file/barjournal/article/documents/pdf4article487.pdf> (“Michigan . . . was the first government in the English-speaking world to abolish capital punishment for murder and lesser crimes.”).

<sup>147</sup> Death penalty concentrates in a few jurisdictions including Florida. See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 230 (2012).

Third, penal regimes differ from state to state where LWOP was introduced into law to replace the death penalty. For instance, the two latecomers to the LWOP regime, New Mexico and Texas, have vastly different patterns in their LWOP practices.<sup>148</sup>

Lastly, while the wide use of LWOP in some states that have retained the death penalty accompanied a drop in the death sentences—such as Texas—the increase of LWOP use can coexist with a steady stream of death sentences and executions in other states, such as Alabama.<sup>149</sup>

In furtherance of these general observations about geographical and temporal patterns in the use of LWOP, Part III catalogues various state approaches in using capital punishment and LWOP to punish what are deemed as the most serious crimes. The historical trends and patterns in the use of the death penalty and LWOP can be placed into at least four categories, each of which will be discussed in turn, with the exception of the last group: (1) In some states, LWOP was enacted strictly to replace the death penalty, such as New Mexico and West Virginia. In other words, the sentencing option of LWOP was created at the same time as the abolition of the death penalty in these states. (2) In the second category of states, LWOP operates alongside the death penalty as a sentencing alternative for the most heinous criminal offenses. This state group comprises the largest in number and weight, and it includes, among others, Texas, Georgia, North Carolina and Florida. (3) In another category, LWOP was introduced into law and operated alongside the death penalty for a while before the complete abolition of capital punishment. In other words, at the time of the repeal of the death penalty, LWOP was already a sentencing alternative; this group includes states such as New York and New Jersey. (4) Finally, in the fourth category of states, LWOP was introduced into law long after the complete abolition of the death penalty.<sup>150</sup> In this cohort of states, the abolitionist movement and the popularization of LWOP has a feeble connection at best. The last category is omitted from the discussion because of its irrelevance to understanding the relation between LWOP and the death penalty.

#### A. LWOP as a Substitute for the Death Penalty

Only two states, West Virginia and West Virginia, enacted LWOP statutes for previously death-eligible offenses simultaneously with the abolition of the death penalty, in 1965<sup>151</sup> and 2009,<sup>152</sup> respectively. These two states present perhaps the most direct evidence of the “substitute” relationship between the death penalty and LWOP; namely, the argument that abolitionists promote the use of LWOP solely to get rid of

<sup>148</sup> In general, New Mexico rarely uses LWOP while Texas has increasingly resorted to LWOP since it was enacted in 2005. *See infra* Figure 5.

<sup>149</sup> *See generally infra* Table 3 for LWOP patterns; for the patterns of death penalty nationwide, *see* Smith, *supra* note 147, at 227–289; *see also* Liebman & Clarke, *supra* note 141, at 264–65.

<sup>150</sup> States in this group include Michigan, Minnesota, Iowa, North Dakota, Vermont, Wisconsin, and Hawaii. It is worthwhile to note that Hawaii does not have LWOP in the strict sense as all LWOP sentences are eligible for commutation to life with parole at the end of 20 years.

<sup>151</sup> In 2009, New Mexico repealed the death penalty and replaced it with life imprisonment without the possibility of parole for the most serious offenders. *See* N.M. Stat. Ann. § 31-20A-2 (2009) (“If a jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist, as enumerated in Section 31-20A-5 NMSA 1978, the defendant shall be sentenced to life imprisonment without possibility of release or parole.”).

<sup>152</sup> West Virginia, one of the states which abolished the death penalty before *Furman*, replaced the most severe punishment with life without the possibility of parole. *See* W. VA. Code Ann. § 61-2-2 (West 2019) (“Murder of the first degree shall be punished by confinement in the penitentiary for life.”); Stan Bumgardner & Christine Kreiser, *Thy Brother's Blood: Capital Punishment in West Virginia*, IX (4) & X (1) W. VA. HIST. SOC'Y Q. (Mar. 1996), <http://www.wvculture.org/history/wvhs/wvhs941.html>.

capital punishment via legislative repeal. Thus, LWOP rose to the status of the new “death penalty” in these states. New Mexico, which had a narrow capital punishment statute before 2009,<sup>153</sup> provides a recent example of state legislative change. Pursuant to the Capital Felony Sentencing Act, death was a possible sentencing option for first-degree murders committed under at least one of the seven “aggravating circumstances,”<sup>154</sup> including scenarios of murdering a law enforcement officer, kidnapping, criminal sexual contact with a minor, criminal sexual penetration, escape while incarcerated, murdering an inmate, murdering a guard, hire to kill, and murdering a witness.<sup>155</sup> When New Mexico repealed the death penalty prospectively, LWOP became the most severe punishment for the once-capital murder. Governor Bill Richardson, who signed the repeal of the death penalty, remarked that, “I want to make clear that this bill I’m signing actually makes New Mexico safer . . . [w]e now have the option of sentencing the worst criminals to life in prison without the possibility of parole. They will never get out of prison.”<sup>156</sup> Similarly, in the post-abolition era, LWOP is imposed when the jury finds the defendant guilty of first-degree murder with one or more aggravating circumstances.<sup>157</sup>

New Mexico remains a light user of the most extreme punishments before and after the repeal of capital punishment. It has a narrow range of capital offenses prior to the abolition.<sup>158</sup> It has maintained a relatively low LWOP volume in the post-2009 era.<sup>159</sup> A subsequent LWOP-related provision was enacted in 1997 for the commission of two violent sex offenses against minors under the age of thirteen.<sup>160</sup> The toughening-up of penal sanctions for sexual offenses against children was a separate legislative process from the repeal of the death penalty. A tentative conclusion can be drawn from this observation: In states where LWOP did not expand to include other lesser criminal offenses at, during, and after the abolition, LWOP does not, in a strict sense, function solely as the replacement of capital punishment.

### *B. LWOP Operates Alongside the Death Penalty*

Most states fall into this category, despite the fact that their approaches to using the death penalty and LWOP vary substantially. I have gathered trend data pertaining to the use of capital punishment and LWOP in twenty-one states that fall within this group.<sup>161</sup> For each of these “dual-mode” states that adopted both LWOP and capital punishment, available statistics represent at least one decade of historical variation of both sets of sentences imposed by courts. These states can be classified into smaller subgroups according to different standards.

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<sup>153</sup> Section 2. Section 31-18-23 NMSA 1978 (being Laws 1994, Chapter 24, Section 2, as amended). See *New Mexico Abolishes Death Penalty!*, AMNESTY INT’L, <https://www.amnestyusa.org/new-mexico-abolishes-death-penalty/> (last visited Sept. 22, 2019) (“New Mexico rarely used its death penalty (only 1 execution since 1960)”).

<sup>154</sup> N.M. Stat. Ann. § 31-20A-5 (West 2019).

<sup>155</sup> Marcia J. Wilson, *The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis*, 38 N.M. L. REV. 255, 261–62 (2008).

<sup>156</sup> *Governor Bill Richardson Signs Repeal of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/governor-bill-richardson-signs-repeal-death-penalty> (last visited Sept. 22, 2019).

<sup>157</sup> These circumstances are enumerated in N.M. Stat. Ann. § 31-20A-5. See also N.M. Stat. Ann. § 31-20A-2.

<sup>158</sup> See *supra* note 148.

<sup>159</sup> It is worthwhile to note that LWOP did exist before the legislative repeal of the death penalty.

<sup>160</sup> N.M. Stat. Ann. § 31-18-25(B)(West 2015).

<sup>161</sup> See *infra* Table 1.

One way of categorization is to sort these dual-mode states by the volume of LWOP sentences imposed.<sup>162</sup> Taking the subgroup represented by Figure 1.2, for instance, similar patterns of fluctuation can be identified among states such as New York, Delaware, and Arizona. However, it is difficult to identify common factors underlying the trends of LWOP in these states. New York is commonly seen as a liberal-leaning state, Arizona a red state, and Delaware a swing state prior to 2000.<sup>163</sup> The geographical size and population of the three states vary significantly. Crime rates, especially homicide rates and violent crime rates, declined over the past two decades in New York and Arizona but increased in Delaware.<sup>164</sup>

This way of categorization does not take into account the variations in the use of capital punishment in these dual-mode states. Alternatively, based on the interrelation between LWOP and capital punishment sentencing trends, states can be classified into three sub-categories to reflect the broader picture of sentencing on life or death matters: (i) states with an inverse proportional correlation between LWOP and capital sentences; (ii) states that have a proportional correlation between LWOP and capital sentencing trends; and (iii) states with no statistically significant correlation between LWOP and capital sentencing trends. The next section describes the different sub-categories and provides examples of states that fall within each.

### 1. States Where an Inverse Correlation Between LWOP and Capital Punishment Sentences Exists

The R-squared coefficient of determination was utilized to test the correlation between the death penalty and LWOP.<sup>165</sup> North Carolina represents the highest inverse correlation between LWOP and capital sentences within this category—the decline in capital sentences appears to coincide with an increase in LWOP sentences.<sup>166</sup> In North Carolina, capital punishment applies only to first-degree murder with the finding of at least one of eleven statutory aggravating circumstances.<sup>167</sup> The scope of LWOP statutes, in a similar vein, includes only first-degree murder and causing the death of an unborn child.<sup>168</sup> The exact same ambit of legislative provisions for LWOP and capital punishment may explain that LWOP functions as an alternative to capital punishment, rather than a severe penal sanction for other types of criminal behaviors.

It is helpful to note, however, that the inverse correlation between the death penalty and LWOP in North Carolina is historically contingent. Roughly divided into two stages,<sup>169</sup> it appears that the two-decade statistics do not represent a consistent correlation. During the first decade (1995-2004), the increase in LWOP sentences

<sup>162</sup> See *infra* Figures 1.1-1.4.

<sup>163</sup> See Toni Monkovic, *50 Years of Electoral College Maps: How the U.S. Turned Red and Blue*, N.Y. TIMES (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/upshot/50-years-of-electoral-college-maps-how-the-us-turned-red-and-blue.html>. My fieldwork was conducted prior to 2016, but the political orientations of the three states stayed the same in the 2008, 2012 and 2016 presidential elections. For the results of the last election, see Presidential Election Results: Donald J. Trump Wins, N.Y. TIMES (Aug. 9, 2017 9:00 AM), <https://www.nytimes.com/elections/results/president?module=inline>.

<sup>164</sup> See FBI, Uniform Crime Reporting (UCR) Program (1995-2015).

<sup>165</sup> The R-Square coefficient tests how well the independent variable predicts the proportion of the variance in the dependent variable. It measures how well the data fits the regression model.

<sup>166</sup> See *infra* Figure 2.

<sup>167</sup> N.C. Gen. Stat. Ann. §14-17 (West 2017); N.C. Gen. Stat. Ann. § 15A-2000 (West 2018).

<sup>168</sup> §14-17; N.C. Gen. Stat. Ann. § 14-23.2 (West 2011).

<sup>169</sup> See *infra* Figure 3.

inversely tracked the decrease in capital punishment sentences.<sup>170</sup> In the second decade (2004-2014), when both trends gradually stabilized, the correlation between the two became statistically insignificant.<sup>171</sup> A possible explanation for the waning of the correlation over time may be that there is a limited number of capital murders for which LWOP may expand to substitute, given the steadily declining homicide rates in North Carolina during the past two decades.<sup>172</sup> The function of LWOP as a sentencing alternative to the death penalty thus gradually diminishes.

