In the Shadow of Death:

The Normalization of Life Without Parole and Death Penalty Abolitionism in California

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Trinity Term 2016

Word Count: 97,796

A thesis submitted for the degree of *Doctor of Philosophy* in Criminology at the University of Oxford

ABSTRACT

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Since its introduction in 1978 as an alternative to the death penalty, there has been a dramatic increase and expansion of life without parole (LWOP), including beyond the scope of capital crimes for which it was originally devised. Despite this growth, there has been limited political and academic attention paid to this punishment and very few attempts made to narrow its scope or curtail its proliferation. Moreover, some inmates on death row find the prospect of awaiting death in prison so bleak that they have opposed reformative efforts that would commute their death sentence to LWOP. Emerging scholarship suggests the punishment has been 'normalized', in part because of how some death penalty abolitionists have framed and instrumentalized LWOP. By providing a more substantive and granular account, drawing upon a wide range of evidence, this thesis significantly deepens and extends this claim. "Normalization" here is defined as a set of mechanisms through which the punishment has been made to seem normal, specifically: routinization, limited visibility, and denial. The concept does not propose a measure of severity. Rather, it offers a lens through which to explore how a punishment's severity can be shaped to fit either a punitive or moderate model of punishment.

To discuss the extent to which some opponents to the death penalty may have facilitated, participated in, or perhaps even animated such normalizing mechanisms, this thesis privileges a 'Punishment and Society' multidisciplinary approach and focuses on three sites where abolitionists have lobbied, campaigned, pled and settled, for LWOP: Congress, the broader political sphere, and courtrooms. This dissertation then contrasts abolitionists' representation of LWOP's severity with prisoners' lived experience. The investigation is carried out between the early 1900s, when the punishment was first imagined, and 2012, when the SAFE Campaign was launched in California to replace capital punishment with LWOP. The thesis sheds light on how, in the shadow of the traditional death penalty, other extreme forms of punishment have been modelled to appear 'moderate'. Ultimately, the normalization of life without parole illustrates how extreme punitiveness can subsist in the guise of penal moderation.

To Marie-Christine and Bertrand Vannier, because they believe in second chances.

ACKNOWLEDGMENTS

Writing these acknowledgments is a fine reminder that this thesis would have been impossible without the support and patience from a great number of individuals. I would first like to thank my supervisors, Professors Carolyn Hoyle and Mary Bosworth for their invaluable insights, expertise and knowledge. I am particularly grateful for their mentorship, encouragements, and genuine kindness throughout this adventure. I would also like to thank Jonathan Simon of the University California–Berkeley and Richard Jones of the University of Edinburgh for their guidance during my visiting positions at their respective universities.

I also wish to thank those individuals who agreed to be interviewed for the research and who helped in many other ways. I hope they find the issues discussed here thought provoking, whether or not they agree with the conclusions drawn. I'm particularly grateful for the invaluable help of Christine Thomas, Judith Tannenbaum, Pat Foley and the late Michael Millman during my fieldwork in California. I am immensely obliged towards Kenneth Hartman and The ODPP for sharing my flyer to prisoners in California and for supporting the project from the start.

For their very helpful comments and thoughtful advice throughout the process, I wish to thank, in no particular order: Aase Villadsen, Kate West, Lucia Zedner, Rachel Condry, Ian Loader, Richard Martin, Marie Tidball, Shona Minson, Sylvia Rich, Roxanna Willis, Alice Gerlach, Dominic Aitken, Kate Fitz-Gibbon, Jonathan Analay, Isabel Scavetta, Christine Liu, Louise Brangan, Alpa Parmar and Tracy Kaye, and all those from the older generation of DPhils at the Centre for Criminology. This thesis is far stronger for their corrections and constructive criticisms. I am forever indebted to Claire Vergerio and Quentin Bruneau, for their friendship, unwavering support, astute feedback and comfortable couch.

I finalized the dissertation at the University of Edinburgh. I cannot speak highly enough of the Law Faculty and its doctoral students. I am particularly grateful to Anna Souhami for having entrusted me with tutoring some of her amazing students during the final stage of the DPhil.

Words fail to fully express my gratitude to my parents, Marie-Christine and Bertrand Vannier, my brothers Mathieu and Romain, and to Paolo Cavaliere. For their love, sacrifices, support, friendship, and most importantly, for putting up with me, through the good times and the bad, I will forever be grateful.

My deepest thanks to the Green Templeton and Edinburgh University boat clubs. The 6am water sessions have given me an invaluable structure to complete this doctoral project. The sport has also taught me resilience and perseverance, and how to push beyond set limits.

Finally, I would like to thank the funding bodies that have been incredibly generous with their financial support and have made this research possible, namely the *Fondation Roger Abdesselam*, Oxford University Law Faculty, and Green Templeton College. Of course, responsibility for the following chapters, and any errors therein, remains entirely my own.

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GLOSSARY OF ACRONYMS

American Civil Liberties Union-North California (ACLU-NC)

California Commission on the Fair Administration of Justice (CCFAJ),

California Code of Regulations (CCR)

California Department of Corrections and Rehabilitation (CDCR)

California League Against Capital Punishment (CLACP)

California Penal Code (CPC)

California Rules of Court (CRC)

Campaign To End the Death Penalty (CEDP)

Central California Women's Facility (CCWF)

Crime Victims for Alternatives to the Death Penalty (CCV)

Death Penalty Information Center (DPIC)

Friends Committee on Legislation (FCL)

Life without the possibility of parole (LWOP)

Oxford English Dictionary online (OED)

The Other Death Penalty Project (The ODPP)

The California Correctional Peace Officers Association (CCPOA)

CHAPTER 1—INTRODUCTION

I. ROWAN'S LETTER

Rowan was sentenced to life without the possibility of parole when he was 19 years old. He was 41 when he wrote this letter to me in 2014. He describes his ethnic origins as African American, Native American and European. At the time of writing he was held in Sacramento State prison. This is an extract of his letter:[1]

> Currently I am in reception of your flyer titled "Sharing your experience of life without parole". Ironically, I was contemplating this very issue after waking up yesterday morning (the same day I received your flyer). That such a sentence is a persistent backdrop to everything one does (and perhaps "backdrop" is a great misnomer) is simply an understatement. (…)
>
> My emotions, sentiments and physical brain just simply were not fully mature to really and truly understand what happened. I'm currently 41 years old and will be 42 April 4, 2014. I've filed many petitions saturated with exonerating information, but due to my inability to pay the exorbitant fees most attorneys require, my paperworks simply fail in the American Appeals system(s). This has only fortified my growing sentiment that the ostensible principles of freedom and "Justice for all" is no more than ostensible at best. In my time, it has been obvious to me that those with the needed financial means always get much better results, sometimes regardless of the specifics of their cases. Essentially you have to pay for your rights.
>
> Upon my arrival to this system of incarceration in December of 1992 I was sent to the infamous San Quentin State Prison, which served as a "reception center". As we pulled up to the entrance of the prison suddenly there was a great downpour of rain. It took approximately two to three minutes before entering pass the gates of the prisons. Amazingly as our back tires crossed the threshold into the grounds of the prison the violent down pour of rain suddenly stopped just as fast as it commenced. Later, I've always likened this experience to being baptized into the system!
>
> That same day I was taken to a number of orientation-like seminars, simultaneously I witnessed acts of violence and aggressive homosexuality. I believed at that point there was no way I would make it.
>
> San Quentin was / is a evil prison. As I went to the housing area I was assigned to a well known section (Carson section), immediately upon entering the section I could feel death and a very strong sense of gloom. I later learned some years later that numerous inmates had been killed in this prison and one individual specifically by the very door I had walked by and felt such a powerful gloom there!

[1] I have not edited the participants' letters to correct errors of syntax or spelling mistakes. Where there is emphasis in the original I have left it in and have not inserted any emphasis myself.

As I walked toward the staircase to head to my assigned housing (a very small cell designed for one person but housed two) I noticed all the inmates looking out of their celldoors. In this area of the prisons there were 5 floors or "tiers". All the cells reminded me of sardine cans with bars and metal grate. My assigned cell was on the fourth tier cell number 15.

"Come here man, let me holler at you blood", one man yelled to me. A wicked laugh pierced the cacophony of voices. (…) As I climbed the staircase I traversed the thickness of the gloom that saturated both the ambience and milieu. The solemn gloom was so thick it felt as if it had eyes and was awaiting its opportune time to take over my body!!!

I was stuffed into a very small cell with another individual who would pelt me from time to time with homosexual innuendos. I eventually moved out of this cell and later was sent to the well known Pelican Bay State Prison, February 23, 1993 (how coincidental, tomorrows date). I was twenty years old and had been thrust into a prison war zone.

I was quickly acclimated into the prison system!

Institutions have a sound, a smell, a feel, taste and touch to all of them. For me its always been the sound of those damn keys on the "officers'" clanging as they walk. The constant alarms, with the scream of "get down'" during an "emergency". My first day on the yard at Pelican Bay the loud scream of "get down" saturated the air. I got down immediately, at that point it was apparent that two inmates in front of 4 block were fist fighting.

One of the inmates was shot by an "officer" in a nearby control tower. His intestines came out and were thrown over on top of him as he was being carted off the yard on a stretcher. Shortly thereafter a matter of months a number of inmate were involved in a minor brawl. A number of shots were fired and one inmate due to be released soon was shot through his neck and killed. This was about August of 1993.

At this time, in Pelican Bay all "incidents" were answered with gunshots. Even a mere fistfight! It was hard back then to focus on anything other than just day to day survival. You literally did not know if you would make it back to your cell from day to day.

In the backdrop of all this was the difficulty of never knowing if the nightmare will end. It's still that way now. There is simply no way to understand an end to the nightmare. The experience is simply ineffable. There are no words in the human language that could carry the sentiment(s).

You simply have no tunnel or light. You just exist in a separate dimension, floating what seems between life and death. One foot amongst the living and one foot in the grave. Forever floating, never settling, a nomad, a constant travelled to nowhere, taken over by the jet stream of uncertainty… you literally exist simply to die!

Life without Parole is the death penalty!!!

The only difference is that time is your murderer instead of the gas chamber. The sentence – is simply impossible!

I believe that it simultaneously is a powerful example of this countries desire to punish rather than reform, because no matter how many different people you become through the natural course of development from teenager to adult it doesn't matter, you still suffer for an ordeal that happened long before you were able to understand more visceral and powerful key issues about Life.

> The most difficult part of the sentence is multitudinous. Essentially what I find noticeable is the lack of social interaction which naturally thwarts social development and ability to network. I've been in prison since I was 19 years old and I've never used the internet for example; I've never accessed a website nor could I even begin to know how to use Twitter or Facebook etc… I've never "been on a date", held a job, never been to a family function as an adult, had a drink in a club or a bar, none of these things.
>
> Simultaneously, the consistent mental warfare of the milieu is particularly punishing. The constant concern about safety, being shot, attacked etc…
>
> There are no pleasures, none! Those that are, are simply too basic to mention. What I find to be the hardest about my sentence is I know I shouldn't be here under these terms. At this point of twenty three years past and irretrievable experiences gone I feel as if this will always be an impingement of sorts in my life, that I could never outlive. At this point I've been in here far longer than I was ever in society.
>
> I've made numerous attempts to end this time by suicide. My suicide attempts have been basically an attempt to create my own ending, my own tunnel and my own light at the end of the tunnel. The way I view it now that the death is an occurrence all will experience, but living in a perpetual state of violence and uncertainty is more punishment than death itself! Death would be a great friend at this point!!! Life without Parole creates, feeds and fuels the sense of no worth whatsoever, just merely existing! (…)
>
> I'm in great hopes that this piece of information will greatly contribute to your research. I have also enclosed a poem I recently penned while locked further away in what is known as the hole (prison in prison). I was in there for four years for refusing to take a cellmate. I live better by myself.
>
> Also this institution is notorious for stealing outgoing mail. Just a couple years ago over thousand pieces of out-going mail were discovered. So any acknowledgment that this missive was received would be greatly appreciated.
>
> Thank you for your time.