Texas is another example of a group (i) state. Texas is essential to the discussion of capital punishment because of the sheer volume of death sentences and executions taking place within the state, both historically and currently. The various legislative changes in recent years explained below make it especially interesting to explore the state's pattern of using the ultimate punishment. After LWOP was introduced into law in 2005, Texas adopted a two-dimensional, triple-tiered approach to punishing capital felonies.<sup>173</sup> The use of LWOP is allowed both as a sentencing option alongside the death penalty—when the death sentence is sought by the prosecutor—and alongside capital life for juveniles when capital punishment is not sought.<sup>174</sup> The passage of LWOP statutes in Texas has been widely cited as a successful example of abolitionists' endeavor to decrease the application of capital punishment.<sup>175</sup> An inverse correlation between the sentencing trends of LWOP and capital sentences has generally been supported by available data.<sup>176</sup> However, there are three reasons for questioning the claim that an increased use of LWOP has led to a decline in capital sentences.

First, a closer look at the double-faced character of LWOP shows that when LWOP was enacted in Texas in 2005, it was intended mainly to replace “capital life,” a life imprisonment under which prisoners are ineligible for parole for a minimum of

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<sup>170</sup> *Id.*

<sup>171</sup> Here, the R-squared is small (0.0131). The fraction by which the standard deviation of the errors is less than the standard deviation of the dependent variable, as shown in the table above. So, for example, if your model has an R-squared of 10%, then its errors are only about 5% smaller on average than those of a constant-only model, which merely predicts that everything will equal the mean.

<sup>172</sup> See Federal Bureau of Investigation, *Estimated Crime in North Carolina*, UNIFORM CRIME REPORTING STATS., <https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (as prepared by the National Archive of Criminal Justice Data) (generated based on the selection of “North Carolina” as the state, “Violent crime rates” and “Property crime rates” as the variables, and 1995 to 2014 as years for inclusion). For instance, violent crime rates declined from 646.4 in 1995 to 329.5 in 2014; property crime rates from 4,993.1 to 2,873.1 during this period.

<sup>173</sup> Texas Senate Bill 60 proposed by Senator Ellis Lucio introduces LWOP as an option for capital murder so that jurors may choose between the death penalty and LWOP. See Tex. S.B. 60, 79th Leg., R.S. (2005). See also Capital Felony, Tex. Penal Code Ann. § 12.31(a) (West 2013) (“An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for: 1) life, if the individual committed the offense when younger than 18 years of age; or 2) life without parole, if the individual committed the offense when 18 years of age or older.”).

<sup>174</sup> See, e.g., § 12.31.

<sup>175</sup> Hilary Hylton, *Is Texas Changing Its Mind About the Death Penalty?* TIME (Dec 23, 2008), <http://content.time.com/time/nation/article/0,8599,1868145,00.html>; Eric Nicholson, *Texas Falls Out of Love with the Death Penalty, Embraces Life Without Parole*, DALLAS OBSERVER (Dec. 17, 2015), <https://www.dallasobserver.com/news/texas-falls-out-of-love-with-the-death-penalty-embraces-life-without-parole-7860819>; Jolie McCullough, *In an Unusual Year, Texas Didn't Lead the Nation in Executions*, THE TEX. TRIB. (Dec. 15, 2016), <https://www.texastribune.org/2016/12/15/unusual-year-death-penalty-texas-didnt-have-most-e/>.

<sup>176</sup> See *infra* Figure 4.

forty years.<sup>177</sup> Prior to 2005, an individual convicted of a capital felony<sup>178</sup> was punished by death or “capital life.”<sup>179</sup> The 2005 LWOP bill essentially made an adult capital felony punishable either by the death penalty or LWOP.<sup>180</sup> From 2005 to 2009, LWOP served as an extra sentencing option in cases where the state sought the death penalty. This is because, compared with a life sentence with the possibility of parole after forty years, LWOP provides the jurors with greater incentives to avoid imposing death.

From 2009 to 2013, capital life became a sentencing option for cases in which the individual’s case was transferred to the district court.<sup>181</sup> In 2013, in response to *Miller*,<sup>182</sup> Section 12.31 was amended once again to ban the use of LWOP for juveniles, restoring capital life as a sentencing option.<sup>183</sup> In summary, LWOP’s replacement function in Texas applied both upward and downward: the death penalty and reducible life imprisonment. The complex legislative history makes it difficult to isolate patterns and impacts with respect to the use of LWOP sentences. Yet it seems that LWOP, in addition to restraining the use of the death penalty, might have broadened the net of severe punishment to cover offenses which were previously parole-eligible. Essentially, it is unsafe to assume that LWOP is the cause of the decline in executions.

Second, the broad legislative context within which LWOP was enacted also provides useful clues about its complex implications. Indeed, the enactment of LWOP statutes in Texas does not necessarily represent a one-sided success for abolitionists.<sup>184</sup> Prior to 2005, conservative lawmakers, prosecutors, and pro-death penalty victim families, with their deep devotion to the death penalty,<sup>185</sup> had resisted incorporating LWOP into law for many years, fearing that enactment would make it harder for them to seek the death sentence.<sup>186</sup> This demonstrates why the LWOP bill was hailed as progress for abolitionists in Texas.<sup>187</sup> Meanwhile, legislative changes also reflect tough-on-crime efforts to permanently incarcerate offenders, including juveniles. With the 2005 Supreme Court ruling in *Roper v. Simmons*<sup>188</sup> outlawing the use of the death penalty for juvenile offenders, failure to pass the LWOP statutes would mean that juvenile murderers could only be sentenced to capital life with the possibility of parole

<sup>177</sup> § 12.31(a) (limited on constitutional grounds by *Collins v. State*, No. 01-07-00065-CR, 2008 WL 340364, at \*3 (Tex. App. 2008)).

<sup>178</sup> For the classification of felonies, see Tex. Penal Code Ann. § 12.04(a) (West 1994) (“Felonies are classified according to the relative seriousness of the offense into five categories: (1) capital felonies; (2) felonies of the first degree; (3) felonies of the second degree; (4) felonies of the third degree; and (5) state jail felonies.”).

<sup>179</sup> See Tex. S.B. 60, 79th Leg., R.S. (2005) (Committee Report by Ellis Lucio et al., Texas Senators), which proposed to amend Section 12.31 of the Penal Code, to “include imprisonment for life without parole, in addition to imprisonment for life or the death penalty, as a permitted method of punishment for an individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty.”

<sup>180</sup> § 12.31(a) Acts 2005, 79th Leg., Ch. 787 (S.B. 60), Sec. 1, (eff. September 1, 2005).

<sup>181</sup> TEX. FAM. CODE § 54.02 (West 2013).

<sup>182</sup> *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (ruling that the Eighth Amendment’s prohibition against cruel and unusual punishment forbids the mandatory sentencing of life in prison without the possibility of parole for juvenile homicide offenders).

<sup>183</sup> See the textual changes reflected by Texas Senate Bill No. 2 to § 12.31(a)(2), available at <https://capitol.texas.gov/tlodocs/832/billtext/html/SB00002F.HTM>. Tex. S.B. 2, 83rd Leg., 2d Spec. Sess. (2013) (enacted).

<sup>184</sup> See Note, *A Matter of Life and Death*, *supra* note 16, at 1843.

<sup>185</sup> See Nellis, *Tinkering with Life*, *supra* note 29, at 446.

<sup>186</sup> See Steiker & Steiker, *The Death Penalty and Mass Incarceration*, *supra* note 16, at 197.

<sup>187</sup> See *supra* note 175.

<sup>188</sup> 543 U.S. 551, 1183, 1198 (2005) (holding that standards of decency have evolved so that executing minors is “cruel and unusual punishment” prohibited by the Eighth Amendment).

after forty years. As a result, opponents of LWOP changed their standpoint on the issue because LWOP toughens rather than relaxes penal sanctions for juvenile murderers.<sup>189</sup>

As jurors are now offered two options regarding prosecutorial decisions to seek the death penalty, the increasing application of LWOP may have dampened Texas's zeal for the death penalty. However, a closer examination of the available statistics on LWOP and death sentences in Texas since 2002 reveals that the death sentences in Texas started a downward trend even before the introduction of LWOP into legislation.<sup>190</sup> In the post-2005 era, two distinct trends in the death penalty and LWOP sentences have emerged. Capital sentences increased, then slightly dropped, and then remained constant for a few years.<sup>191</sup> The sharpest decline occurred only between 2002 and 2006, from an annual number of thirty-seven to eleven. From 2006 to 2014, the number of capital sentences remained relatively stable, ranging between eight and fourteen throughout the nine years, while annual LWOP sentences increased exponentially from three in 2006 to a high of 101 in 2012. Thus, even if one assumes that the decline in the use of the death penalty may have contributed to the proliferation of LWOP, it is premature to conclude such a contribution is conclusive or even significant.

Two possible inferences can be drawn from the scenario. First, the wishful belief in a strong correlation between capital punishment and LWOP sentences cannot be accepted uncritically. Although LWOP supposedly functions as an alternative to the death penalty, it seems to take on a life of its own once enacted and implemented. LWOP punishes criminal offenses of a lesser degree and thus is influenced by factors not directly related to the shift in the use of capital punishment. Second, without the sharp increase in the use of LWOP, capital punishment over the past decade would have increased more dramatically. Thus, LWOP may function as a latent inhibitor of the state's use of capital punishment, whose importance is hidden from statistical patterns. This hypothesis, of course, remains an open question and is in need of further investigation.

A superficial reading of the LWOP and capital punishment figures reveals that, during the past decade, the LWOP population increased from zero to 724 in Texas,<sup>192</sup> while the total decline of capital sentences was less pronounced. The 2014 capital sentences figure is the same as the 2006 annual death sentence: eleven.<sup>193</sup> While it seems safe to conclude that the availability of LWOP as a sentencing alternative can only be partially attributed to abolitionist efforts, the role of LWOP in reducing the use of capital punishment in Texas remains unclear. At any rate, claiming that the 724 LWOP sentences would otherwise all result in death sentences may be far-fetched. The expansion of the use of LWOP appears to affect the less-serious criminals, rather than

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<sup>189</sup> Their attitudes towards LWOP might have changed again in 2012 as *Miller* precluded the possibility of imposing LWOP in juvenile cases. *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (“By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment.”); see also Steiker & Steiker, *The Death Penalty and Mass Incarceration*, *supra* note 16, at 197.

<sup>190</sup> See *infra* Figure 5.

<sup>191</sup> The number of death sentences again dropped sharply from eleven in 2014 to two in 2015. As I do not have the number of LWOPs for the whole year of 2015, I will not focus my discussion on this most recent change. See *Death Sentences in the United States From 1977 By State and By Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited June 8, 2016).

<sup>192</sup> Statistics obtained from Texas Department of Criminal Justice, on hand as of February 28, 2015.

<sup>193</sup> Statistics obtained from Texas Department of Criminal Justice, as of March 23, 2015.

only the criminals who would be subjected to the death penalty. In other words, LWOP extends both upward in the penal hierarchy to replace the death penalty and downward to sweep up offenders previously subjected to lesser punishments, such as life imprisonment with possibility of parole.