Rowan, like the other 298 men and women currently serving LWOP in California who participated in this study, described his punishment as a certain form of death. At the same time, death under LWOP carries a degree of uncertainty in terms of when the end will come. Rowan's letter highlights the violence of the carceral world and the racism of the criminal justice system that sentences thousands of young black men to serve interminable prison terms. Rowan will spend the remainder of his life without ever being eligible for parole; no matter what he does to change, improve, reform or rehabilitate. This thesis, through prisoners' testimonies in particular, sheds unprecedented light on an under-researched, rarely considered and often misconceived, yet extreme, form of punishment. In addition to relying on a unique

dataset, which will inform academic knowledge policy and practice, this research provides a crucial platform for voices of people exposed to a lifetime of extreme violence to finally be heard.

II. WHAT IS LWOP?

LWOP holds a unique place in the landscape of extreme forms of punishment. It stands at the intersection between the death penalty and long-term imprisonment. Most believe that the death penalty is the most severe sentence in the American legal justice. For instance, the United States Supreme Court in *Glossip v Gross* (2015), citing precedent opinions, reiterated that death 'differs from all other forms of criminal punishment not in degree but in kind'.[2] Unlike the death penalty, LWOP permits prisoners to remain alive. While they are likely to die in prison, their death does not require the state's affirmative action to physically kill them (Hamilton 2015: 3). As a result, capital sentences and life imprisonment have been constructed differently, with traditional death sentences attracting most of the media and political attention. Dilts (2015: 114) speaks of the 'almost fetishistic levels of concern over executions'. Journalist Stephen Lurie (2015) similarly noted: '[p]rison cells don't attract many spectators, but executions have always drawn crowds'.

Rather than viewing LWOP as a lesser and more acceptable penalty, a contrasting perspective is that it is a sentence to death (Villaume 2005; Appleton and Grøver 2007; Henry 2012; Hamilton 2015; Krajicek 2015; Sliva 2015). Some commentators have begun drawing analogies with the death penalty (see chapters in Ogletree and Sarat 2012), coining LWOP as the 'new death penalty' (Henry 2012:67)

[2] The Court cited *Woodson v North Carolina* (1976) which had concluded that, '[d]eath in its finality differs more from life imprisonment than a 100 year prison term differs from one of only a year or two'.

or the 'other death penalty' (Gottschalk 2013: 354). The Supreme Court in *Graham v Florida* (2010 at 842)—a case that involved LWOP applied to juveniles—drew attention to the similarities between the two extreme forms of punishment. In particular, the court in *Graham* underscored that both punishments are irrevocable (*Graham* at 842):

> It is true that a death sentence is "unique in its severity and irrevocability" yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by forfeiture that is irrevocable.

Some commentators have submitted that life sentences with no possibility of review are more punitive than death sentences (Ridgeway and Casella 2014). For Berry (2015: 18), a life sentence may be experienced by prisoners as extremely brutal because it does not have an 'end date':

> A death sentence has an end date which for some may be less traumatic than imprisonment until one dies of natural causes. To the extent that living in prison constitutes suffering life without parole allows for greater suffering or at least a longer time for suffering.

LWOP cases do not receive the individualised attention, extensive reviews, and lengthy appellate processes that are available for death penalty cases, at least in theory (Nellis 2013: 448–450). When facing death sentences, some defendants, including innocent ones, plead guilty to crimes they did not commit in order to make a deal with the prosecution by accepting a sentence of LWOP (Nellis 2013: 445).

While the Supreme Court has ranked lengthy prison sentences as the third most severe form of punishment behind LWOP and the death penalty (*Harmelin v Michigan* 1991 at 996), LWOP also shares characteristics with those prison sentences that extend beyond a person's natural lifespan (Hamilton 2015: 12). These prison terms span over dozens if not hundreds of years (Gottschalk 2013) and the outcome is the same: prisoners will die behind bars (Villaume 2005: 276). Like lifers, LWOP prisoners will progressively disappear from the public view, remaining visible only to

prison officials who must house them indefinitely (Hamilton 2015: 3). Like offenders sentenced to LWOP, defendants serving lengthy prison terms have fewer opportunities for discharge and for challenging their sentence than those sentenced to the traditional death penalty (Henry 2012: 71). For this reason, prisoners serving such sentences have been designated as 'virtual lifers' and their sentence described as 'de facto' LWOP sentences (The ACLU 2013: 13) or 'effective life sentences' (Bowman 2014: 47).

While the availability of parole is slim for virtual lifers (Schwartzappel 2015), they can, in theory, work towards it. By contrast, LWOP prisoners are denied such an opportunity from the moment their sentence is handed down; there is no hope for review. This particularity not only shapes prisoners' understanding and experience of the punishment (e.g. Leigey 2010; Leigey and Ryder 2015); it also, as this thesis will demonstrate, affects how others—such as prison and medical staff, activists, legislators, sentencers and victims' families—perceive and treat offenders sentenced to LWOP. Another major difference between LWOP and life with the possibility of parole is that LWOP is systematically viewed through the lens of the death penalty (e.g. Ogletree and Sarat 2012). LWOP is presumed to be, by comparison, less severe. Yet, it remains largely unclear how punitive the sentence actually is. By contrast, lengthy prison terms tend to be placed outside the death penalty's realm; their severity seems to appear more evident (e.g. van Zyl Smit 2002).

To gauge LWOP's severity, we might evaluate it in terms of traditional and modern theories of punishment, namely retribution, utilitarianism, and incapacitation. Retributive theories are principally concerned with the degree of blame that can be attributed to an offender: those who commit a crime and inflict harm to others deserve to be punished (Blecker 2010). This approach tends to be backwards looking, and is

relatively unconcerned with preventing future harms. From a retributive standpoint, the degree of punishment that can be inflicted should be proportionate to the crime, balancing the harshness of the penalty with the gravity of the offence. From this standpoint, LWOP is highly retributive as there is little prospect for release (Robinson 2012). The punishment would thus only be justified for the most heinous crimes and criminals. Yet, when the punishment is handed down for less severe crimes, including non-homicidal ones, it is at risk of losing its retributive justification (Robinson 2012: 240; Taylor 2012: 1855, 1856) .

Utilitarian theories—deterrence, incapacitation, and rehabilitation—evaluate penalties prospectively; that is, they consider the punishment's possible future benefits (Frase 2008: 43). Individual deterrence aims to dissuade the offender from reoffending while general deterrence seeks to discourage others from engaging in criminal activities (Bentham 2009). LWOP, because of its indefinite nature, is assumed to carry significant deterrent effects. However, if used too expansively or routinely, the punishment is at risk of losing its communicative purpose, namely it no longer appears as extremely severe (Hamilton 2015: 15).[3]

Under an incapacitative logic, the state prevents those at highest risk of recidivism from relapsing (von Hirsch 2009: 75-81). When an offender is sentenced to LWOP he or she is permanently incapacitated. For Jonathan Simon (2012a: 282), LWOP epitomizes 'total incapacitation'. Yet such a sentence is often unnecessary and too severe for those who do not present such a degree of risk (Hamilton 2015: 16). Some studies challenge the connection between harsh punishment and crime reduction, suggesting that imposing harsh penalties in order to reduce crime is perhaps overly simplistic (e.g. Wright 2010). As such, the arbitrariness of the

[3] Moreover, studies show that swiftness and certainty are greater deterrents than severity (Gottschalk 2013: 359; Travis et al. 2014: 154).

relationship between the punitiveness of a sentence and crime levels undermines incapacitative rationales.

Finally, rehabilitative penal grounds aim to reform the offender in order to ensure his or her reintegration in society (Bottoms 2009). From this perspective, the severity of a punishment is determined by the time needed to prepare an offender for reinsertion. LWOP, in denying from the outset any opportunity for relief, challenges the very purpose and scope for rehabilitating offenders (Pettigrew 2015: 199). The sentence cannot reward desistance. If anything, the sentence does not reform or prepare the offender for release and reintegration but rather to endure the sentence until they die, 'it prepares a lifer not for success but for death in prison' (Hamilton 2015: 16).

Whether LWOP is considered to be wrong, or to be better or worse than death sentences, is essentially a moral or philosophical question. Separately, more sociological questions arise about what has happened and what has changed. While both LWOP and the death penalty are objectionable for being overly severe, there is a puzzling silence around LWOP. This thesis does not further engage in a moral evaluation of the punishment but instead privileges a 'Punishment and Society' (Simon and Sparks 2012) approach—one that draws on legal, political and historical perspectives of punishment and includes micro level sociological inquiries—to explore the normalization of LWOP's severity. In investigating the mechanisms that have helped to shape understandings of its extreme severity, this thesis is a step toward uncovering LWOP's degree of punitiveness.

III. THE PUZZLE

1. LWOP's severity: what we know

Relatively few studies have focused on LWOP outside the unique context of juveniles (Hamilton 2015: 3). In comparison to the wealth of monographs, articles, and human rights reports on capital punishment, little has been written on life imprisonment with no possibility of release. Towards the end of 2012 a book edited by Charles Ogletree and Austin Sarat (2012) explored whether life without parole had become America's new death penalty but none of the chapters relied on empirical data. When studies do turn to qualitative sources (e.g. Leigey 2010) they tend to rely on data collected from small samples. Also, to date, no research study has turned to women serving LWOP in the United States.

Because LWOP shares some similarities with lengthy prison terms, this section includes in its review of the literature works on the severity of life-long incarceration. Studies show that LWOP denies hope to a number of individuals, including juveniles, the elderly, and the mentally ill (Dolovich 2011, Dolovich 2012; Barkow 2012; Nellis 2013). This denial of hope is cruel and inhumane because it rules out any possibility for the convicted individuals to change and become capable of being reintegrated back into society (see below on the right to hope under European human rights law). Left with little prospect of release or review some turn to drugs or become suicidal (Hartman 2013: 17, 25–27, 79–80). LWOP's cruelty, however, goes beyond the denial of hope: it also entails that these individuals are going to experience the general pains of prison extended to the very limits of their life while having no hope of ever escaping them (Dolovich 2011, Dolovich 2012: 105–107). In this sense, LWOP exacerbates the wider set of pains associated with imprisonment.

There is significant evidence that various pains, both physical and psychological, mar life in prison (e.g. Sykes 1958; Crewe 2011). Those individuals who are sentenced to perpetual incarceration will endure these pains until they die (Dolovich 2012). Because a majority of LWOP prisoners are sentenced at a young age, their suffering will span over decades. As a number of studies suggest, the combination of being denied hope with being locked up and alienated aggravates psychological pains. While some life term offenders develop coping mechanisms by entering into certain routines such as committing to sport and work activities (Johnson and Dobrzanska 2005; Villaume 2005; Irwin 2009), long-term incarceration inevitably leads to emotional and mental deterioration (Johnson and Dobrzanska 2005: 37; Abrahams 2011). McGunigall-Smith's (2004) research points to the particularly debilitating effect that being locked up forever has on lifers. Such psychological harm is likely to be aggravated by the fact that those prisoners with serious mental illnesses are under-medicated, over-medicated or even not treated at all (Kupers 2008: 1008; Dolovich 2011: 319). LWOP inmates' experiences mimic the grief responses of dying patients (Sliva 2015).

Leigey (2010) found that LWOP inmates struggled with the transition to imprisonment but over time seemed to adjust to incarceration and to exhibit fewer mental health issues or instances of misconduct than the general population. Because the chances of being released are minimal, inmates strive to make their experience positive and refrain from engaging in institutional violence (Johnson and McGunigall-Smith 2008). Yet, what some scholars interpret as 'adjustment' or 'coping' may in fact be symptomatic of profound psychological damage and alteration (Wright et al. 2016).

Being locked up in certain types of prisons further intensifies the psychological damage and contributes to the punishment's harshness (Torti 2013: 1934). A number of LWOP prisoners are held in overcrowded cells or experience solitary confinement in high security facilities (Shalev 2009: 64; Solitary Watch). The essential features of this latter type of confinement are 'isolation, intense surveillance and elaborate precaution against assault and escape whenever prisoners are out of their cells' (Rhodes 2010: 406–407). In practice, this translates into locking up individuals in small single cells that resemble concrete boxes for twenty-one to twenty-two hours a day with little or no human contact and minimal sensory stimulation. To shower or exercise, prisoners on solitary are cuffed, tethered, and escorted; they also exercise alone (Haney 2003; Rhodes 2005, Gawande 2009; Shalev 2009; Rhodes 2010). Sharon Shalev (2009: 19) describes how those held in solitary confinement in Supermax prisons are dehumanized and turned into 'blank slates'. The prospect of having to endure this psychological pain indefinitely only exacerbates the distress of those sentenced to LWOP (Dolovich 2012: 105–109).

In addition to being denied hope and held in brutal conditions, prisoners sentenced to LWOP experience an acute degree of alienation from the outside world. Unlike other convicts, their ties with their families and friends tend to be destroyed permanently (Liptak 2005; Hartman 2009, Hartman 2013; Travis et al. 2014: 283–291). Their only connection with the outside world is often reduced to the medium of television (Hartman 2009; Abu-Jamal 2016). They are also alienated within the prison walls where they are frequently denied educational or employment programs (Hartman 2009; Nellis 2010; The ACLU-NC undated; Gottschalk 2012: 267, 281) and sometimes denied adequate medical care (Mauer et al. 2004; The ACLU-NC undated; Gottschalk 2011).

Being sentenced to LWOP may also lead to various physical pains and degradation (Harvard Law Review Association 2006; Nellis et al. 2009). Ageing in prison will necessarily be accompanied by deteriorating health (Williams et al. 2012: 1151). A documentary entitled *Serving Life* (2012) illustrates this aspect of life-long incarceration particularly well. It documents a hospice program inside Louisiana's Supermax prison at Angola where fellow inmates care for those who are dying, showing not only the pains of ageing but also the neglect by public authorities of those prisoners left to die. Compounding matters, many LWOP prisoners are exposed to other inmates' violence and the cruelty of certain guards (Haney 2008; Nellis, Ashley and King 2009; Dolovich 2011; Bowers 2012; Gottschalk 2012). In all these ways LWOP is more than a permanent deprivation of liberty; prisoners endure a cruel and traumatising existence. Under these circumstances it is unsurprising that prisoners describe their punishment as 'hell' (Abu-Jamal 2016), or claim that 'nothing could be worse than this' (McGunigall-Smith 2004: 13). Some prisoners on death row have even expressed their preference to be executed rather than have their sentence commuted to life without parole (Johnson and McGunigall-Smith 2008: 333; Burns 2013; Tutro 2014).

2. Dramatic increase and proliferation

While LWOP clearly appears to be cruel and inhumane, according to prisoners' perspectives and under human rights principles, its use has dramatically increased. The lifer population has significantly contributed to the increase of the overall prison population. The number of lifers in the United States quadrupled between 1985 and 2012 to the point that one in nine prisoners are now serving a life sentence (Nellis and Chung 2013: 1). A subset of the lifer population includes the men and women

sentenced to LWOP, and the number of these prisoners has increased at an even faster pace (Hoyle and Miao 2014). Of the total 160,000 lifers, nearly 50,000 prisoners—one out of every 30 prisoners—are serving LWOP sentences (Mauer and Nellis 2016). The rapid escalation of the LWOP population in the United States has, like the broader lifer population, contributed to the prison population's explosion (Mauer et al. 2004: 1).

Since its introduction in the late 1970s (Ogletree and Sarat 2012), there has been a dramatic expansion of life without parole beyond the scope of capital crimes for which it was originally intended (Nellis 2013). The LWOP population has also increased during a period of substantial reduction in crime rates, with studies disputing the correlation between enhanced public safety and extreme prison sentences (Gottschalk 2012; Zimring and Johnson 2012). For Marie Gottschalk (2012: 233) the punishment has been so 'widely used', it has become 'so commonplace', 'an 'unremarkable part of the sentencing toolkit in the United States' (Gottschalk 2012: 228).

While every US state but Alaska provides LWOP (Nellis and Chung 2013: 3), prisoners are disproportionately represented in Florida, Pennsylvania, Louisiana, California, and Michigan (Nellis and Chung 2013: 3). By 2013, these five states accounted for nearly 60% of all LWOP sentences nationwide. Also, concerns about racial disparity are more significant amongst prisoners serving LWOP in comparison to the lifer population. While African Americans represent 47.2% of the overall lifer population, 58% of the LWOP population are African American (Nellis and Chung 2013: 10). In seven states, the portion of African Americans serving LWOP reaches two-thirds of the LWOP population (Nellis and Chung 2013: 10). In some states, the portion of Latinos serving LWOP is equally high (Nellis and Chung 2013: 10).

The embrace of LWOP stands in sharp contrast with the rest of the world. Few countries other than the United States provide life without parole sentences. According to the 9th Quinquennial report of the United Nations Secretary-General on the use of capital punishment (United Nations Secretary-General 2015, para. 9) the majority of abolitionist states have replaced capital punishment with life sentences that provide a form of review and early conditional release. The minimum term of imprisonment ranges between 20 and 40 years. There are only few countries that leave former capital crimes to the discretion of the courts and that prescribe no minimum. Exceptions to the general rule on abolitionist states include Australia, providing LWOP in every territory and state, including for juveniles (Fitz-Gibbon and O'Brien 2016). Many abolitionists jurisdictions even prohibit life imprisonment—such as Croatia, Nicaragua, Norway, Portugal, Paraguay, Slovenia, Spain and Venezuela—primarily because of the emphasis on rehabilitation or re-education of prisoners in these countries (United Nations Secretary-General 2015: 47–48). Further, the Rome Statute that set up the International Criminal Court stipulates that life sentences for even the gravest crimes, such as crimes against humanity and genocide, should be reviewed after 25 years (Articles 77 and 110 of the International Criminal Court).

In Europe, a life without parole sentence would probably breach the European Convention on Human Rights. While it may be too early to speak of a fully-fledged European 'right to hope',[4] (van Zyl Smit 2013, van Zyl Smit 2014a-b; Simonsen 2015), a life sentence with no realistic possibility of release would most likely breach Article 3 of the Convention, which prohibits inhuman and degrading treatment of punishment. Considerations about offering prisoners a right to hope first arose in

[4] Explicit mention of a 'right to hope' was made by Judge Power-Forde in her concurring opinion in *Vinter and others v the UK* (2013).

Kafkaris v Cyprus (2008). The Strasbourg Court decided that a life sentence *per se* was not incompatible with the Convention if it was carried out in full (if a prisoner died while serving the sentence; *Kafkaris* at 98). However, the Court also found that in order for such a form of punishment to be valid under human rights law, it would have to be reducible *de facto* and *de jure*; as a matter of fact and a matter of law. This finding does not mean that a life sentence *must* be reduced but rather that it must be *capable* of being reduced.

In *Vinter and others v UK* (2013), the Grand Chamber clarified the parameters of the prohibition on inhuman and degrading punishment when applied to whole life orders in England and Wales. The Chamber reiterated the *Kafkaris* finding that life sentences are not *ab initio* incompatible with the Convention. Indeed, such a punishment may be justified to keep prisoners locked up if they continue to pose a danger to society (*Vinter* at 108). The decision in *Vinter* further confirmed that a life sentence must be capable of being reduced as a matter of fact *and* of law, otherwise it would raise concerns under Article 3.[5] More specifically, the Court held that the national law must afford the possibility of review with an actual prospect of commutation, remission, termination, or conditional release (*Vinter* at 106, 108-109). The state must not merely and abstractly provide prisoners with a prospect of release, it must be 'realistic'. The review procedure must be clear from the outset, from the moment the sentence is handed down (van Zyl Smit et al. 2014). A prisoner should not have to wait for an indeterminate period of time to ask for review since that would be a violation of legal certainty. The Court found that it would be 'capricious' to expect prisoners subject to a whole life order to work towards rehabilitation without knowing whether and when they would be entitled to be considered for release (*Vinter*

[5] This is different from requiring that a punishment is both irreducible *de facto* and *de jure* for there to be a breach of Article 3 (Mavronicola 2014: 303).

at 122).[6] Furthermore, the review should be available no later than 25 years after the imposition of a life sentence (*Vinter* at 120).[7]

The penal rationale for providing prisoners hope is founded on the concept of rehabilitation (*Vinter* 2013 at 111).[8] For the Grand Chamber, denying prisoners any prospect of release would breach the Convention as it would negate any possibility of change; for 'whatever the prisoners do in prison, however exceptional their progress towards rehabilitation their punishment, remains fixed and unreviewable' (*Vinter* at 113, 117). To establish the primacy of rehabilitation, the Court relied on the notion of human dignity, described as the 'very essence' of the Convention (*Vinter* at 113). In its latest decision on the matter, *Murray v The Netherlands* (2016), the Grand Chamber referred to 'hope' and relied on the *Vinter* precedent to conclude that sentencing to life imprisonment an offender with severe psychological problems while failing to give him any psychological treatment removed his chances of ever being realistically released. His sentence was not *de facto* reducible and as such breached Article 3 of the Convention.

3. Silence

Despite the growth of the LWOP population and evidence of the punishment's cruelty, little attention has been paid to LWOP. At the start of this study there were very few official records of the number of LWOP sentences, or details about the demographics of prisoners. The Bureau of Justice Statistics department explained to

[6] The Grand Chamber sanctioned whole life orders precisely because the procedural review mechanism available in England and Wales was not clear from the outset and as such did not provide a meaningful prospect of release.

[7] In the recent decision, *Hutchinson v the UK* (2015) the European Court on Human Rights found that the judicial interpretation of the applicable law provided by the Court of Appeal decision in *R v McLoughlin* (2014) made the release mechanism sufficiently clear and as a result whole-life orders no longer breached Article 3 of the Convention.

[8] For detailed critique of the justifications of punishment (see von Hirsch 2000; Ashworth 2010).

me in 2013 that they were in the process of compiling data on LWOP for the first time, stressing that the task would likely be hampered by the fact that some states such as California had failed to record the number of LWOP sentences since its introduction.

The public also seems broadly unconcerned that LWOP might discriminate against minorities, be disproportionate to individual crimes and offenders, and is unnecessary to ensure public safety (Gottschalk 2013: 353; Hamilton 2015: 3). Some scholars point out that the punishment is in fact widely supported (Harvard Law Review Association 2006; Appleton and Grøver 2007; Gottschalk 2012; Nellis 2013). National polls and surveys suggest that the American voters are largely in favour of LWOP where offered as an alternative to the death penalty (Public Religion Research Institute 2015).

Some media have suggested that LWOP should become 'the new standard', for it is 'just', 'harsh', and 'final without being irreversible' (*Dallas Morning New*s 2007, emphasis added):

> Justice demands a punishment that is fair yet revocable one that provides a sense of finality while allowing for the fallibility of the system. Life without parole meets that bar. It's harsh. It's just. And it's final without being irreversible. Call it a living death. [It protects] society from violent criminals and ensur[es] that every day of a murderer's life is a miserable existence. Our standards of punishment have evolved over time from the gallows to firing squads from the electric chair to lethal injection. *Life without parole, essentially death by prison, should be the new standard*.

As inmates disappear from the public gaze because they are in prison, policymakers and courts end up ignoring the increasing LWOP population, and fail to engage with the severity of the punishment (Gottschalk 2012). Other than for juveniles, very few reforms have been implemented to curtail the expansion of LWOP (Barkow 2012: 202-203; Cunneen et al. 2013: 9). An assortment of conservatives and liberals are calling for the reduction of the prison population by decreasing the number of prison

sentences, releasing older inmates and allowing more prisoners opportunities for relief (Coalition for Public Safety 2015: 1-3). Yet, none of these calls for reform directly concern LWOP and its prisoners.

The political inertia that surrounds LWOP is in part explained by the absence of strong and vocal activist groups to campaign against the punishment (Barkow 2012). The most significant engagement against this form of punishment stems from prisoners themselves (Hartman 2009, 2013). Kenneth Hartman who is serving an LWOP sentence in California, has created The Other Death Penalty Project (The ODPP). It is composed exclusively of prisoners and calls on death penalty abolitionist groups to stop promoting such punishment as a 'supposedly humane alternative to lethal injection' (The ODPP 2010). The group opposes the idea that it is a necessary first step to abolish the death penalty. The ODPP published an anthology of prisoners' stories, *Too Cruel Not Unusual Enough* (2013), to raise attention to the cruelty of their punishment. Death row prisoners, like Kevin Cooper, have also spoken against the commutation of their sentence to LWOP, denouncing the inhumanity of the alternative (Cooper 2012).