## 2. No Correlation Between LWOP and Capital Punishment Sentencing Trends

Florida serves as a good example of group (ii) states, for which a tenuous correlation between the trends concerning capital punishment and LWOP is shown. Florida is an important state jurisdiction for a few reasons, one of which stems from its practical significance. If Texas is the leader of capital punishment, Florida is no doubt the champion of LWOP. As of March 2015, correction facilities statewide housed 8,418 LWOP prisoners, the cumulative result of over two decades of sentencing practices.<sup>194</sup> This aggregated number, divided by twenty-one years, expresses a rate of approximately 401 LWOP sentences per year, or more than one sentence per day. In contrast, Minnesota, a state that also introduced LWOP in the mid-1990s, had a LWOP population of 121 in 2015 and a rate of 5.5 LWOP sentences per year.<sup>195</sup> Florida's annual LWOP growth rate is seventy-three times that of Minnesota. On average, the annual aggregated LWOP sentences in Florida are twenty-five times that of the death penalty figures.<sup>196</sup>

The legislative net-widening effect of LWOP statutes is most prevalent in Florida. Pre-1995 Florida penal statutes provided that a capital felony was punishable by a mandatory sentence of life with the possibility of parole after twenty-five years.<sup>197</sup> In 1995, the Florida legislature eliminated parole eligibility for first-degree murder.<sup>198</sup> Since then, the only two possible penalties for first-degree murder are death and LWOP. Parole was abolished for all capital felonies in 1995 and for any sentences imposed under the Criminal Punishment Code in 1997.<sup>199</sup> The fact that a sentence of LWOP today is provided for offenders convicted of as many as over fifty different offenses<sup>200</sup>

<sup>194</sup> Data collected by the author from Florida Department of Corrections, reflecting Florida's LWOP prison population as of February 2015.

<sup>195</sup> Data obtained by the author from Minnesota Department of Corrections, reflecting Minnesota's LWOP prison population as of January 2015.

<sup>196</sup> Nine death sentences were meted out in Florida in 2015. *See Death Sentences in the United States From 1977*, *supra* note 191.

<sup>197</sup> Fla. Stat. Ann. § 775.082(1) (West 2019).

<sup>198</sup> Section 775.082(1) of Florida Statutes was amended so that defendants convicted of a capital felony are punished either by death or LWOP. *See* Ch. 95-294, § 4, Laws of Fla.; *Robinson v. State*, 955 So. 2d 1230 (Fla. Dist. Ct. App. 2007)

<sup>199</sup> *See* *Horsley v. State*, 160 So. 3d 393, 407 (Fla. 2015).

<sup>200</sup> *See, e.g.*, Fla. Stat. Ann. §§ 775.0823 (West 2017), 782.04 (West 2018), 782.051(1) (West 2017) (various degrees of murder and attempted murder); Fla. Stat. Ann. §§ 775.0823(8) (West 2017), 787.01 (West 2014), 787.02 (West 2015) (kidnapping and false imprisonment); Fla. Stat. Ann. § 775.084 (West 2019) (habitual felony offender); Fla. Stat. Ann. § 775.087 (West 2016) (various offenses for possessing or discharging a firearm or destructive device); Fla. Stat. Ann. § 775.0875(2) (West 2002) (taking an officer's firearm during first degree felony); Fla. Stat. Ann. § 775.31(1)(e) (West 2017) (facilitating terrorism); Fla. Stat. Ann. § 790.16(1) (West 2018) (discharging machine gun in public with intent to do harm); Fla. Stat. Ann. § 790.161 (West 2018) (destructive device causing death); Fla. Stat. Ann. § 790.166(2) (West 2019) (making available or using weapon of mass destruction); Fla. Stat. Ann. §§ 794.011 (West 2017) & 794.023 (West 2002) (various offenses of sexual battery); Fla. Stat. Ann. § 810.02(2) (West 2016) (armed burglary); Fla. Stat. Ann. § 812.13(2)(a) (West 2013) (robbery with dangerous weapon); Fla. Stat. Ann. § 812.133(2)(a) (West 2013) (carjacking with deadly weapon); Fla. Stat. Ann. § 843.167(3)(e) (West 2001) (interception of police communication to aid escape); Fla. Stat. Ann. § 874.04(2)(c) (West 2008) (criminal street gang activity); Fla. Stat. Ann. §

in Florida seems to be part of a state legislative history that “repeatedly, arguably unwisely, eschewed the alternative of parole.”<sup>201</sup>

In contrast, capital punishment in Florida applies to a much narrower scope of offenses.<sup>202</sup> Rather than being directly linked to the progress towards abolition of the death penalty, the enactment and proliferation of LWOP in Florida has been closely entwined with the state legislature’s efforts to curtail and eliminate the institution of parole.<sup>203</sup> LWOP, at least in part, is the outcome of parole abolition, rather than the enactment of a penal alternative to the death penalty. LWOP operates within the domain of life imprisonment and broadens over time to include criminal offenses that had not been previously subject to capital punishment.<sup>204</sup> LWOP was *not* tasked to extend upward to replace capital punishment for the most serious offenses. This observation has been supported by the trend data of LWOP and capital punishment,<sup>205</sup> which does not demonstrate a significant statistical correlation between the historical variation of LWOP and capital punishment.

### 3. A Proportional Correlation Between LWOP and Death Sentences

In the last dual-mode state group, proportional changes between LWOP and capital sentences are present. Two states fall within this category: Arkansas and Pennsylvania. Recent sentencing data trends for both states demonstrate a coincident reduction in the use of LWOP and capital punishment.<sup>206</sup> Despite the similar trends, the scale on which LWOP is used in these two states differs. In Pennsylvania, which houses the second largest parole-ineligible lifer population,<sup>207</sup> court-imposed LWOP sentences are seventeen times more common than capital sentences on average.<sup>208</sup> The annual volume of LWOP sentences fluctuates between 112 and 194.<sup>209</sup> In contrast, the LWOP to death penalty sentencing ratio in Arkansas is 8.76, with the annual number of LWOP sentences trending between eight and thirty-nine.<sup>210</sup> The difference may reflect, among other things, legislative variation between the two states, as LWOP is a penal sanction for a wide range of criminal offenses in Pennsylvania<sup>211</sup> but only for treason or capital murder in Arkansas.<sup>212</sup>

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876.38 (West 2001) (intentional interference with defense or prosecution of war); Fla. Stat. Ann. § 893.135 (West 2018) (various offenses for trafficking, importing, or manufacturing illegal drugs); Fla. Stat. Ann. § 921.142 (West 2017) (capital drug trafficking).

<sup>201</sup> *Washington v. State*, 103 So. 3d 917, 921 (Fla. Dist. Ct. App. 2012).

<sup>202</sup> Fla. Stat. Ann. §§ 782.04 (West 2018) & 782.09 (West 2014) (first-degree murder); § 794.011 (capital sexual battery); § 790.161 (destructive device causing death); § 790.166 (making or using a weapon of mass destruction); § 921.142 (capital drug trafficking).

<sup>203</sup> See Christopher Seeds, *Disaggregating LWOP: Life Without Parole, Capital Punishment, and Mass Incarceration in Florida, 1972–1995*, 52 LAW & SOC’Y REV. 172, 175 (2018).

<sup>204</sup> See *id.* at 192–96. These new offenses include, for example, drug offenses, habitual offenses and even aggravated carjacking and home invasion.

<sup>205</sup> See *infra* Figure 6.

<sup>206</sup> See Appendix: Table 1. Correlation Between LWOP and Capital Punishment Trends in Twenty-One Dual-mode States.

<sup>207</sup> Pennsylvania’s LWOP population is second only to Florida and the federal corrections facilities; its LWOP population in 2014 was 5,321. Data obtained from Pennsylvania Department of Corrections in March 2015.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Data on LWOP sentences (1994–2014) obtained from the Arkansas Department of Corrections in April 2015.

<sup>211</sup> 18 Pa. Stat. and Cons. Stat. Ann. § 1102 (West 2012).

<sup>212</sup> Ark. Code Ann. § 5-4-104 (West 2019); Ark. Code Ann. §§ 5-4-601, 5-4-605, 5-4-607, 5-4-608 (West 2018).

In Pennsylvania, the only criminal offense punishable by the death penalty is first-degree murder.<sup>213</sup> As early as 1925, life imprisonment sentences were enacted as an alternative to the death penalty in first-degree murder cases.<sup>214</sup> However, it was so rarely used that “only one of 607 commonwealth lifers who were released during the thirty-seven years preceding 1969 in Pennsylvania was convicted of first-degree murder”.<sup>215</sup> The upheaval of *Furman v. Georgia*<sup>216</sup> in the early 1970s led to the creation of the noncapital offense of second-degree murder and a mandatory sentence of life imprisonment.<sup>217</sup> This was the beginning of a process of net-widening the scope of life sentences. Life imprisonment for the most serious offenders had been treated as “without parole” before 1982.<sup>218</sup> However, it was not until 1982 that LWOP statutes were explicitly incorporated into the legislation as a penal sanction for third-degree murder as well as first- and second-degree murder related to arson.<sup>219</sup> The enactment of LWOP statutes in Pennsylvania in the 1980s was not directly linked to the abolition of the death penalty, but these statutes were enacted in response to the moral outrage of a small group of people and a political value judgment.<sup>220</sup> This is the likely explanation for the absence of an inverse correlation between LWOP and capital sentences.

There are two possible explanations for the concurrent decline during the past two decades in Pennsylvania. First, external forces have been influencing the trends in the judicial imposition of both LWOP and capital punishment sentences. As Table 2 illustrates, LWOP sentences in Pennsylvania for first-degree murder contributed to about two-thirds of the total number of LWOP sentences during the past two decades.<sup>221</sup> Violent crime rates have declined since the early 1990s in Pennsylvania, which has led to a much smaller number of homicide cases, including criminal homicide that can be investigated, prosecuted, and sentenced.<sup>222</sup> Although LWOP covers a much wider range of offenses beyond the scope of first-degree murder, the bulk of LWOP sentences derives from homicide cases.<sup>223</sup>

A second possible explanation lies in the changing character of criminal justice policies. In the early 1990s, the penological pendulum may have already reached the apex of incapacitation and retribution with the extinction of parole and a considerable decline of executive clemency in Pennsylvania.<sup>224</sup> The last decade of the twentieth century may have ushered in a new era during which the harshness of penal machinery was reduced. As the ratio of LWOP to capital punishment for punishing first-degree murders stabilized over time, external influences including, but not limited to, shifting penal policies, may have had a substantial impact on sentencing trends concerning both

<sup>213</sup> 18 Pa. Stat. and Cons. Stat. Ann. § 1102 (West 2012).

<sup>214</sup> 1925 Pa. Legis. Serv. 759 (West).

<sup>215</sup> Jon E. Yount, *Pennsylvania: Parole and Life Imprisonment* (Feb. 2004) [www.prisonpolicy.org/scans/yount/PA\\_parole.pdf](http://www.prisonpolicy.org/scans/yount/PA_parole.pdf).

<sup>216</sup> 408 U.S. 238 (1972).

<sup>217</sup> See Yount, *supra* note 215, at 30.

<sup>218</sup> See *id.* at 29–30; Wright, *supra* note 16, at 545 n.105.

<sup>219</sup> 42 Pa. Stat. and Cons. Stat. Ann. § 9715 (West 1982).

<sup>220</sup> See generally Derral Cheatwood, *The Life-without-Parole Sanction: Its Current Status and a Research Agenda*, 34 CRIME & DELINQUENCY 43 (1988).

<sup>221</sup> See *infra* Table 2.

<sup>222</sup> State-by-State and National Crime Estimates by Year(s), UNIFORM CRIME REPORTING STATS. (2014).

<sup>223</sup> See Yount, *supra* note 215, at 30.

<sup>224</sup> See *id.* at 27.

penalties.<sup>225</sup> Interestingly, in Arkansas, homicide rates from the mid-1990s to recent years have also significantly dropped, suggesting that declining crime rates may be one of the contributing factors to the co-decline of LWOP and capital punishment sentences over the same period.<sup>226</sup>

### C. LWOP Enacted and Retained Before the Abolition of the Death Penalty

For some states that have abolished the death penalty in recent years prior to the legislative repeal or judicial invalidation of capital punishment, LWOP had already been in their criminal justice vernaculars. This Part examines two states: New York and New Jersey.<sup>227</sup> What is the impact of abolition on the trends of LWOP sentences? In New York, the post-abolition average of annual LWOP sentences (2008-2014) is slightly lower than the pre-abolition era (1996-2006).<sup>228</sup> In New Jersey, the post-abolition average of LWOP sentences is higher than the pre-abolition figure.<sup>229</sup> In both states, crimes that were previously death-penalty eligible are now punishable by a maximum sentence of LWOP.

In New York, the enactment of LWOP occurred prior to the 1997 judicial invalidation of the death penalty.<sup>230</sup> First-degree murder in New York State had been punishable by either the death penalty or natural life imprisonment since 1937.<sup>231</sup> In the 1960s and 1970s, the scope of the death penalty was further limited to first-degree murder with certain aggravating circumstances.<sup>232</sup> Meanwhile, the alternative sentencing option to the death penalty became mandatory indeterminate sentences ranging from fifteen to twenty-five years to regular life.<sup>233</sup>

During the eighteen-year period between *Furman v. Georgia*<sup>234</sup> and the 1995 reinstatement of the death penalty statutes, neither the death penalty nor LWOP existed in New York.<sup>235</sup> Even in the post-1995 era, the scope of death-eligible offenses and the

<sup>225</sup> These policy changes include but are not limited to tough-on-crime sentencing policies and rising populism. See generally JOHN PRATT, PENAL POPULISM (2007); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); MICHAEL H. TONRY, SENTENCING FRAGMENTS (2016).

<sup>226</sup> See, e.g., Federal Bureau of Investigation, *Estimated Crime in Arkansas*, UNIFORM CRIME REPORTING STATS., <https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (as prepared by the National Archive of Criminal Justice Data) (generated based on the selection of “Arkansas” as the state, “Violent crime rates” and “Property crime rates” as the variables, and 1995 to 2014 as years for inclusion). For instance, in Arkansas, violent crime rates declined from 553.2 per 100,000 population in 1995 to 480.1 in 2014; property crime rates dropped from 4,137.7 to 3,338.0 during this period.

<sup>227</sup> There are other states which fall within this category, including a new member to the abolition camp, Delaware, where the death penalty was abolished by the state judiciary in August 2016. See *Rauf v. Delaware*, 145 A.3d 430, 443-44 (Del. 2016).

<sup>228</sup> See *infra* Figure 7.

<sup>229</sup> See *infra* Figure 8.

<sup>230</sup> *People v. Davis*, 371 N.E.2d 456, 466 (1977).

<sup>231</sup> See N.Y. STATE TEMP. COMM'N ON THE REVISION OF THE PENAL LAW & CRIMINAL CODE, SEVENTH INTERIM REPORT OF THE STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE 81 (1968).

<sup>232</sup> Act of 1965, ch. 321, 1965 N.Y. Sess. Laws 1022; Act of 1967, ch. 791, 1967 N.Y. Sess. Laws 2138; Act of 1968, ch. 949, 1968 N.Y. Sess. Laws 2785; Act of 1971, ch. 1205, 1971 N.Y. Sess. Laws 3123.

<sup>233</sup> Wright, *supra* note 16, at 534 n.23.

<sup>234</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>235</sup> N.Y. ASSEMBLY STANDING COMM. ON CODES, HEARING ON COSTS OF THE DEATH PENALTY AND RELATED ISSUES: BEFORE THE N.Y. ASSEMBLY STANDING COMMS. ON CODES, JUDICIARY, AND

judicial use of both the death penalty and LWOP were limited. The 1995 law authorized the death penalty for first-degree murderers and for those whose conduct fell within at least one of the thirteen separately listed aggravating factors.<sup>236</sup> From 1995 to 2007, there were only seven death sentences imposed by courts state-wide.<sup>237</sup> Both the death penalty and LWOP were narrowed to include only the “worst of the worst” murderers, sexual offenders, and terrorists.<sup>238</sup> This rarity and infrequency in the use of the death penalty even before the judicial invalidating of capital punishment statutes may explain the lack of a substantial increase in the LWOP sentences after the death sentences were removed.

On the other hand, LWOP as an alternative to the death penalty lies at the heart of New York’s judicial challenge to the death penalty. The two-step judicial invalidation of the penalty-phase “deadlock” jury instruction through *People v. LaValle*<sup>239</sup> and *People v. Taylor*<sup>240</sup> centered on the constitutional flaws of the deadlock jury instructions. In essence, jurors were instructed that if they could not unanimously reach an agreement between two choices of the death penalty or LWOP, the judge would sentence the defendant to a third, more lenient, choice of indeterminate life imprisonment.<sup>241</sup> In this way, the 1995 law unconstitutionally “induce[d]” jurors into imposing the death penalty.<sup>242</sup> Surveying several empirical studies<sup>243</sup> on juror behavior regarding capital sentencing, the courts concluded that jurors tend to grossly underestimate the length of sentences received by capital murderers and thus are likely to vote for death in the fear that dangerous felons may be paroled in as few as twenty years.

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CORRECTION 2 (2005) (statement of Richard. C. Dieter, Executive Director Death Penalty Information Center).

<sup>236</sup> N.Y. Penal Law § 125.27(1)(a)(i)–(xiii) (McKinney 2013).

<sup>237</sup> The number of death sentences imposed since 1995 by New York state court systems is as below: one in 1998, four in 1999, one in 2000, and the last one in 2003. Statistics obtained from New York State Corrections and Community Supervision in May 2015.

<sup>238</sup> A list of mandatory life-without-parole provisions is provided by New York penal law. For example, “aggravated murder,” N.Y. Penal Law § 125.26(1)(a)(iii) (McKinney 2013), automatically results in a sentence of life without parole. N.Y. Penal Law §§ 60.06, 70.00(5) (McKinney 2009); N.Y. Penal Law § 70.00(3)(a)(i) (McKinney 2009). The killing of a police officer or a peace officer is also aggravated murder. N.Y. Penal Law § 125.26(1)(a)(i)–(ii) (McKinney 2013). Additionally, the legislature has mandated a sentence of life without parole for someone, 18 years of age or older, who intentionally murders a child under the age of 14 during the course of certain sex crimes. Joan’s Law, ch. 459, 2004 N.Y. Sess. Laws 7488 (McKinney); *see also* N.Y. Penal Law §§ 60.06, 70.00(5) (McKinney 2009); N.Y. Penal Law § 125.25(5) (McKinney 2006); and the crimes of terrorism where the underlying offense is a class A-I felony, or when there is possession of a chemical or biological weapon in the first degree, or use of a chemical or biological weapon in the first degree *See* Act of July 23, 2004, ch. 1, 2004 N.Y. Sess. Laws 11723–A (McKinney) (creating the State Office of Homeland Security and enacting various anti-terrorism measures); *see also* N.Y. Penal Law §§ 490.25 (1), (2)(c), (2)(d) (McKinney 2001); N.Y. Penal Law §§ 60.06, 490.45, 490.55, 60.06 (McKinney 2004); N.Y. Penal Law § 70.00(5) (McKinney 2009).

<sup>239</sup> 817 N.E.2d 341, 366 (N.Y. 2004).

<sup>240</sup> 878 N.E.2d 969, 984 (N.Y. 2007).

<sup>241</sup> This third option was life with a possibility of the defendant’s release on parole after twenty or twenty-five years.

<sup>242</sup> LaValle, 817 N.E.2d at 359.

<sup>243</sup> Jurors tend to believe capital murderers who are not sentenced to death could be released soon and, consequently, tend to vote for the death penalty. *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* 77 TEX. L. REV. 605, 648 (1999). South Carolina jurors were also misguided by fears of early release generating death sentences and premised their sentencing options on the future dangerousness of the offenders. *See* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1,4 (1993).

[B]y interjecting future dangerousness, the deadlock instruction [gave] rise to an unconstitutionally palpable risk that one or more jurors who [could not] bear the thought that a defendant [might] walk the streets again after serving 20 to 25 years [would] join jurors favoring death in order to avoid the deadlock sentence.<sup>244</sup>

The 1995 capital punishment statute was struck down by the Court of Appeals of New York in *LaValle* and *Taylor* because of the deadlock jury deliberation.<sup>245</sup> To a certain extent, the judicial declaration of the unconstitutionality of capital punishment statutes in New York suggests that LWOP is a necessary, sufficient, and irreplaceable alternative to the death penalty. It is deemed to be so essential that a lesser punishment, for example one that offers possibility of parole, would not fulfill the task of punishing the most serious instantiations of murder. This suggests that the symbolic centrality of LWOP in the cause of abolition has little to do with the proliferation of LWOP sentences or executions.

New Jersey, whose rejection of the death penalty was achieved through a different dynamic, led the nation in the post-*Furman* reconsideration of the death penalty. Nevertheless, abolitionists were deeply divided on when progress towards the repeal of the death penalty should be made. Prior to the final abolition of the death penalty, a report by the New Jersey Death Penalty Study Commission recommended that capital punishment be replaced with LWOP, which would have “sufficiently ensure[d] public safety and address[ed] other legitimate social and penological interests, including the interests of the families of murder victims.”<sup>246</sup> Rationales behind the popular and political support for requiring LWOP for all capital cases are worth revisiting today. A representative of the New Jersey State Office of the Public Defender stated that “to expand unnecessarily the categories of cases in which discretion is totally removed from the sentencing equation would be a grave mistake.”<sup>247</sup>

A *Newark Star-Ledger* report, based on analysis of murder cases since 1982—when capital punishment was reinstated in New Jersey—found that convicted offenders would have been punished more harshly under the new LWOP bill proposed by the Death Penalty Study Commission: “Had it been enacted twenty-five years ago, the number of executions would have remained unchanged, at zero, while more than 100 murderers who might one day have went free would have faced the certainty of dying in prison.”<sup>248</sup> In New Jersey, like elsewhere, the LWOP bill was a product of the political bargaining and compromise surrounding the abolition process. The exact outcome of the compromise, however, depends on the relative weight and balances of local political forces. In addition, eliminating the threat of execution extinguished the opportunity for jurors to exhibit mercy and for judges to consider mitigating factors.

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<sup>244</sup> *LaValle*, 817 N.E.2d at 358.

<sup>245</sup> Pursuant to CPL 400.27(10) of the New York statutes, courts instructed the jurors choose between death sentence or to life without parole. If they failed to agree unanimously on either choice, the defendant receives a life imprisonment with parole eligibility after serving a minimum of 20 to 25 years. *See LaValle*, 817 N.E.2d at 356.

<sup>246</sup> THE N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 1 (2007).

<sup>247</sup> *Id.* at 90.

<sup>248</sup> Robert Schwaneberg, *When Life Without Parole is Worse than Death: Analysis Finds More than 100 Murderers Who Might One Day Go Free Would Face Certainty of Dying in Prison*, NEWARK STAR-LEDGER (Feb. 4, 2007), <https://www.mail-archive.com/deathpenalty@lists.washlaw.edu/msg05056.html> (last accessed Feb. 22, 2020).

The expansion of New Jersey LWOP statutes and the removal of judicial discretion may explain why the post-abolition figures in the use of LWOP have increased in New Jersey. Nevertheless, New Jersey is by no means a frequent user of LWOP or capital punishment.<sup>249</sup> This serves as proof that the actual imposition of LWOP sentences is related to, but not solely determined by, the scope of legislative provisions and abolitionist influences.