A very small number of external activists campaign alongside prisoners. The Campaign to End the Death Penalty (CEDP) focuses on abolishing the death penalty and is one of the few groups that provides in its convention that LWOP 'is not a humane or just alternative to the death penalty' (CEDP 2009). Texan capital defence attorney David Dow spoke against the California 2012 ballot initiative that offered to replace the death penalty with LWOP. For Dow, '[t]he justifications given by death penalty opponents who have embraced life without parole have surrendered the moral basis of their position' (Dow 2012).

By contrast, strong and vocal groups have campaigned against prison

overcrowding and death sentences (Cummins 1994; Gottschalk 2006; Haines 1996; Steiker and Steiker 2008, 2012). While costs have been a driving factor in challenging the death penalty and mass incarceration (Gottschalk 2011; Steiker and Steiker 2010; Dilts 2015), revealing the cruelty and pains caused by these punishments has considerably undermined them (Groner 2002a-b; Denno 2007; Alper 2008; Dieter 2008; Martschukat 2009). In the words of Richard Dieter, the then Chief Executive of the Death Penalty Information Center (DPIC), litigations brought by abolitionists under the auspices of pain caused by lethal injection have 'already held up more executions and for a longer time than appeals involving such (…) issues as race, innocence and mental competency' (Dieter 2008: 789; see also Steiker and Steiker 2008: 170). The growing awareness of the painfulness of the lethal injection process has shaken the public's confidence in the execution method and in the death penalty more widely (Dieter 2008: 815). Politicians, legislators and judges have also responded to these discoveries, sometimes radically changing their views on the death penalty (Songer and Unah 2006; Acker 2009).

By bringing prisoners' painful and degrading experiences of overcrowding into public consciousness, prison abolitionists have similarly successfully destabilized mass incarceration (Simon and Sparks 2012). A recent US Supreme Court case has acknowledged the humanitarian crisis going on within prison walls. In *Brown v Plata* (2011) the Court condemned the inhumane treatment of prisoners, finding it contrary to the Eighth Amendment which prohibits cruel and unusual punishment. The Court relied on photographic and expert evidence to conclude that prisoners experienced physical ill treatment, listing the following (in Garland 2011: 771):

> (i) crowding that runs as high as 300 percent of design capacity; (ii) backlogs of 700 prisoners waiting to see a doctor for physical care; (iii) unsafe and unsanitary conditions; (iv) cramped conditions that promote unrest and violence; (v) suicidal inmates held for prolonged periods in telephone-booth-sized cages without toilets; (vi) prisoners suffering from physical illness receiving severely

> deficient care; (vii) up to 50 sick inmates held together in a 12-by-20-foot cage for up to five hours awaiting treatment; (viii) an "extremely high" proportion of "preventable" deaths; and (ix) an "unconscionable degree of suffering and death".

While standing at the crossroads between imprisonment and the death penalty, LWOP's extreme severity has not triggered similar attention and reaction.

IV. NORMALIZING LWOP

The intensity of LWOP may be attractive for those who favour severe penalties. Conservatives advocate for LWOP because it provides an opportunity to incarcerate indefinitely (Berry 2015: 3). But it is not unreasonable to assume that fundamental rights activists, who traditionally defend individual's intrinsic human capacity to change, would challenge LWOP. Yet, not only has LWOP triggered little activism, it has also at times been actively promoted by 'progressive' reformers. The punishment has indeed received bipartisan support. The National Coalition Against the Death Penalty (2007) for instance, on its list of 'Ten reasons Why Capital Punishment is Flawed Public Policy', described LWOP as a 'sensible alternative to the death penalty'. One of the leading figures of the Innocence Movement, Barry Scheck (Harvard Law Review Association 2006: 1838 n.2), also defended LWOP as a reasonable substitute for the death penalty. At a time when capital punishment is living on borrowed time, some opponents of the death penalty seem to view LWOP as an opportunity to avoid death sentences in court as well as a political tool to challenge capital punishment before legislators and voters (Appleton and Grover 2007: 605; Barkow 2009a; Gottschalk 2012). Some authors have argued that these activists are partly responsible for LWOP's 'normalization'. Marie Gottschalk for instance writes (2012: 259):

> Over the years many leading abolitionists in the United States have ardently

> supported LWOP. They have 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. These abolitionists have helped normalize a sanction that, like the death penalty, is way out of line with Human Rights and sentencing norms in other developed countries.

These activists may have helped legitimate the punishment by disregarding its cruel and severe nature (Hamilton 2015: 10; see also Lerner 2015: 789):

> Unfortunately, death penalty abolitionists—perhaps unwittingly—legitimated life sentences by insufficiently attending to a life sentence's extreme nature and the likelihood that it, too, would be disproportionately visited upon poor and minority populations.

Other scholars have similarly suggested that the uncritical and exponential use of LWOP was related to how death penalty abolitionists framed the punishment's severity, namely fostering the belief that it was benign, human, and merciful (Steiker and Steiker 2008, 2012; Barkow 2012; Capers 2012; Gottschalk 2012; Zimring and Johnson 2012). For Markus Dubber (1995: 713), '[a] sentence of life without parole has come to be regarded as a benign penalty thanks in no small part to the 'death-is-different' campaign of opponents of capital punishment.' While Professor James Liebman (quoted in Liptak 2005, para. 37) underscored the benefits of tactically highlighting the availability of life without parole to challenge the death penalty, such a strategy, for Carol and Jordan Steiker (2008, 2009), is at risk of misrepresenting LWOP's punitive features. This approach makes '[e]ven the lengthiest sentences lose their horror when they are so avidly sought and so victoriously celebrated by the (rarely) successful capital litigant' (Steiker and Steiker 2008: 190).

For Rachel Barkow (2009a: 1191), death penalty abolitionists who plead in court often frame LWOP as an appropriate sentence. In so doing, they not only appear to approve of the punishment despite its evident cruelty, but they also shape sentencers' understanding of LWOP's extreme severity (Barkow 2009a: 1191):

> Death penalty abolitionists frequently tout life without parole as a viable sentencing option even though non-capital sentencing reformers have highlighted that life without parole itself raises fundamental questions of justice.

V. THIS THESIS

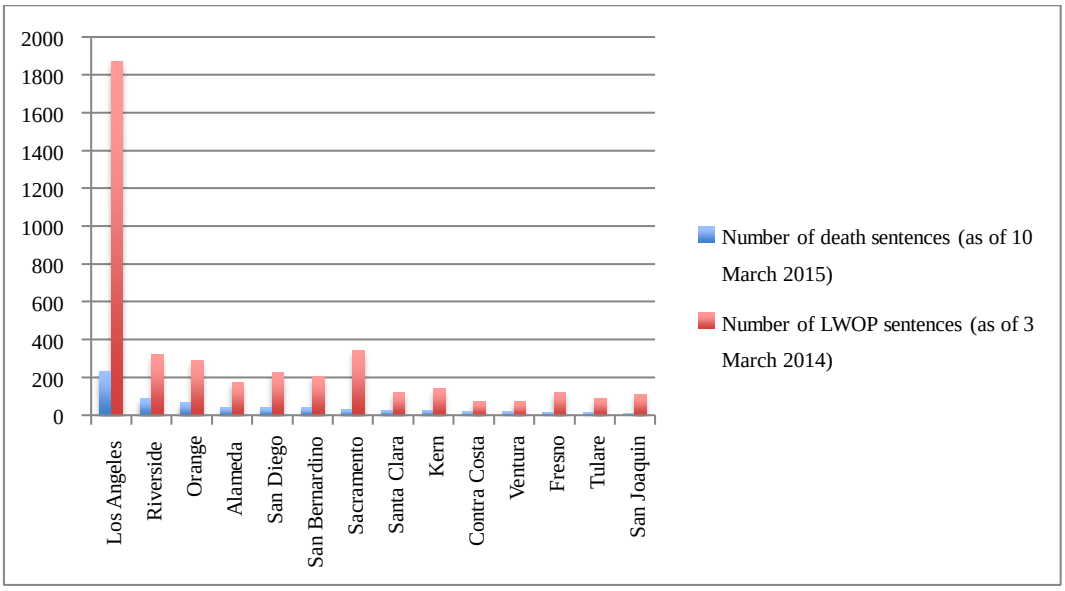
The ways how some death penalty abolitionists have framed LWOP, namely its lesser severity, prompts a fundamental rethinking of the ties between death penalty abolitionism and LWOP's normalization. Privileging a Punishment and Society multidisciplinary approach (Sparks and Simon 2012), this thesis investigates the mechanisms that have helped to shape understandings of LWOP's extreme severity. To discuss the extent to which some opponents to the death penalty have facilitated, participated in, and animated such mechanisms, this thesis focuses on three settings where they have lobbied, campaigned, pled and settled, for LWOP: Congress the broader political sphere, and courtrooms. This dissertation then contrasts how abolitionists have represented LWOP's extreme punitiveness with prisoners' lived experience, thereby turning to what happens behind bars as a fourth setting. The investigation is carried out between 1900, when the punishment was first discussed, until 2012, when the SAFE Campaign was launched in California to replace capital punishment with LWOP. This thesis seeks to answer the following research questions: *Through which processes has LWOP's severity been normalized? To what extent and in what respect have death penalty abolitionists played a part in these mechanisms of normalization?*

This thesis uses California as a case study to develop an in-depth analysis of the normalization of LWOP. While focusing on a single state may constrain the possibilities of generalization, using a single case study was the best avenue to complete this investigation. Indeed, given the fact that no research has been done on the normalization of LWOP and its ties with death penalty abolitionism, focusing on one case study provided a solid starting point for understanding the processes at stake.

Additionally, since many cultural variations exist between states, it was preferable to select one relevant jurisdiction, which is important by virtue of the following aspects.

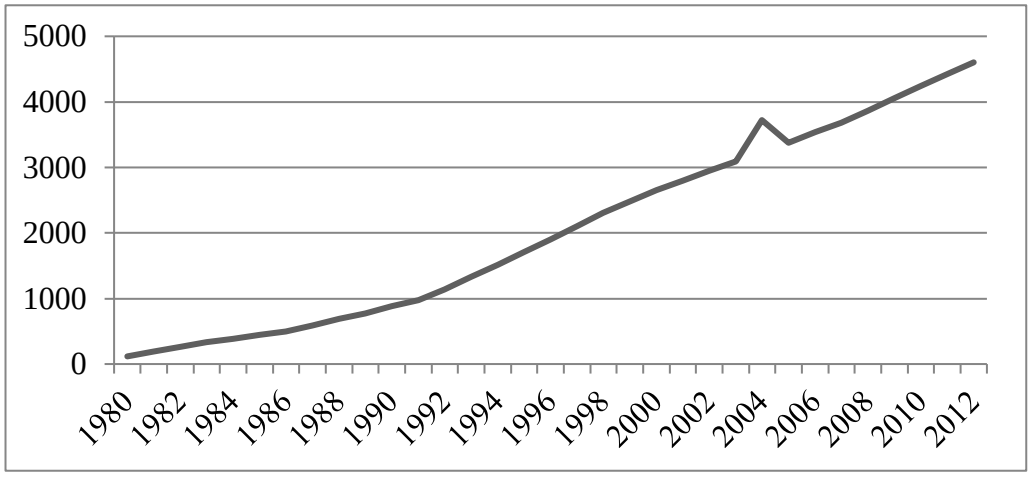
To begin with, California retains both forms of ultimate punishment shedding light on how they interact and intersect. Whereas the number of death sentences and executions are declining in California, the counties that continue to hand down death sentences are also those who sentence to LWOP the most, suggesting that the two punishments are positively correlated. Los Angeles, for instance, produces the greatest number of death sentences (DPIC 2015) and holds the largest death row population in the state and the nation overall. The county also gives the most LWOP sentences. The correlation between LWOP and the death penalty does not seem to work negatively, as some of the counties that do not sentence to death are also amongst the most fervent users of LWOP. For instance, Sacramento stands out as a state that does not sentence to death but holds the second largest LWOP population.

Number of sentences per county in California



While California's death penalty is withering, the state's use of LWOP is illustrative of the dramatic expansion and proliferation of the punishment. Between 1980 and 2012, the California LWOP population has multiplied 40-fold.

Number of offenders serving LWOP (1980-2012)



By 2013, the state held one of the largest LWOP populations (Nellis 2013: 3) and more than half of the nation's LWOP female population (Nellis 2014; Pishko 2015).[9] In 2012, over 300 offenders were serving LWOP for murders committed when they were younger than 18 years old (Turner 2012) placing California among the states with the highest number of youths sentenced to life with no prospect of review (HRW 2008).[10] As of 3 March 2014, 42% of the offenders serving LWOP had been incarcerated between the ages of 18 and 24.