#### *D. A Brief Summary: Measuring Punitiveness*

The state-by-state survey discussed above maps out recent trends of capital punishment and LWOP sentencing across the country. Consequently, three general observations come to light. First, state-level practices and laws are not cut from the same cloth. Every abolitionist state uses LWOP in its own way. Some adopted LWOP prior to the abolition of the death penalty and others replaced capital punishment statutes with LWOP law. For some, the enactment of LWOP legislation has little to do with the reduced usage of capital punishment. And even among states grouped together, the similarity in their LWOP versus capital punishment trends may be attributable to different legislative, judicial, social, and political factors.

With regard to the judicial use of extreme penal sanctions, there are a wide-variety of punishments and punitiveness in America. The disparity in the use of capital punishment in the United States is considerable. As Professor Liebman and Mr. Clarke illustrated, while the United States is “the only Western nation” that still has the death penalty for civilian crimes, Michigan, for instance, is “a vanguard of abolition in the Western world.”<sup>250</sup> The picture is even more complicated when considering the use of LWOP. State jurisdictions that have long abolished the death penalty—such as Michigan and Massachusetts—are avid LWOP users. On the other hand, top executioners such as Texas have a relatively small LWOP population due to conservative forces’ strong commitment to capital punishment. It is therefore important to consider capital punishment and its twin—LWOP—as well as the rest of the penal regime, as an organic whole when evaluating a state’s penal response to serious crimes. This is particularly notable because, as discussed above, the line between the death penalty and LWOP is feeble at best. Death is not that different from LWOP.

The analysis above also brings out two important observations. First, it seems that heavy users of capital punishment demonstrate a stronger reliance on LWOP to sanction severe criminal behaviors. Two indicators can be used to assess the frequency and severity of a state’s capital punishment practices: the volume of executions and the number of death sentences imposed. From 1973 to 2013, the ten state jurisdictions imposing the largest number of death sentences were Texas, Florida, California, North Carolina, Alabama, Ohio, Pennsylvania, Oklahoma, Georgia, and Arizona.<sup>251</sup> The aggregated number of LWOP sentences imposed by these states accounts for 48.9% of the total number of LWOP sentences in all fifty jurisdictions. The top ten executioners were Texas, Virginia, Oklahoma, Florida, Missouri, Alabama, Georgia, Ohio, North Carolina, and South Carolina and account for 34% of LWOP sentences in total.<sup>252</sup> Alternatively, the average per capita LWOP sentences imposed in the thirty states that

<sup>249</sup> From 1977 to 2004, the annual number of death sentences imposed by New Jersey courts never exceeded eight in total. It abolished the death penalty *de jure* in 2007. In a similar way, the number of LWOP sentences meted out by New Jersey courts have stayed below seven from 1989 to 2014. See *Death Sentences in the United States From 1977 By State and By Year*, *supra* note 191.

<sup>250</sup> Liebman & Clarke, *supra* note 141, at 258.

<sup>251</sup> See *infra* Table 3.

<sup>252</sup> *Id.*

still retain the death penalty is five times higher than in the twenty non-capital states.<sup>253</sup> This demonstrates that, with limited exceptions, leading consumers of capital punishment are also zealous supporters of LWOP at slightly varying degrees.

A second observation is that the correlation between LWOP and capital punishment sentencing trends are not evenly distributed over time. In some states, what seems to be a strong correlation in the early periods after the passage of LWOP into law wanes over time. This has been discussed previously with respect to North Carolina, a subgroup (i) state.<sup>254</sup> This unevenness also holds true for Florida, a subgroup (ii) state, where the data patterns show no correlation between LWOP and capital punishment sentences in general. In fact, within the first five years following the state's initial imposition of LWOP sentences in 1994, there was a strong co-increase of both LWOP and capital sentences.<sup>255</sup> In Kansas, there is little overall correlation between the death penalty and LWOP, as the nine-year period from 2006 to 2014 first saw a co-increase of both sets of sentences, and later, a strong inverse relationship.<sup>256</sup> Similarly, LWOP and capital punishment sentences in Georgia from 1977 to 2014 manifest at best a tenuous correlation. A closer look at the data, however, reveals a two-stage process characterized by a proportional fluctuation at the first half (1977-1990) and an inverse correlation during the second half (1990-2014).<sup>257</sup> Thus, the lack of obvious correlative relationships between LWOP and capital punishment sentences in Kansas and Georgia is due to shorter-termed oppositional trends that canceled each other out.

There is a notable lesson to be learned from the complex ways in which LWOP and death sentences are imposed by courts. Courts should exercise caution when penal policies are made and when legislation is proposed or passed. Available data do not support the thesis that the proliferation of LWOP has caused the decline of death sentences. Meanwhile, moving away from capital punishment in some parts of the country has recently played an important role in legitimizing and entrenching the use of LWOP. Yet, once established as a penal institution, LWOP attains its own meanings, function, and logic that cannot be simply reduced to a sentencing alternative to the death penalty.

Specifically, besides the judicial implementation of and legislative changes in relation to capital punishment, other forces such as homicide rates have an impact on both the death penalty and the use of LWOP. Factors like parole policies have visible influences on the use of LWOP but not on capital punishment. Yet other factors, such as widely-reported cases of botched executions that arouse public indignity and sympathy, may pacify aggressive capital punishment policies within a given state in the short-term.<sup>258</sup> In addition to these proximate factors, a whole range of deeper social factors—such as economic growth, immigration, technology and scientific innovation that leads to exonerations by DNA evidence, political ideology that normally sway penal policies, demographic and population changes, and cultural constructions of crime and punishment—all play a part in shaping what one views to be the use of

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<sup>253</sup> As of September 2016, Delaware is considered an abolitionist state.

<sup>254</sup> See *supra* section i (“An Inverse Correlation Between LWOP and Capital Punishment Sentences”).

<sup>255</sup> See *supra* section ii (“No Correlation Between LWOP and Capital Punishment Sentencing Trends”).

<sup>256</sup> See *infra* Table 1 and Figure 1.2 (“Dual-Mode State Subgroup 2”).

<sup>257</sup> See *infra* Table 1 and Figure 1.3 (“Dual-Mode State Subgroup 3”).

<sup>258</sup> See generally, AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY (2014); Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 422 (2002); Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 835 (2015).

ultimate penal sanctions. Accordingly, one of the main aims of this Article is to inspire broader and more in-depth quantitative research.

The last observation of this Article concerns the net-widening effect of the judicial use of LWOP. The number of defendants sentenced to life without parole is far greater than the number of death-sentenced prisoners in states that have both LWOP and death on the books. While a total of 683 LWOP sentences were imposed by Texas during the nine years between 2006 and 2014, only eighty-seven death sentences were imposed.<sup>259</sup> It seems that in many states, there is no process in place to ensure LWOP sentences are reserved only for the most heinous offenders. LWOP enjoys broader application than its supposed function and limits.<sup>260</sup>

To make a crude calculation, Texas imposed fourteen death sentences in 2005.<sup>261</sup> If one were to attribute the decline in subsequent years entirely to the rise of LWOP, then the cost of saving thirty-nine defendants (or prisoners, convicted felons, etc.) from executions is similar to locking up 683 defendants (or prisoners, convicted felons, etc.) for the rest of their natural lives. The total LWOP to capital punishment ‘exchange rate’ in Pennsylvania and Florida respectively stands at 16.2<sup>262</sup> and 25.4<sup>263</sup> for the past two decades. The net-widening effect means that prisoners who previously would not have been subjected to the death penalty are now punished by LWOP. Yet, while proponents who support “replacing” the death penalty with LWOP are busy celebrating their victory of shifting the national dialogue, a critical analysis of the ramifications on enacting and popularizing the use of LWOP is overlooked. A recent example demonstrating the politics of replacing the death penalty with LWOP was the legislative repeal of capital punishment in Nebraska in May 2015.<sup>264</sup>

In essence, there are at least three ways in which this net-widening effect takes place. First, in many states, legislative bills expand the list of aggravating factors which would make a defendant eligible for LWOP, such as Senate Bill 43 in Texas.<sup>265</sup> Thus, LWOP does not only extend upwards to replace the death penalty but also downwards to cover previous noncapital offenses.<sup>266</sup> States with large numbers of prisoners serving

<sup>259</sup> For the number of death sentences, see *Death Sentences in the United States From 1977 By State and By Year*, *supra* note 191; the number on LWOP sentences was collected by the author herself from the Texas Department of Criminal Justice. As stated above, states which also have far more LWOP sentences than death sentences include, for instance, Florida.

<sup>260</sup> See *infra* Part II(b) (“Harsh Politics of the Abolition Campaign”).

<sup>261</sup> See *Death Sentences in the United States From 1977 By State and By Year*, *supra* note 191.

<sup>262</sup> The number of death sentences and LWOP sentences imposed by courts in Pennsylvania from 1994 to 2013 totalled 173 and 2807 respectively. The LWOP vs Death Penalty exchange ratio was, therefore, 16.22. For the death penalty figures, see *Death Sentences in the United States From 1977 By State and By Year*, *supra* note 191; the LWOP yearly counts was obtained by the author from Pennsylvania Department of Corrections on March 17, 2015.

<sup>263</sup> The number of death sentences and LWOP sentences imposed by courts in Florida from 1994 to 2013 totalled 371 and 9428 respectively. The LWOP vs death penalty exchange ratio was, therefore, 25.4. For the death penalty figures, see *Death Sentences in the United States From 1977 By State and By Year*, *supra* note 191; the LWOP yearly counts was obtained by the author from Florida Department of Corrections on March 27, 2015.

<sup>264</sup> The death penalty was repealed by an extremely narrow margin of votes. See Russell Berman, *How Nebraska Abolished the Death Penalty*, THE ATLANTIC (May 27, 2015), <https://www.theatlantic.com/politics/archive/2015/05/how-nebraska-banned-the-death-penalty/394271/> (a “growing coalition of liberals, religious groups, and libertarian-minded conservatives overcame more traditional tough-on-crime Republicans who saw the death penalty as the appropriate, ultimate punishment for murder”).

<sup>265</sup> See discussion *supra* note 103 on the net-widening effect of LWOP statutes in Texas.

<sup>266</sup> J. Turner, *A Living Death: Life without Parole for Nonviolent Offenses*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (2013); Nellis, *Life Goes On*, *supra* note 29.

LWOP, such as Florida, Pennsylvania, and California have broadened LWOP statutes.<sup>267</sup> Second, the mandatory nature of LWOP minimizes judicial discretion, particularly in the consideration of mitigating factors. LWOP is a mandatory sentence upon conviction under three strikes laws<sup>268</sup> in thirteen states and the federal government.<sup>269</sup> Requiring LWOP as a mandatory sentence, even for all capital cases where judges refrain from imposing the death penalty, inevitably creates opportunities for the judicial imposition of unjustly harsh sentences. Controversies surrounding this issue surfaced in debates over the abolition of the death penalty. For instance, in 2002, members of Illinois Governor Ryan’s commission on capital punishment warned that:

As for the need to impose life without parole as the alternative to death, it is important to bear in mind the many past Illinois cases in which, after appellate reversal of a death penalty, the prosecution has agreed that the defendant should be sentenced to a term of years.<sup>270</sup>

Third, the unique procedural protections applicable to capital cases do not apply in LWOP cases. While courts spend years tinkering with capital punishment regimes and providing layers of procedural protections for defendants facing death, the LWOP machine has continued to churn on largely unchecked. For instance, the separate guilt and sentencing phases provided in death penalty trials are not offered to LWOP defendants.<sup>271</sup> The process does not require special attention to either individualized mitigating circumstances or heightened focus on the quality of defense counsel.<sup>272</sup> Indeed, the “super due process” safeguards made available for capital defendants via huge financial and intellectual investments have, for several decades now, evaporated with the gradual demise of capital punishment.<sup>273</sup> There is no sign that these extra procedural protections have trickled down to regulate the judicial use of LWOP.