California gives further evidence of the discriminatory ethnic distribution of LWOP sentences. Ethnic Minorities represent over 66% of the total LWOP population in California, with 32% 'Hispanic/Latino' and 36% African American (Nellis 2014). The racial disproportion is even more flagrant as we combine age with ethnic background. As evidenced by Human Rights Watch (HRW) 2008 report, California has the worst record for racially disproportionate sentencing of young individuals, with 85% of youth sentenced to LWOP being either African American or Hispanic (HRW 2008: 4-5). Young African Americans are sentenced 18.3 times more than Whites, and young Hispanic offenders are sentenced at a rate that is five times

[9] By 2013, there were approximately three hundred women sentenced to LWOP across the United States (Nellis and Chung 2013).
[10] Along with Florida, Michigan, and Pennsylvania.

the rate of a young White male (HRW 2008: 4-5).

Additionally, California is most suited to research the extent to which the normalization of LWOP may be intertwined with policies on the death penalty seeking to replace or abolish it. In 2012, two death penalty abolitionist groups, Death Penalty Focus (DPF) and the American Civil Liberties Union-North California (ACLU-NC), launched an unprecedented campaign against capital punishment in California. The SAFE Campaign, which stands for 'Savings; Accountability; and Full Enforcement', sought to convince voters to replace the death penalty with LWOP. A video—*Yes on Prop. 34*—was broadcasted on different social media in which the then president of Death Penalty Focus and former warden of San Quentin, Jeanne Woodford, assured viewers that replacing the death penalty with LWOP would not only save billions of dollars, it would also guarantee offenders would die behind bars (SafeCalifornia 2012). Other campaigners further ensured the punishment was less inhumane in comparison to the death penalty.

VI. CONTRIBUTION AND SIGNIFICANCE

While an emerging scholarship on LWOP suggests that the punishment has become 'normalized', there is no monograph or article devoted to this argument, and instead it often constitutes no more than a few lines or paragraphs, supported with minimal empirical evidence. By providing a more substantive engagement with a wide range of evidence, this thesis significantly deepens and extends the claim brought forward by these scholars. It offers a theoretical reflection on the notion of 'normalization', conceptualizing it as a set of processes through which the punishment is made to seem normal and acceptable. The project also sheds light on the normalizing mechanisms and how they operate in practice. Rather than lumping 'death penalty

abolitionists' together as an undifferentiated group, this thesis further gives a more nuanced account of abolitionists, stressing their varied roles and environments.

The project is situated within the broader scholarship on 'Punishment and Society' (Simon and Sparks 2012: 2) which is concerned with,

> [t]he powers that are activated in the name of punishment, the resources generated and consumed, the claims made and disputed, the emotions aroused and, of course, the millions of lives around the world that are affected by the ways in which penal practices are conducted and applied.

Punishment and Society lies at the intersection of a range of disciplines such as history, law, politics and sociology. To explore punishments, these works rely on a large set of methods and theories, and include both macro and closer range inquiries.

Within the Punishment and Society scholarship, there seems to have been a shift, which has moved from exploring the 'why' of penal punitive turns to the 'how' (Barker 2009; Lynch 2009; Shalev 2009; Page 2011). These academic writings explore how political structures—electoral systems or policymaking processes such as the ballot initiative—have facilitated certain penal trends and shaped penal policies (Cavadino and Dignan 2005; Lacey 2008). In his book entitled *The Toughest Beat*, Page (2011) illustrates this focus shift on penal processes and mechanisms, by investigating the role played by a particular interest group, the California Correctional Peace Officers Association (CCPOA), in the unfolding of California's punitive turns.

Research on punishment has been criticised for having reached a dead-end or being 'intellectually stuck' (Zedner 2002; Bosworth and Kaufman 2012; Hannah-Moffat and Lynch 2012). This critical scholarship re-evaluates prevalent and normatively accepted definitions of punishment and penal outcomes, and to this end suggests turning to different, less explored, conceptual frames and bodies of literature, asking different research questions and drawing on alternative sources and perspectives.

With these recommendations in mind, this thesis contributes to the wider Punishment and Society literature in the following ways. It focuses on a particular, yet under-researched and under-theorized penal outcome, that of normalization, which differs from the oft-explored 'tough-on-crime' and mass incarceration phenomena, and the emerging idea of 'penal moderation' (Loader 2010). Like the works which concentrate on how certain political mechanisms have facilitated particular penal outcomes (e.g. Barker 2009), this thesis investigates the different processes at work in political and legal settings that have helped to shape LWOP's severity. Furthering this scholarship, this study also includes a historical component by delving into the origins of LWOP and tracing how, and in what context, it became pivotal to abolitionist politics.

Moreover, this thesis makes an important and original contribution to on-going theoretical debates on the emergence and proliferation of certain forms of punishment. A significant scholarship has investigated and discussed how punitive actors (voters, lobbyists, legislators) are mainly responsible for the emergence and rise of extreme forms of punishment (e.g. Garland 2001; Pratt 2007; Simon 2012a-b). What this thesis reveals is that progressive reformers have also played a part in different normalization processes. It highlights the unfortunate consequences of progressive activism and reforms that privilege one social problem over another. As such, the project provides new knowledge about death penalty abolitionism, how it functions, why certain issues are prioritized over others, and the consequences thereof. In so doing, this research speaks to earlier writings that have critically discussed the part played by progressive rather than punitive reformers in legitimizing certain forms of penalties (Cohen 1979; Donzelot 1979; Foucault 1980; Rothman 1980; Gottschalk 2006; Murakawa 2014). A recent example is Naomi Murakawa's

The First Civil Right: How Liberals Built Prison America (2014). She argues that too often, scholarly and more popular accounts of the punitive turns have focused on the strategic policies, goals and interests of conservative elites and resentful whites during the 1960s. Murakawa (2014) reminds us that liberals, too, were strategic actors in the punitive turns. In legitimising federal intervention, proposing a new criminal code and extending the financial support to police, the liberals' strategy has facilitated the construction of the very system of 'lawful racial violence' that would lead to confining thousands of blacks in the post-civil rights era. In sum, by seeking to address racism in the criminal justice system, liberals have helped legitimise the remaining racial disparities by attributing them to black criminality (Murakawa 2014).

In addition, this thesis enriches our empirical knowledge of LWOP's extreme severity by relying extensively on a unique set of testimonies from prisoners serving life without parole in California. The 299 letters sent to me by men and women held in more than fifteen different prisons dispatched across the state—nearly a third of the total LWOP population in California—not only provide a unique and large-scale database; they also offer a highly relevant and largely under-explored representations and experiences of the punishment's severity. In fact, their testimonies are the very puzzle which makes us stop, pause and reflect on how the punishment's extreme severity has become normalized. Finally, this thesis carries significant policy implications. By drawing attention to the experience of the thousands of men and women serving LWOP, it seeks to bridge the gap between inmates and the society from which they are estranged. It also encourages social change, starting with a reconsideration of certain death penalty abolitionist strategies.

While the findings I describe in my dissertation share a great deal with patterns

observed throughout the United States, it remains no more than an investigation of the normalization of LWOP by specific death penalty abolitionists, in California, over a specific and short period of time. Yet, recent academic studies suggest that the part played by progressive reformers in punitive penal changes may in fact be far from unique (e.g. Nellis 2013; Simon 2014b). It is thus foreseeable that this research will resonate beyond its original spatial and temporal scope.

Conducting research on LWOP is topical not only in the United States. The project is relevant to other jurisdictions where similar forms of sentences are emerging or being considered. For instance, in January 2015, the Canadian Government announced it would introduce LWOP (Fine 2015). Having abolished capital punishment and made sure not to replace it with irreducible forms of imprisonment, recent empirical evidence shows that prison sentences in many European countries have progressively morphed into *de facto* LWOP sentences (see van Zyl Smit and Appleton 2016 forthcoming). Also, in light of terrorist attacks, some European states such as France are debating whether to implement a similar form of punishment (Vannier 2016).

VII. THESIS OUTLINE

This thesis is structured around 8 chapters, including an introduction and conclusion. Chapter 2 sets out the analytical frame and the guiding concepts within which this thesis explores whether, in what ways, and to what degree death penalty abolitionists, have participated, facilitated and animated normalizing mechanisms. Within the 'penal field', this chapter conceptualises 'normalization' around notions of routinization, limited visibility and denials.

Chapter 3 connects the methods of investigation and study with the theoretical

framework. On the basis of this approach the following methods were used: i) a textual analysis of different sets of documents, namely, archival legislative texts; US and California case law, criminal and sentencing laws; death penalty abolitionist organizations' policy documents; state statistics and reports; and prison administrative rules and regulations; ii) interviews with legal practitioners (prosecutors and defence lawyers), academics and representatives of various interest groups; and iii) a textual study of prisoners' written testimonies.

Chapter 4 turns to the first setting where death abolitionists have lobbied in favour of LWOP, the California Congress. It critically examines the period during which the idea of sentencing offenders to life imprisonment with no possibility of review first emerged, starting in the early 1900s and culminating with its enactment for capital murder in 1978 in the Californian Penal Code. Since its introduction, few reforms have been put forth to reduce the punishment's scope, and some death penalty abolitionists have appeared reluctant or worried when attempts have been made to curtail the punishment's reach (e.g. for juveniles). What in LWOP's legislative origins could explain the scarcity of penal reforms? How was the punishment first imagined in earlier legislative debates? What emerges from the textual analysis of legislative archives and a set of newspaper articles and editorials from the early 1900s until 1978 is that different experts—prison wardens, police officials, academics, spiritual leaders and criminologists—suggested LWOP as a strategic way for legislators to repeal the death penalty, and framed its severity accordingly. This new strategic idea was however diverted from its original progressive endeavours, to serve more punitive agendas. Congressmen concerned with preserving capital punishment in contexts of sensationalized crimes and early forms of populist demands instead introduced LWOP. This historical investigation

reveals that the punishment's particular severity can serve agendas which are seemingly in tension with one another.

In addition to lobbying legislators, abolitionist activists have also sought to change voters' views on the death penalty and LWOP. Chapter 5 turns to the second setting where death penalty abolitionists have promoted LWOP, the broader political sphere, and traces the abolitionist strategies of two of the most vocal organizations involved in the 2012 SAFE Campaign: The American Civil Liberties Union-North California and Death Penalty Focus. To this end, this section of the thesis combines an analysis of pamphlets, flyers and public discourses, with a narrative informed by interviews with some of the Campaign's most vocal activists. The politics of abolition have been characterised by a progressive instrumentalization of LWOP's severity, in a context of penal populist paradigm shifts and heightened fiscal concerns. This chapter also includes the voices of those who have spoken against the punishment, in particular prisoners, prisoners' families and prison-focused organizations.

In their efforts to avoid a death sentence for their client, defence attorneys promote LWOP and underplay its particular severity. Chapter 6 explores courtrooms as the third setting where abolitionists have supported LWOP and instrumentalized its severity. This section of the dissertation concentrates on one particular crime, capital felony murder, as a large proportion of the participants are serving this sentence. In examining sentencing pathways, this chapter finds that very little space is given to prosecutors, defence lawyers and sentencers (judges and jurors) to discuss or debate, evaluate and review the severity of the punishment. In part, this has to do with how the sentencing mechanisms—such as plea bargaining, mandatory application and proportionality review—detach the offender, in particular his or her level of culpability, from the punishment. Mitigating factors, which would otherwise be

expected to justify considering the punishment's severity, are not taken into account to decide whether to impose LWOP. This chapter triangulates textual analysis of criminal and sentencing laws in California, interviews with prosecutors and defence lawyers, and the study of prisoners' testimonies. It also relies on a small statistical component of data on LWOP and death sentences collected from two District Attorney's offices (Alameda and Los Angeles) to supplement the qualitative findings.