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<sup>267</sup> These states experienced the highest growth rates of LWOP population in recent years. During the past two decades (1994–2013), the yearly counts of LWOP sentences in Florida, California and Pennsylvania were 360, 182 and 155 respectively. Data obtained by the author from Florida Department of Corrections on March 27, 2015, from California Department of Corrections and Rehabilitation on February 3, 2016 and from Pennsylvania Department of Corrections on March 17, 2015.

<sup>268</sup> “Three Strikes and You’re Out” law was first enacted in response to high profile murders in California in 1994. Under the law, if defendants have two prior convictions for serious or violent offenses, they will receive a life sentence for the third offense they commit, regardless of the gravity and nature of the offense. ‘Three Strikes law’ has been criticized because it disproportionately affects racial minorities and mentally disabled persons. More than half of inmates sentenced under the law are punished for nonviolent crimes. *See Three Strikes Basics*, STAN. L., <https://law.stanford.edu/stanford-justice-advocacy-project/three-strikes-basics/> (last visited Feb. 23, 2019).

<sup>269</sup> LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?, *supra* note 16, at 4–5.

<sup>270</sup> RYAN, *supra* note 125, at 156.

<sup>271</sup> *See* Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?, *supra* note 16, at 31–2.

<sup>272</sup> *Id.*

<sup>273</sup> The huge financial investment made by state governments in lengthy and expensive capital proceedings can bring states and counties to the brink of bankruptcy; intellectual investment here includes, but is not limited to, the extra efforts made by prosecutors and defense counsel to investigate, review, prepare and follow up the multiple layers and phases of trials and post-conviction of capital proceedings. *See* Richard C. Dieter, *Millions Misspent: What Politicians Don’t Say About the High Costs of the Death Penalty*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 401–9 (Hugo Adam Bedau ed., 1997); Jonathan Martin, *How the Death Penalty Can Bankrupt a County*, SEATTLE TIMES (Feb. 18, 2014), <https://www.seattletimes.com/news/how-the-death-penalty-can-bankrupt-a-county/>.

The ethical costs and moral burdens associated with locking up an offender for the entirety of their lives is significantly smaller than sentencing them to death row. An indicator of society's contrasting attitudes towards LWOP and capital punishment is that the problematic nature of LWOP as applicable to juveniles has only become an issue in recent years. And as Bennett Capers, a former federal prosecutor describes:

We prosecuted our LWOP defendants as if they were interchangeable widgets on an assembly line . . . Even now, though I can remember the names of my death-eligible defendants, I have trouble remembering even one of my LWOP defendants. And no one lost sleep over racial disparities, which was even more pronounced than in death penalty cases.<sup>274</sup>

### CONCLUSION

While the anti-death penalty movement across the United States has long been the focus of policy debates and academic research, the relationship between capital punishment and LWOP has rarely been explored in existing literature. The results of the analysis provided in this Article on this under-researched issue are threefold. First, this Article explores the conceptual connections between life and death, revealing that the demarcation between life and death as well as the boundary between the death penalty and LWOP are far from being clearly defined. To a certain extent, the similarity between the two has been neglected while the difference overemphasized. Thus, many of the criticisms toward and concerns about the death penalty may be extended to the analysis of LWOP. Moreover, this Article argues that the idea of a penal alternative to the death penalty is riddled with paradoxes and strained by idealism—that we are able to invent a perfect penal sanction which is simultaneously humane and effective and capable of curing all existing problems at the top of the penal hierarchy.

Political dynamics surrounding the abolition campaign have contributed to the entrenchment and normalization of LWOP in public discourse. In morality's muddy waters, profound dilemma, denial, and ambivalence have been discovered among advocates and activists who endorse or accept LWOP in lieu of what is perceived as the greatest penal evil. This Article links the dynamics at the forefront of the abolitionist movement to their impact on the rest of the criminal justice apparatus, in particular, LWOP.

Part III tested the assumption that the decline of death sentences is causally linked to the expansion of LWOP or vice versa. Considerable variations among states in their judicial use of both capital punishment and LWOP do not support the assertion that the expansion of LWOP caused the decline in death sentences. On the other hand, at least symbolically, abolition movements contributed to the expansion and legitimization of LWOP in multiple states during the past decades. Anti-death penalty activists in states where the political resistance for abolition is high are motivated to publicize the availability of LWOP in order to gain support from tough-on-crime politicians and opponents of parole. Thus, the judicial imposition of LWOP is much broader than "the worst of the worst" in many states today. In sum, it would be a stretch to claim a causal connection between the decline in death sentences and the proliferation of LWOP in most states.

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<sup>274</sup> Capers, *supra* note 28, at 169.

This Article concludes that an isolated focus on the death penalty distorts our understanding of the criminal justice system. The political process that lends legitimacy and popularity to LWOP is plagued by the specter of the “death is different” mentality. Is it a success to transform the American criminal justice system from a system obsessed with a brutal form of death to a regime demanding a bloodless and invisible new “death sentence?” Solutions to existing problems need to be based on a holistic, rather than a piece-by-piece, approach. The decline in death sentences by single digits is achieved at the cost of scores of permanent losses of liberty in some states. This alarming phenomenon begs fundamental questions as to the meanings of human life and death. It might be useful to revisit the speech delivered by John Stuart Mill in the British House of Commons 147 years ago, where Mill said: “It is not human life only, not human life as such, that ought to be sacred to us, but human feelings.”<sup>275</sup>

## APPENDIX

*Table 1: Correlation Between LWOP and Capital Punishment Trends in Twenty-One Dual-mode States<sup>276</sup>*

STATE	TYPE <sup>277</sup>	R <sup>278</sup>
Arkansas (AR)	P	0.428
Arizona (AZ)	N	0.019
Colorado (CO)	N	0.031
Florida (FL)	N	0.071
Georgia (GA)	I	0.393
Indiana (IN)	N	0.012
Kansas (KS)	N	0.0001
Kentucky (KY)	I	0.143
Missouri (MO)	N	0.049
Montana (MT)	N	0.0175
Nevada (NV)	N	0.004
North Carolina (NC)	N	0.017
Ohio (OH)	I	0.413
Oklahoma (OK)	I	0.317
Oregon (OR)	N	0.001
Pennsylvania (PA)	P	0.362
South Carolina (SC)	I	0.177
Texas (TX)	I	0.534
Utah (UT)	N	0.008
Virginia (VA)	N	0.006
Washington (WA)	N	0.0004

<sup>275</sup> John Stuart Mill, April 1868 Speech on Capital Punishment, in UTILITARIANISM 65, 69 (George Sher ed. 1868).

<sup>276</sup> In addition to 30 dual-mode states which retain both the death penalty and LWOP are 20 abolitionist states, where LWOP is the maximum penalty on statutory books. Within the former group, the author has only been able to obtain data for 21 states. The Department of Corrections in other states declined the author’s request for access to data.

<sup>277</sup> “P” stands for proportional correlation between death sentences and LWOP sentences. “N” stands for no correlation between LWOP and death sentences. “I” stands for inverse correlation between LWOP and death sentences.

<sup>278</sup> R<sup>2</sup>, the square of the Pearson product-moment coefficient, indicates the correlation between LWOP sentences and death sentences.

*Table 2: The Makeup of LWOP Sentences in Pennsylvania (1992-2014)<sup>279</sup>*

offense	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014		
AGGRAVATED ASSAULT		1																						1	
AGGRAVATED ASSAULT W/SERIOUS BODILY INJURY																					1			1	2
AGGRAVATED INDECENT ASSAULT OF A CHILD																					1				1
ARSON (GENERAL)			1																						1
ARSON ENDANGERING PERSON		1																			1				2
BURGLARY												1													1
CONTACT/COMM. W MINOR-SEXUAL OFFENSES																					1				1
CORRUPTION OF MINORS																								1	1
CRIMINAL HOMICIDE	11	9	10	14	19	14	15	5	7	7	10	9	13	8	7	2	1	2	3						166
FIRST DEGREE MURDER OF UNBORN CHILD															1										1
INDECENT ASSAULT						1																			1
INDECENT ASSAULT-JUVENILE																						1			1
INVOLUNTARY DEVIATE SEXUAL INTERCOURSE PERSON LESS THAN 16 YRS. AGE																					1				1
INVOLUNTARY DEVIATE SEXUAL INTERCOURSE W/ A CHILD																		1							1
KIDNAPPING								1																	1
MURDER	16	9	33	22	22	22	23	18	15	6	10	8	13	3	4	3	4	3	1	2			1		238
MURDER (1ST DEGREE)	105	105	124	99	89	93	64	92	88	93	87	106	107	102	126	114	103	127	101	123	153	116	94		2411
MURDER (2ND DEGREE)	49	35	66	49	32	36	31	44	23	30	37	27	27	32	30	20	30	21	36	30	32	27	28		772
MURDER (3RD DEGREE)	3	2	2	2	1	1	1	1	1	2				1		1	1	1	2		1	3	1		27
RAPE						1																			1
RAPE BY FORCIBLE COMPULSION																					1				1
RAPE OF A CHILD W/SERIOUS BODILY INJURY																					1				1
ROBBERY												1										1			3
ROBBERY W/SERIOUS BODILY INJURY																		1							1
SEXUAL ABUSE OF CHILDREN. POSSESSION OF CHILD PORNOGRAPHY																								1	1
VOLUNTARY MANSLAUGHTER	1																								1
	186	162	235	186	163	168	134	161	134	138	144	152	160	146	168	140	141	154	146	160	187	148	126		3639

<sup>279</sup> Data obtained by the author from Pennsylvania Department of Corrections in May 2015.

*Table 3: The Death Sentences<sup>280</sup>, Executions<sup>281</sup> and LWOP<sup>282</sup> Population in 50 States*

Jurisdiction	Death Sentences	Execution	LWOP Population	Per Million Capita Death Sentence	Per Million Capita Executions	Per Million Capita LWOP Sentences	Resident Population
Alabama	439	56	1553	90.53	11.55	320.25	4,849,377
Alaska	0	0	0	0.00	0.00	0.00	736,732
Arizona	307	36	405	45.61	5.35	60.17	6,731,484
Arkansas	114	27	601	38.43	9.10	202.60	2,966,369
California	1,013	13	4687	26.11	0.34	120.79	38,802,500
Colorado	22	1	675	4.11	0.19	126.03	5,355,866
Connecticut	15	1	70	4.17	0.28	19.46	3,596,677
Delaware	60	16	397	64.13	17.10	424.32	935,614
Federal	71	3	4058	107.76	4.55	6158.81	658,893
Florida	1,040	81	8418	52.28	4.07	423.16	19,893,297
Georgia	325	53	1090	32.19	5.25	107.95	10,097,343
Idaho	42	3	122	25.70	1.84	74.64	1,634,464
Illinois	307	12	1600	23.83	0.93	124.22	12,880,580
Indiana	103	20	122	15.61	3.03	18.49	6,596,855
Iowa	0	0	644	0.00	0.00	207.27	3,107,126
Kansas	13	0	24	4.48	0.00	8.26	2,904,021
Kentucky	83	3	112	18.81	0.68	25.38	4,413,457
Louisiana	245	28	4637	52.69	6.02	997.27	4,649,676
Maine	0	0	48	0.00	0.00	36.09	1,330,089
Maryland	53	5	340	8.87	0.84	56.89	5,976,407
Massachusetts	4	0	1030	0.59	0.00	152.70	6,745,408
Michigan	0	0	3635	0.00	0.00	366.81	9,909,877
Minnesota	0	0	121	0.00	0.00	22.17	5,457,173
Mississippi	197	21	1518	65.80	7.01	507.00	2,994,079
Missouri	186	70	1036	30.67	11.54	170.86	6,063,589
Montana	15	3	42	14.65	2.93	41.03	1,023,579
Nebraska	33	3	264	17.54	1.59	140.31	1,881,503
Nevada	156	12	553	54.95	4.23	194.78	2,839,099
New Hampshire	1	0	87	0.75	0.00	65.57	1,326,813
New Jersey	52	0	62	5.82	0.00	6.94	8,938,175
New Mexico	28	1	0	13.43	0.48	0.00	2,085,572
New York	10	0	270	0.51	0.00	13.67	19,746,227
North Carolina	536	43	1311	53.90	4.32	131.84	9,943,964
North Dakota	0	0	27	0.00	0.00	36.51	739,482
Ohio	419	52	490	36.14	4.49	42.26	11,594,163
Oklahoma	353	108	831	91.03	27.85	214.28	3,878,051
Oregon	63	2	196	15.87	0.50	49.37	3,970,239
Pennsylvania	417	3	5321	32.61	0.23	416.12	12,787,209
Rhode Island	2	0	32	1.90	0.00	30.33	1,055,173
South Carolina	204	43	1071	42.21	8.90	221.63	4,832,482
South Dakota	7	3	181	8.20	3.52	212.15	853,175
Tennessee	225	6	328	34.35	0.92	50.08	6,549,352
Texas	1,075	508	724	39.88	18.84	26.86	26,956,958
Utah	0	0	105	0.00	0.00	35.68	2,942,902
Vermont	27	7	14	43.09	11.17	22.34	626,562
Virginia	0	0	774	0.00	0.00	92.96	8,326,289
Washington	152	110	623	21.53	15.58	88.22	7,061,530
West Virginia	40	5	280	21.62	2.70	151.32	1,850,326
Wisconsin	0	0	237	0.00	0.00	41.16	5,757,564
Wyoming	12	1	35	20.54	1.71	59.92	584,153

Figure 1: Dual-Mode State Subgroup 1<sup>283</sup>

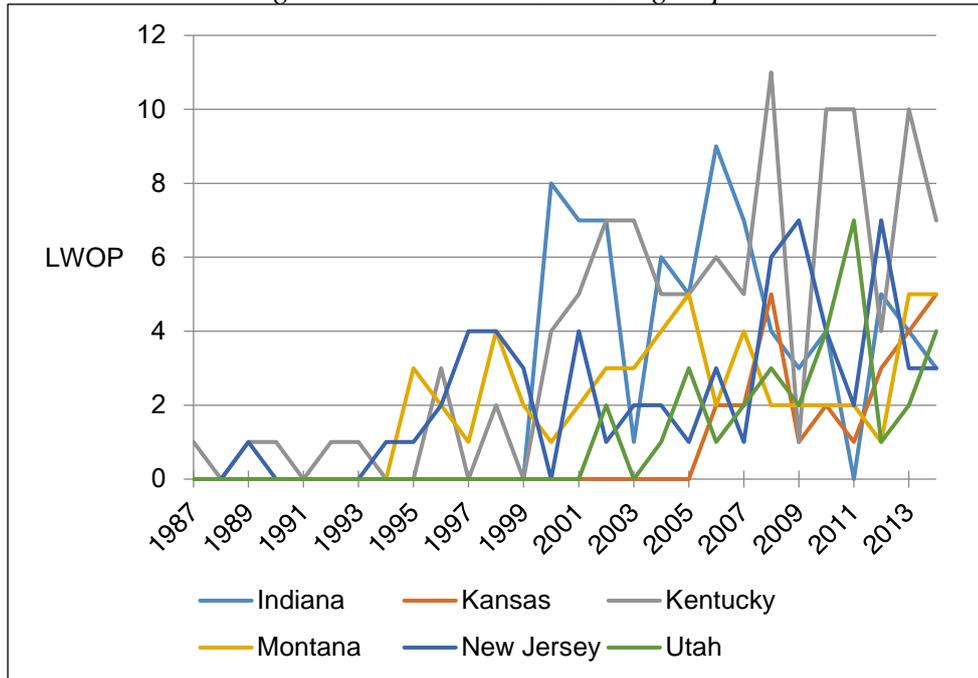
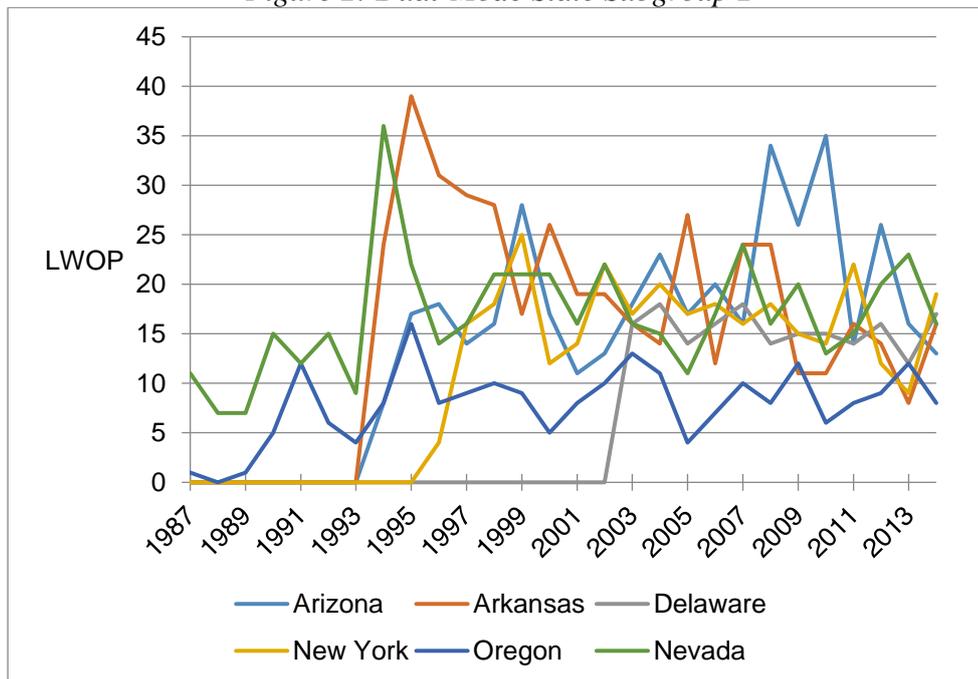


Figure 2: Dual-Mode State Subgroup 2<sup>284</sup>



<sup>280</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CAPITAL PUNISHMENT, 2013 — STATISTICAL TABLES 20 (2014), <https://www.bjs.gov/content/pub/pdf/cp13st.pdf>.

<sup>281</sup> *Id.* at 17.

<sup>282</sup> Data collected from state-level departments of corrections by the author from 2014 to 2016.

<sup>283</sup> Data concerning the counts of LWOP sentences imposed by courts in this group of states were collected by the author from respective state-level Department of Corrections.

<sup>284</sup> *Ibid.*

Figure 3: Dual-Mode State Subgroup 3<sup>285</sup>

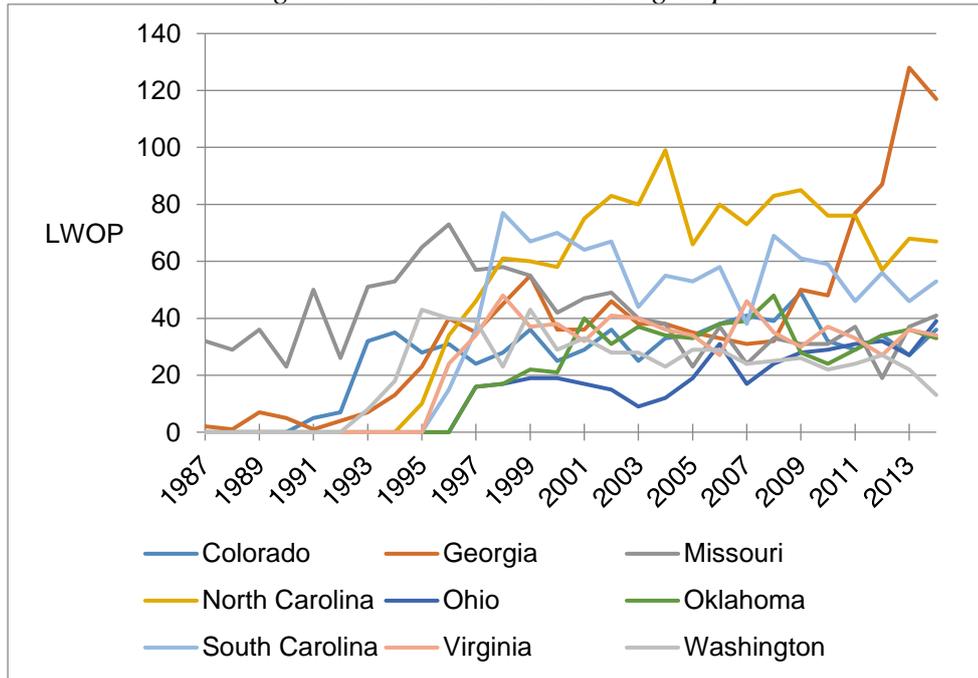
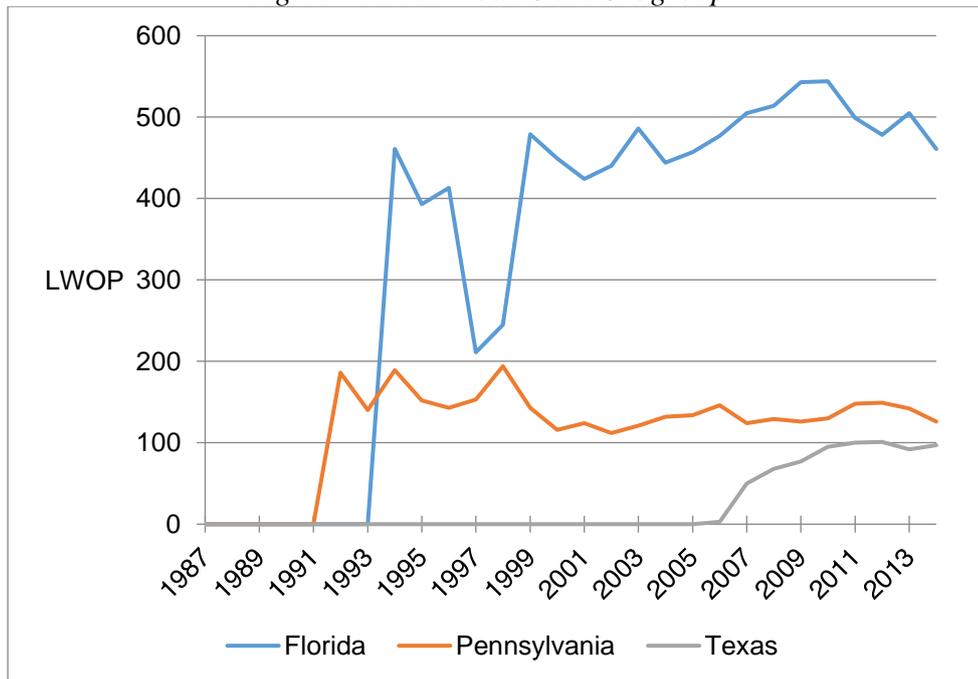