In the legal and political settings, LWOP's severity is rarely discussed. It is eclipsed, distorted or partially represented. To address this gap, Chapter 7 sheds some light on the punishment's extreme severity. It is commonly assumed that LWOP differs from traditional death sentences because it preserves offenders' lives until they die of their 'natural' death. Drawing on the 299 letters from LWOP inmates, this chapter explores other meanings of death in punishment. Prisoners' testimonies point to the certainty of dying behind bars as well as to the concomitant impossibility to quantify the time left to serve. Death also takes on a more embodied dimension, provoked by ageing and diseased bodies, as well as through the removal of parenthood and parenting. Further, death is experienced as the destruction of former identities and as a disinterest with inmates' capacity to change. Participants describe how they are reduced to being spectators of others' lives.

The concluding chapter connects the different normalizing mechanisms that have emerged, where some, but not all, death penalty abolitionists have lobbied, pled or settled, and campaigned for LWOP. Looking back to the scholarship that argues that death penalty abolitionists have helped normalize LWOP, this final chapter unpacks this claim, drawing attention to the variety of actors who have to negotiate particular environments. In the penal field, LWOP's extreme severity has been normalized. The main driver behind each normalizing process has been the traditional

death penalty. In the shadow of death, an inhumane form of punishment has proliferated and been championed by a wide range of penal reformers. While not responsible for activating mechanisms of routinization, restrained visibility and denial, some death penalty abolitionists have nonetheless become a part of them. They have helped to maintain and reinforce such normalizing processes. What then does LWOP express as a penal phenomenon? Does it signal moderation or punitiveness? The concluding claim is that through normalization processes LWOP's severity has been shaped to appear 'moderate'. In sum, the normalization of LWOP illustrates how extreme punitiveness can subsist in the guise of penal moderation.

CHAPTER 2—ANALYTICAL FRAME AND GUIDING CONCEPTS: NORMALIZATION AND THE PENAL FIELD

I. INTRODUCTION

A Punishment and Society approach aims to make sense of the penal world, both at a macro level (why do states punish?) and at a micro level (how are penalties implemented and experienced in practice?). This particular perspective draws attention to the quantity of crimes, penal policies and modes of repression, as well as to their quality, intensity and degree of punitiveness. From this standpoint, this thesis draws on the concept of 'normalization'[11] to explore how the quantitative use of a punishment and qualitative representations of it help make a penalty such as LWOP seem normal. Generically, normalization is defined as 'the action or process of making normal or normalizing' (OED, 'normalization, n.'). The verb 'to normalize' means 'to make normal; to bring or return to a normal or standard condition or state' (OED, 'normalize, v.'). For this particular research, the concept of normalization helps to illuminate how punishments are tolerated.

[11] The concept of normalization has been used and developed within a number of disciplines, such as visual neuroscience (Heeger 1992) and maths and statistics (The Oxford Dictionary of Statistical Terms 2004). As a contribution to the field of science and technology (May and Finch 2009), Normalization Process Theory is a sociological theory of the implementation, embedding, and integration of certain social practices. In gender studies, normalization depicts the processes through which particular gendered behaviours become normative; if individuals fail to conform to the predominant standards they are at risk of being excluded or marginalized (Adams 1997; Butler 1990, 1993). It has also been used to underscore the spread of a rape culture; i.e. those social attitudes that work to subjugate women's sexuality by making male violence on women trivial and by blaming the victims for their own abuse (e.g. Stanko 1985; Fineran and Bennett 2000). In international law, customary law refers to the normalization of certain practices that have developed over time and become standard practice through the regular exchanges between states over time (e.g. Shaw 2003). Historians also use the concept of normalization. Jeffrey Olick (1998) for instance explored how German politicians had sought to normalize West Germany after 1989. They tried to relativize German's Nazi past by equating the atrocities perpetrated by the Nazis with those committed by the Allies, in particular the Soviets. Politicians in the late 1980s also sought to place West Germany on the same level as other Western states, stressing how the country was experiencing similar social and economic difficulties as other welfare states, and facing the same 'normal' problems (Olick 1998: 563).

This chapter sets the study of normalizing mechanisms within Joshua Page's (2011) notion of the 'penal field', drawn from Pierre Bourdieu's works (1990, 1991). The concept of the 'field' offers an overarching analytical frame to explore and understand particular social outcomes as well as the part played by different actors. This chapter then addresses the three guiding analytical concepts used in this thesis. From a Punishment and Society standpoint, there are three concepts that help to explain how LWOP's severity has become normalized: routinization, visibility and denial. While in no way comprehensive, these concepts provide analytical guidance and explanatory power to the processes—the 'how'—that have helped to shape the punishment's degree of punitiveness. The field on the one hand, and routinization, visibility and denial on the other, together provide the overarching conceptual framework for this study. They offer the analytical setting and tools to explore whether, in what ways, and to what degree, death penalty abolitionists have participated, facilitated or animated normalizing mechanisms with regards to LWOP.

II. THE OVERARCHING ANALYTICAL FRAME: THE PENAL FIELD

1. The penal field

The field represents bounded social settings in which actors behave and interact. Within the boundaries of the field, a range of people, groups and organizations make decisions that establish policies and practices. These decisions reflect actors' internal and long-lasting dispositions and experiences, with the latter shaping perceptions, appreciations, and ultimately orienting their actions (Bourdieu, 1980: 52; Bourdieu, 1997: 138).

For the purpose of this research, I have relied on Page's (2011) concept of the penal field. Drawing on Bourdieu's concept of the field, Page explores the place of the California Correctional Peace Officers Association (the CCPOA) in the Californian 'penal field', which he defines as the 'social space in which agents struggle to accumulate and employ penal capital—that is, the legitimate authority to determine penal policies and priorities' (Page 2011: 10). The penal field, he suggests, is situated at the crossroads with other neighbouring fields; it 'intersects the bureaucratic, political, and legal fields, and neighbours the economic, academic and journalistic fields' (Page 2011: 10). This particular field also contains various sub-fields, such as the fields of the death penalty, imprisonment, policing, probation or parole (Page 2011: 10-12), and each have their 'own logic, rules and regularities' (Bourdieu and Wacquant 1992: 104).

The concept of the penal field was used to structure and frame this research. It served to delineate the different settings where death penalty abolitionists had framed, promoted or instrumentalized LWOP's severity. Within each setting, different rules applied, orienting penal behaviours and practices. Further, the penal field was helpful to identify the specific actors who played a part in normalizing mechanisms, and to discuss the degree to which they have animated, participated and facilitated a particular penal outcome, here the normalization of LWOP's extreme severity. Using the penal field was also pivotal to draw attention to the less predominant agents, namely prisoners and activists who hold competing knowledge and views about LWOP.

Additionally, the concept was particularly helpful to research and discuss the type of knowledge (or *capital*) some actors used to orient and impose policies and practices relating to LWOP and the death penalty. To impose their preferred policies,

actors in the field will strive to employ and accumulate particular skills or knowledge they have acquired during their education or professional experience (Bourdieu 1986). Such resources help them to obtain, improve, or conserve their position in the field, which in turn enables them to introduce the desired actions. For example, early career academics strive to acquire academic knowledge by completing doctoral degrees in prestigious universities, publishing articles in leading journals, and winning teaching awards and obtaining grants in order to apply for jobs at desirable universities.

In the context of penal policymaking, capital gives actors such as interest groups the authority to orient penal policies and priorities (Page 2011: 10). Some individuals share their knowledge with congress (Zimring 1996; Lacey 2008). Part of the reasons for inviting these individuals to testify before Congress has to do with their particular penal expertise. With regards to criminal justice policymaking, scholars also refer to 'experts'[12] who are capable of producing certain forms of knowledge (Foucault 1977; Garland 1992; Zimring 1996; Lacey 2008: 72-75, 191-192). For instance, Joachim Savelsberg (1994) discusses how academics, in particular criminologists, and criminal justice experts on crime and punishment, produce and share their expert knowledge with the United States legislature on penal policies. While experts' influence and involvement may have declined in the US, in part due to a populist shift of paradigms in the late 1970s (Bottoms 1995; Zimring 1996), it was not unusual in the 1950s and 1960s for academics, prison wardens, lawyers, and parole officers to present their reports and findings, share their personal experiences as well as opinions, on matters relating to penal reforms issues such as the death penalty (Zimring and Hawkins 1991; Haines 1996: 5, 36, 69).

[12] The notion of the expert is tied to that of special 'experience' or 'expertise' where '[o]ne whose special knowledge or skill causes him to be regarded as an authority' (OED, 'expert, n.').

Certain types of expert knowledge will come to matter more than others depending in part on the penal field's orientation, its 'guiding principles and values' (Page 2011: 11). For instance, until the mid-1970s, the rehabilitation ideal predominated the penal field. Those who privileged penological and correctional expert evidence and knowledge, bolstering prevailing ideas about crime and punishment, held a dominant position in the field (Page 2011: 16). The penal field's orientation then shifted, privileging incapacitation rather than correction and treatment. This change modified agents' positions in the field: those with correctional and penological expertise became subordinate whilst those with first-hand experience of violence, crime and the prison-world dominated the field (Page 2011).

Also, the importance of certain types of capital will depend on who shares it and the positions actors' already hold. When they are dominant in the field, agents determine the nature of legitimate capital. Subordinate agents, by contrast, struggle to alter the composition of the capital in order to improve their position in the field (Bourdieu 1986). This distinction based on positionality tends to sideline ingrained inequalities grounded on class, gender and race, which influence which type of capital matters. Some minorities, no matter how much capital they may acquire, are always going to find it hard to orient penal policies because of their situation and subjectivity within the broader social world. For instance, indigenous people in Australia, as Chris Cunneen discusses (2011: 2015; see also Cunneen and Rowe 2014), find it hard to be considered as penal experts, as their forms of knowing are testament to the lingering effects of colonialism. Rachel Condry and Caroline Miles' (2012, 2014, 2015) work on adolescent to parent violence illustrates how parents' experience and knowledge of children's abusive behaviours has been devalued and often cast as bad parenthood.

The penal field as a setting is unsettled rather than peaceful. Actors struggle to

acquire capital and to hold their positions. Bourdieu (1984: 11) uses the metaphor of a 'battlefield' to describe the tension that runs within the boundaries of the field, it is,

> [the] locus of struggle to detain the conditions and the criteria of legitimate membership and legitimate hierarchy, that is, to determine which properties are pertinent, effective and liable to function as capital so as to generate specific profits guaranteed by the field.

Another helpful metaphor for this study is that of the '*sporting field*' (Page 2012: 154, emphasis in text). Like a football field, the social field has rules, positions, strong and weaker players, where skill and talent is the capital for which they fight. Importantly, players must adjust their moves to that of their opponents. Their '"feel for the game"' evolves accordingly (Page 2012: 154). Social fields are, however, continually challenged and reshaped whereas the orientation of the sporting field tends to be fixed (Page 2012: 154). The unsettled nature of the penal field was helpful to trace and discuss how (i.e. using what type of knowledge) actors opposed to the death penalty strived to acquire dominant positions at different points in time.

While these struggles occur within a relatively bounded social place, they also arise in relation to political, social and economic determinants that emerge from the 'outside world' (Garland 2001: 24). These include phases of economic decline and budget shortage, demographic changes, growing ethnic divisions, varying crime trends, migration flux, and highly mediatized events such as heinous crimes or acts of terrorism. These external factors often influence actors' practices and actions within the penal field. However, the ways in which they penetrate it and shape penal outcomes vary. For instance, economic decline affecting state budgets could lead to lenient penal policies, such as the release of groups of prisoners. It could also result in the outsourcing and privatizing of prisons, thereby encouraging the variance of prison sentences rather than attempting to reduce them. In essence, external factors lead to different penal outcomes because they are not directly and automatically transposed

into the field. Rather, they are mediated and processed *through* the field.[13] The composition and overall orientation of the field together retranslate external pressures (Swartz 1997: 128) and channel them in particular directions. Those who dominate the penal field will, for instance, determine whether fiscal concerns matter in the context of penal politics, namely whether budget cuts should lead to less imprisonment or to more, yet cheaper, forms of incarceration. Paying attention to external factors is helpful to discuss what has influenced and oriented anti-death penalty actors' practices and strategies.

2. The field in criminology: an overview

This section provides an overview of criminological works that have relied on the field as a guiding theoretical concept, highlighting the gaps this study offers to address. The field has gained some traction with criminology in general, and the sociology of punishment, in particular (e.g. Garland 2008; Page 2011, 2012).[14] Scholars have relied on the concept of the field to guide their studies of penal outcomes. For instance, in *The Culture of Control*, David Garland used the concept of the field (2001: 5, 211) to explore the evolution of the crime control field in the United States and the United Kingdom. The changes he documented included the progressive centrality of crime victims in penal policymaking, the decline of the rehabilitative ideal, and the rise of punitive legislation. These shifts have generally been associated with shifting economic trends, growing ethnic and class inequalities, as well as family reorganizations. Yet, developments did not automatically translate

[13] The penal field in essence links macro and micro phenomena (Page 2012: 164).
[14] Bourdieu used the concept of the field to explore social practices in different areas, including education (Bourdieu and Passeron 1990), politics (Bourdieu 1991), art (Bourdieu 1996), law (Bourdieu 1987) and sport. He did not analyse actors, institutions and practices in the area of criminal and sentencing practices (Wacquant 2009: 289).

into penal outcomes. Rather, they were channelled and mediated through formal and informal actions into the crime control field. Formal controls, Garland explains, are exercised by the state or criminal justice entities, whilst informal means of control are by contrast, less visible, but more embedded and assimilated into the everyday life and activities[15] (Garland 2001: 5, 211)

Garland's work and many other studies that use the notion of the field in their analysis of crime control tend to focus on macro-level shifts. Whilst suggesting external elements shape and influence penal actors, these works rarely investigate how external changes affect agents and their decision-making process in practice. Some scholars have started to address this gap, which is an approach this study develops. Fergus McNeill and others (2009), for instance, studied the forces that influence criminal justice social workers in Scotland when preparing their pre-sentencing reports for judges. They focused on how these particular actors constructed ideas of risk in their reports, finding that social workers faced formal and informal pressures to prioritise risk assessment. Yet, the pressures did not translate explicitly into practice; rather they remained peripheral to the report-making process (McNeill et al. 2009: 428). To understand why such pressures did not dictate actors' actions, the scholars examined the positions social workers held in the field. Social workers stood at the crossroads of the social work field and the penal field, receiving conflicting pressures from both sides. Within the penal field, social workers held subordinate positions and in order to prove their legitimacy they used risk-oriented rhetoric in their reports. In so doing they acquired the necessary capital to be recognized and acknowledged within the penal field. At the same time, risk assessment was taboo in the social work field in which they held a dominant position.

[15] Other scholars have used the crime control field to describe and compare the introduction of new penal outcomes penalties across the world (see in Page 2012: 156).

In essence, the study demonstrated how social workers' positions influenced their perceptions and appreciation of risk, revealing evidence of both managerial as well as more welfarist considerations. Other studies have illustrated that punitive and rehabilitative penologies can overlap within a set field. For instance, a study on parole agents evidenced how rhetoric and conduct was simultaneously rehabilitative, managerial and punitive (Lynch 2000).

Among the scholars who focus on micro explorations some, like Page (2011, 2012) use the field to examine penal change. Page focuses on particular interest groups rather than on individual agents or macro structural factors, which is an approach this research has chosen. Page (2011) traces how the CCPOA progressively acquired a dominant position in the penal field, focusing on the ways through which the organization employed and accumulated capital, encouraged or discouraged politicians to take action, and altered the composition of the field notably by helping to create politicized and punitive crime victims groups. Page also emphasizes how the interest group shaped dominant conceptions of crime and punishment, reinforcing the view that prisoners and victims are enemies, that prisons are perpetually chaotic and violent, and that offenders are necessarily and indefinitely predatory. The CCPOA, he argues, also helped redefine penal expertise. The organization criticised and undermined the status of psychologists, criminologists, social workers, and legal scholars, establishing a new form of capital known as '"real-life" experience (Page 2011: 135, 211). Prison guards, in contrast to specialists standing outside prisons, have legitimate expertise and knowledge of incarceration and of the world behind bars.

At the same time, Page (2011) was careful to nuance his findings, mitigating the degree of responsibility the CCPOA bore in punitive penal outcomes. In particular, he

stressed that the organization, *per se*, did not create categories and images of crime and punishment but rather helped promote them. Further, the organization was not the only agent involved in the promotion of certain penal policies. It is because the CCPOA progressively came to hold a dominant position that others championed its visions.

While not questioning the worth and value of these works, there is a tendency amongst Punishment and Society scholars of the field to focus on the most visible and vocal actors, neglecting quieter attempts that arise from the less visible and powerful, who do not hold dominant positions. Some academics have sought to address this imbalanced attention while not necessarily using the penal field as a structuring concept. For example, in *Arrested Justice* (2012) Beth Ritchie charts the convergence of multiple dangerous phenomena: the intensification of a 'prison nation' that funnels disadvantages in low-income communities, the reconfiguration of the women's anti-violence movement, and the instrumentalization of mass incarceration by conservative politicians to address violence against women. Richie argues that anti-violence activism, whilst successful, has really only helped socially privileged women with the most visibility and power. Because these interest groups construct male violence as a problem that any and every woman could face—disregarding the racial and class elements of violence—evidence of violence against poor, Black women has been overlooked. Drawing on Ritchie's work but using the penal field as a frame, this study draws attention to those actors who, in the context of extreme forms of punishment, have been largely sidelined.

With a focus on progressive reformers—in this case death penalty abolitionists—this study relies on the penal field as an overarching and structuring frame. The concept was useful to isolate the settings where actors have promoted and

campaigned for LWOP, to identify the specific agents involved in the normalization of LWOP's severity, and to discuss the part they have played in different normalizing mechanisms. Within this frame, the thesis draws particular attention to less dominant actors, namely prisoners and activists, who hold competing views and knowledge about LWOP's severity. To discuss the normalizing mechanisms that have been activated within the boundaries of the penal field, this thesis has relied on three concepts: routinization, denial, and visibility. These notions provided analytical guidance and explanatory power to the processes that have helped to shape the penalty's degree of punitiveness.

III. GUIDING CONCEPTS: NORMALIZATION THROUGH ROUTINIZATION, VISIBILITY AND DENIAL

1. Normalization through routinization

a) Routinization as scale

To think of normalization in terms of routinization evokes issues of scale and quantity. With regards to punishments, this perspective can be traced back to Emile Durkheim (1973). For Durkheim, punishment was a 'normal' feature of society in part because of how much it was used. Imprisonment, Durkheim noted, had become a common means of punishment, '[d]eprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, then to become *more and more the normal means* of social control' (Durkheim 1973: 294, emphasis added). A number of scholars have since then centred their attention on the increase and proliferation of prison sentences (Zimring and Hawkins 1991; Zimring et al. 2001; Wacquant 2009; Simon 2010). The routinization of imprisonment is also illustrated

by the lengthening of prison terms, whether as a result of penal enhancement within 'Three Strikes' policies (Zimring et al. 2001), the imposition of determinate lengthy prison terms, or the transformation of life sentences into perpetual incarceration due to the decline or outright removal of parole (Simon 1993, 2012).

Routinization as scale is further illustrated by how prison sentences disproportionally affect large groups of individuals (Feeley and Simon 1992; Garland 2001; Zimring and Johnson 2012), in particular the poor and ethnic minorities (De Giorgi 2006; Gilmore 2007; Wacquant 2009). The concept also draws attention to the proliferation of large, high-security custodial facilities. Supermax prisons, originally imagined as exceptional and unique, have burgeoned across the country, informed by a logic of securitization (Shalev 2009). Also, behind bars, certain modes of repression are used in great quantities. For instance, the use of solitary confinement has become common practice against prisoners suspected of gang-affiliation (Shalev 2009) and the mentally ill (Haney 2006; Hannah-Moffat and Klassen 2015; Reiter 2015).

Routinization as scale can help us to understand the normalization of LWOP's severity. The argument here is that quantity and magnitude of a condition can obscure its severity, making it seem normal. The sheer scale of a social phenomenon, including sentences, may give the impression that it has become acceptable. While human atrocities are horrific, when carried out in big numbers they run the risk of appearing quite usual. As Joseph Stalin once said '[i]f only one man dies of hunger, that is a tragedy. If millions die, that's only statistics' (Lyons 1947). There are now hundreds of thousands of men and women in America serving life sentences and as such. The punishment has become commonplace and ordinary. In the words of Hamilton (2015: 14; see also Mauer 2015), '[America's] hyperbolic use of life sentencing is so routinized that the otherwise extreme penalty is no longer considered

extraordinary to the American public'. By contrast, punishments such as the death penalty that now only affect a very small proportion of cases in the United States, retain their unusualness or shock factor. The question then becomes: have death penalty abolitionists in any way participated, encouraged or facilitated the exceptional use of LWOP sentences?

The scale of a condition can also change our emotional reactions to it. In this sense, routinization as scale reflects our personal reactions to information about others' pain and suffering (Sontag 2003). The way scale can affect emotional reactions is helpful to explain why and how some death penalty abolitionists understand, conceive, and portray LWOP's severity. When estimates tell you that millions of children in certain parts of the world are dying every minute or that over half of the population does not have access to clean water it can change 'emotional or moral reactions' (Cohen 2001: 190). In some instances, we may feel indifferent to others' suffering because their experience feels too distant or too different from what we regularly encounter in our daily lives (Sontag 2003).

Zygmunt Bauman (1989: 184, 192; see also Green 2015: 52-53) would argue that these personal reactions rest on proximity. We may find it harder to care about children over there than about those who are closer to home. Or women may feel more attuned to other women's experience of domestic abuse than men would be. The same form of reactions based on proximity could apply to ethnic origins, age, and social class (Sontag 2003). Emotional reactions, or their absence, may be exacerbated when large groups are exposed to distant suffering, as it becomes harder to identify and assimilate to one person's pain (Boltanski 1999). When prisoners serving LWOP are held in remote high security facilities, some death penalty abolitionists may find it difficult to grasp the extreme severity of the punishment.

By contrast, we may suffer from hearing about and witnessing others' pain, and may need to avoid their suffering because it also injures us. To self-protect, we try to shield ourselves from human suffering and horrors. It is not that we are unaware of their experience but rather that we try to block the information or purposefully turn away from it in order to avoid feeling our own pain. Poet Bertholt Brecht (1987: 147) depicted such different emotions in reaction to the scale and accumulation of Nazi regime horrors:

> The first time it was reported that our friends were being butchered there was a cry of horror. Then a hundred were butchered. But when a thousand were butchered and there was no end to the butchery, a blanket of silence spread.
>
> When evil-doing comes like falling rain, no body calls out 'stop!'
>
> When crimes begin to pile up they become invisible. When sufferings become unendurable the cries are no longer heard. The cries, too, fall like rain in summer.

In the face of the immensity of events, we may also experience feelings of helplessness (Cohen 2001: 195; see also Sontag 2003). Often we ask ourselves, 'What could I possibly do to change things?' We see a situation as problematic but fail to know what to do, lacking the agency and power to put an end to such widespread misery. Similarly, some death penalty abolitionists may well be aware of the cruelty of LWOP but feel powerless to address and prevent it as long as the death penalty is in place.

Scale is, however, only one aspect of a larger habituation pattern; a snapshot in time that underscores quantity as opposed to repetition and regularity. The regular and repeated and durable exposure to a certain condition can also blunt its severity. As described in Brecht's poem, a situation's horror progressively disappears as it keeps being carried out. Over time, it is at risk of ceasing to be upsetting and shocking.

b) Routinization as habituation

Routinization suggests that, overtime, we become habituated to certain things and

develop habits and behaviours accordingly. In *The Civilizing Process*, Norbert Elias (1978) traces the development of behavioural patterns, such as violence and table manners, in Western societies. Elias's work highlights how certain habits emerged and were used over centuries, ultimately becoming embedded and commonplace. By the end of the process, behaviours considered 'normal' in the Middle Ages were perceived as 'barbarous'. To explain the development of public executions in Western Europe and their ultimate disappearance, Pieter Spierenburg (1984) drew on Elias' model, extending it to a larger number of European states, to conclude that changes in modes of repression were reflections of changing cultural sensibilities. Like Spierenburg, other scholars have mapped the evolution of methods of execution, which have become increasingly private and aimed at minimising the visibility of pain (Denno 2002; Groner 2002a-b).