Figure 4: Dual-mode State Subgroup 4<sup>286</sup>



<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

Figure 5: North Carolina LWOP and Capital Punishment Historical Trends

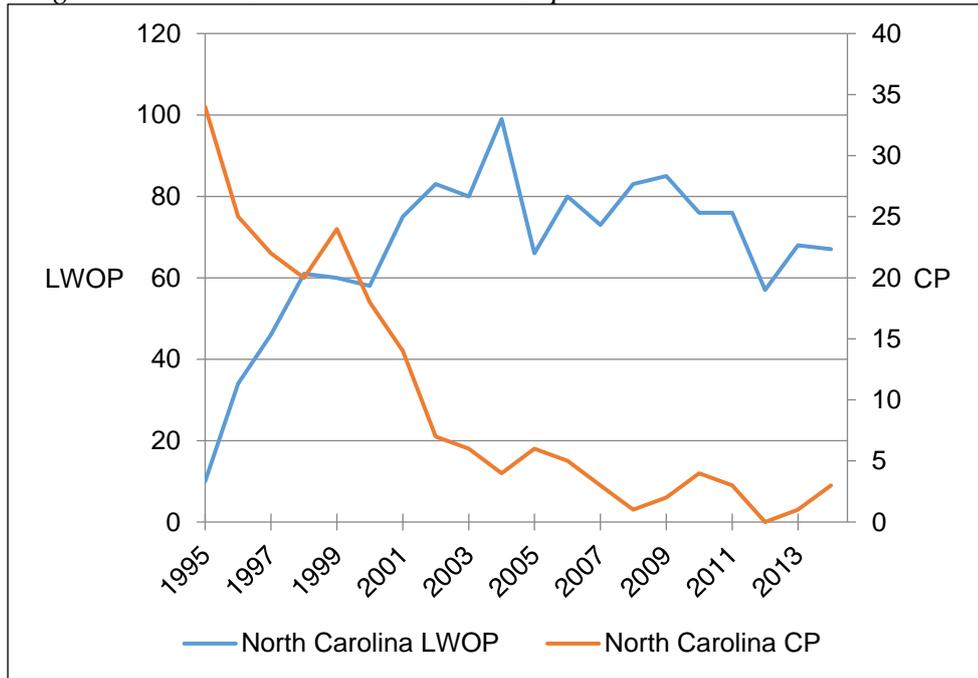
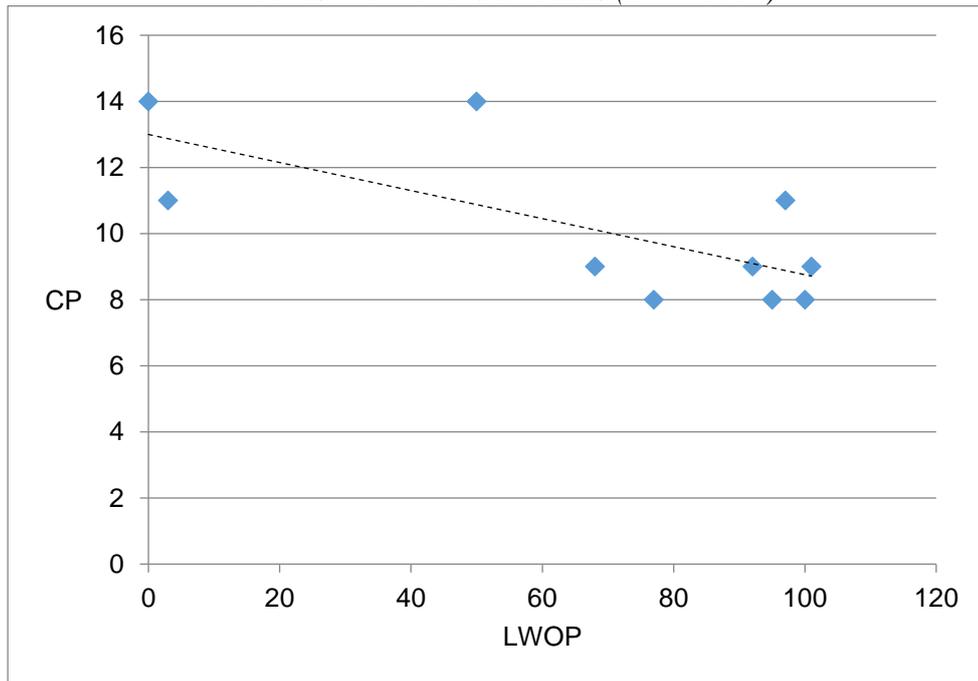


Figure 6: Scatter Plot for Relative Difference Between LWOP and Capital Punishment Trends in North Carolina (1995-2014)



*Figure 7: Scatter Plot for Relative Difference Between LWOP and Capital Punishment Trend in Texas (2005-2014)*



*Figure 8: Texas LWOP and Capital Punishment Historical Trends*

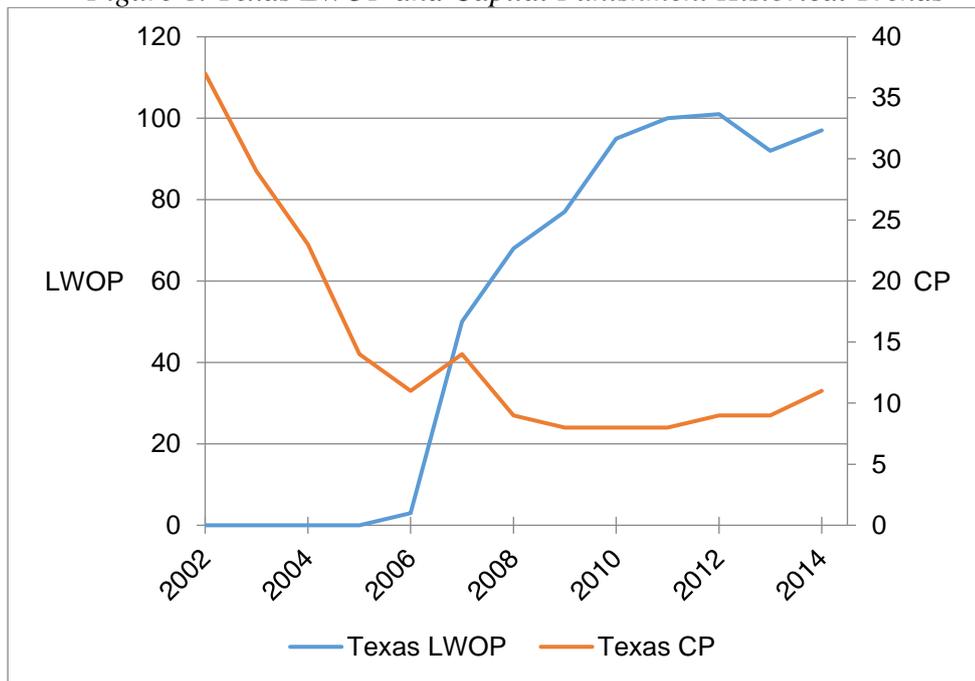


Figure 9: Florida LWOP and Capital Punishment Historical Trends

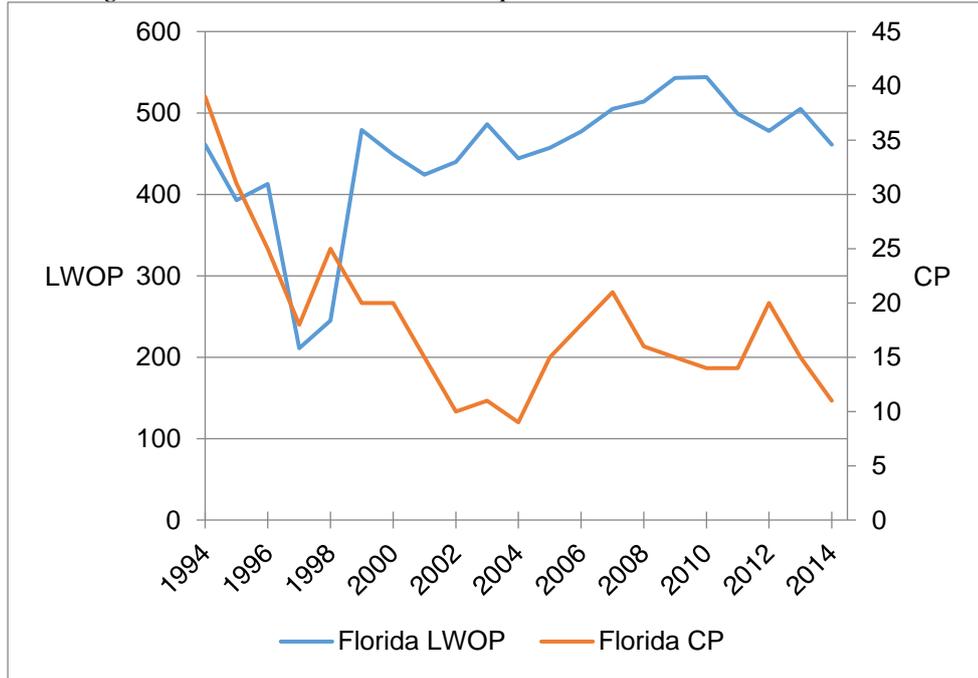


Figure 10: Average LWOP and Capital Punishment Sentences in New York

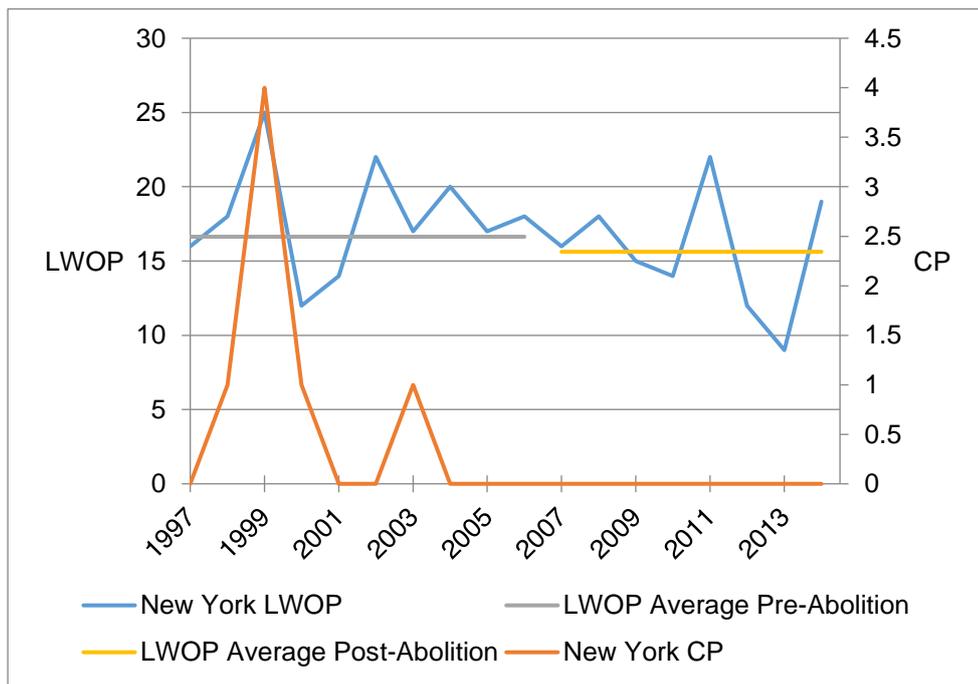


Figure 11: Average LWOP and Capital Punishment Sentences in New Jersey