Bourdieu (1990) relied on Elias' work to focus on individuals from different social groups and to explore taken-for-granted notions of what was deemed appropriate in light of particular educational, residential and socio-economic backgrounds. Central to Bourdieu's work is the concept of the *habitus*. Over time actors acquire habits, behaviours and sensibilities. These internalized habits reflect past experiences and social structures to which individuals belong; they incorporate 'the social into the corporeal' (McNay 2000: 36). Actors can develop a field-specific *habitus*, often after participating in the field for significant time. Those who participate in multiple fields can also develop more than one field-specific *habitus*. Such dispositions more generally shape perceptions, influence actions, reactions, and representations of the self in front of others (see Goffman 1959). Similarly, death penalty abolitionists may have developed habits with regards to capital punishment and LWOP. Overtime, it may have become habitual for those who oppose death

sentences to offer LWOP as a replacement punishment, avoiding to seriously consider the latter's degree of severity.

Routinization as habituation illustrates how we understand certain conditions to which we are regularly and repeated exposed. The more we hear, see and are exposed to something, the more commonplace they are likely to become. For instance, as we take the same paths to work every day, the name of the streets or the landmarks that surprised us at the beginning, gradually fade away to become unnoticeable. In *The Constitution of Society* (1984), Anthony Giddens proposes that society is constituted through remembering and doing much the same thing over and over again. The routinized use of places structures our lives, and the rhythms and time patterns we choose for ourselves give us stability and consistency. Moment-by-moment routines are often habitual and then taken-for-granted, progressively becoming normal.

In the same way, the repeated and regular exposure to certain conditions can eclipse their horror and the extent of their severity. Everyday, many times a day, we hear or read about human horrors across the globe. We hear and read about hundreds of migrants drowning and children dying in Syria. Until the day a three-year old migrant boy was found dead, Alan Kurdi, pictured lying face down on a beach, stories of migrants fleeing their countries and embarking on makeshift boats were common and often deemed uneventful. We may notice homeless people at first but as we grow accustomed to them being there, at the same spot everyday, we may stop seeing them or recognising their predicament. Similarly, yesterday we learned that someone was sentenced to life imprisonment and tomorrow another person will be sentenced to life imprisonment. The impact of extreme conditions such as serving perpetual incarceration becomes lost because of familiarity (Cohen 2001: 73, 189). Exceptional events tend to stand out but regular and ongoing occurrences are at risk of fading

from our attention. Normalization, Stanley Cohen explains, emerges as 'facts and images once seen as unusual, unpleasant, or even intolerable eventually become accepted as normal' (Cohen 2001: 188). What was once disturbing becomes acceptable and the challenge becomes to find ways to renew our sense of horror. In the same way, those anti-death penalty actors who are directly involved in penal policies and sentencing, may have become habituated to LWOP because it is so regularly used.

Like routinization as scale, the repetitive and constant exposure to troubling situations provokes different personal reactions and emotions. At times, the routine occurrence of certain events will pave the way to indifference (Cohen 2001: 189). No reaction is warranted because 'These things are commonplace'; 'They always happen in places like that'. Cohen also (2001) refers to the 'mental inertia' and emotional numbness provoked by the repeated visualization of suffering and atrocities. Some viewers will however retain a sense that such conditions are far from normal, and rather than feeling numb or indifferent will experience a sense of helplessness. For Cohen (2001: 189), these reactions are illustrative of a 'demand overload' rather than 'information overload'. Again, those who oppose the death penalty may feel powerless when confronted with the regular and incessant use of LWOP.

Crucially, reactions to routinized events and conditions depend on perspectives and personal experiences. Not everyone becomes habituated to recurrent and prolonged bad situations. For instance, being repeatedly stopped and searched by the police may become normal for young Black men who live in America (e.g. Brunson and Miller 2006). By contrast, the arrest of young White men, in particular from wealthy socio-economic backgrounds may be considered to be exceptionally shocking' among other elites. From the perspective of those who hear about such

arrests, emotional reactions will again rest on proximity (Bauman 1989: 184, 192), that is, on how close we feel to those who are repeatedly stopped and searched. We may grow habituated to events that occur regularly because they concern individuals who are different, and distant, from us.

When imprisoned, men and women bring some of the habits they have acquired through growing up in particular households or living in certain neighbourhoods, and attending particular schools. The carceral environment will also force upon them new patterns, for instance within the area of sex and sexuality, or with relation to sleeping and eating. Some scholars discuss the different 'coping' mechanisms prisoners develop behind bars (e.g. Johnson and Dobrzanska 2005; Rosher 2005; Leigey 2010; Diehl et al. 2015). Yet, from prisoners' perspectives, these adjustments may be experienced as profound and coerced transformations (e.g. Wright et al. 2016). It is therefore important not to assume that routinization through durability and regularity always and necessarily leads to habituation. Routinization as habituation should therefore serve to engage in micro level explorations, by turning to actors who are exposed to such conditions and investigating their perceptions and understandings. To avoid lumping together all death penalty abolitionists together, it was key to investigate their personal views and understanding of the punishment's severity.

Routinization, either as scale or as habituation, can explain how a punishment, which may appear extremely severe at first, is made to seem normal as it becomes a regular and unremarkable part of the sentencing process. For the purpose of this thesis, it was key to explore whether and in what ways death penalty abolitionists had facilitated the regular and expansive use of LWOP sentences. It was also important to explore if the magnitude and repeated use of the punishment had shaped how those committed to remove the death penalty understood and defined LWOP's severity.

There may also be no causal link between the routine use of a punishment and its severity. Routinization does not necessarily define or qualify a punishment's degree of punitiveness. Through scale, durability and regularity, various forms of punishment have become normalized regardless of their severity. Lengthy prison terms may have become commonplace but so too have community sentences and fines. Within the pool of sanctions routinely handed down, some are harsher than others. The routinization concept is nonetheless useful as it sheds light on the processes (and those who activate them) through which even the harshest forms of repression such as LWOP end up becoming normalized. It is the fact that something so severe has become commonplace that is surprising. Routinization in this instance uncovers the normalizing mechanisms at stake (scale or habituation), and in so doing serves to draw attention to the condition that has become normalized.

2. Normalization through visibility

Visibility strongly affects our perceptions of social phenomena in the field. Some conditions will rarely be discussed or debated among campaigners and legislators, or between lawyers and sentencers. They will seldom make the media headlines or be a topic of (dis)agreement within different social groups. Low visibility does not literally refer to what we 'see' but rather evokes the limited attention and reaction awarded to a condition within a set field. To explore how a penalty that is afforded limited visibility is at risk of becoming normalized in this way I draw on works on the making of 'social problems' and on 'invisible crimes'. These works provide the tools to examine another set of normalizing mechanisms and shed light on the part played by interest groups, whether by drawing attention to a social phenomenon, campaigning against it, collecting and distributing information about it, or by sharing

expert advice and recommendations.

The making of a 'social problem' includes different stages[16] and actors, such as the media, the public, interest groups and policymakers (Spector and Kitsuse 1977; Rubington and Weinberg 2011). It is a process but the phases do not necessarily occur in a set order. They can reinforce one another and, at times, occur simultaneously. For a social condition to reach policymakers' agenda,[17] Joel Best and Scott Harris (2013b: 2) argue that it needs to be deemed problematic and in need of reform by large portions of 'the public'. For instance, modes of repression such as imprisonment may affect members of society because of their cost (Gottschalk 2014). Taxpayers, in a context of economic decline, may find imprisoning large groups of offenders for lengthy periods of time to be problematic because of its financial impact on communities, for instance if resources that could otherwise be used to hire teachers or police officers are used to finance more punishment. A social condition may further be deemed troublesome because it infringes societal values and cultural sensibilities (Rubington and Weinberg 2011: 3). Pictures of 'dry cells', without beds, sinks or toilets in which prisoners could only stand, were shared in the US Supreme Court case *Brown v Plata* (2011: Appendix C) to highlight how California's penal practices had become inhumane, degrading and could no longer be tolerated. Values and sensibilities will obviously differ amongst groups and individuals, and often vary over time. What seems problematic is neither be universal nor permanent.

The part the public and the influence of public opinion play in the making of penal policies should be carefully considered. Garland (2001: 148), for instance,

[16] For Joel Best (2013a), the making of a social problem generally includes six stages: claimsmaking, media coverage, public reaction, policymaking, implementation and outcomes (Best 2013a: 14–28).
[17] The term 'Policymakers' generally refers to legislators. However, and in the United States in particular, there are political mechanisms that enable voters to directly introduce legislation (Barker 2009). For this reason, the notion here points to those with the political power to propose and introduce laws.

concluded that the views of middle class elite had been influential in the rise of a new, increasingly punitive, culture of control in the 1980s and 1990s. Michelle Brown (2006) challenged Garland's claim that these portions of voters had become more punitive and thereby highly influential in the so-called punitive turns. Their views, she found, had not changed. Rather, their influence in penal politics had been hampered, giving the impression that they approved of and embraced punitive shifts. What exactly the 'public' is requires careful scrutiny. The notion is murky and abstract, and has received much criticism (Cullen et al. 2000; Matthews 2005; Brown 2006) .

There is also a tendency in the sociology of punishment to focus on particular strands of 'the public', those deemed to have the most influence on penal politics. Garland (2001: 148), for instance, concentrated on 'liberal elites, best educated middle classes and public sector professionals'. Other times, he channelled his attention to the 'professional working class' (Garland 2000). Yet other members of the public may have voiced their discontent or opposition to particular penal policies. Their influence and views were disregarded, overlooked or restrained. The imbalanced attention given to, and perceptions of, such claims, whether in political or academic settings, are reflective of deeply rooted inequalities. The views of the 'public' which are taken into account, explored and relied on, tend to stem from those who hold powerful and dominant positions in the field. For this reason, this thesis draws attention to quieter and less dominant views amongst actors who oppose the death penalty.

The public's reactions to social conditions vary in intensity, with the most extreme form characterised as 'moral panics'. Some moral panics can be particularly 'noisy', especially when they arise from sensationalised cases (Cohen 2002: xxiii).

Quieter moral panics raise less attention and tend to involve professionals and bureaucrats 'working in organizations and with no public or mass media exposure' (Cohen 2002: xxiii). Moral panics can strengthen and be absorbed by the social problem-making process. As Garland (2008: 14) puts it, such reactions can 'cause the deviance in question to be halted, amplified or altogether transformed'.

Most importantly for the purpose of this thesis, the making of social problems often involves individuals or interest groups that Best (2013) calls 'claimsmakers'. For Spector and Kitsuse (1977: 75), the process includes 'the activities of individuals or groups making assertions of grievance and claims with respect to some putative conditions.' Claimsmakers are those individuals who seek to convince and persuade voters or legislators that a social phenomenon is wrong and ought to be recognized as such. In the context of extreme forms of punishment, some claimsmakers will strive to convince the electorate or congressmen to replace the death penalty with LWOP.

The claimsmaking process generally begins with collecting information and evidence about the troubling condition (Best 2013a: 31). Once evidence about the troubling condition is collected, claimsmakers must choose whether to go ahead and make the claim. When they do, they seek to frame the issue in such a way as to draw attention to it (Benford and Hunt 2003), appealing to people's morality, emotions or reason (Gould 2009). In particular, interest groups seek to influence and shape policymakers' understanding of a social phenomenon, that is, 'groups, individuals and government agencies deliberately and consciously design portrayals so as to promote their favored course of action' (Stone 2011: 131). To this end, their statements try to define the nature and scope of the problem and generally include evidence to illustrate why a condition is troubling. The claims will also often specify why something ought to be done, suggesting that the condition violates a sense of justice, fairness, equality,

or is unjustified by costs. In the context of the death penalty, arguments tend to be either principled and moral, or utilitarian and pragmatic.

The statements generally include recommendations about what action needs to be taken. With regards to extreme forms of punishment, some death penalty abolitionists would recommend replacing the death penalty with LWOP. These framings evolve over time so as to attract people to enlist in the movement and are shaped by the context within which it is set (Best 2013). Paying careful attention to the type of information death penalty abolitionists collect and disseminate with legislators, voters or sentencers is essential to discuss whether and in what ways some actors have shaped LWOP's severity.

At the other end of the social problem-making spectrum, policymakers also have to decide whether or not to place the condition on their political agenda. Such decisions are often, but not always, responsive to the different claims brought to their attention. Bryan Jones and Frank Baumgartner (2005: 5) explain, '[d]ecision makers, like all people, often ignore important changes until they become severe or until policy entrepreneurs with an interest in the matter highlight such changes'. Policymakers tend to rely on claims brought forward by the most influential and vocal groups. Some groups will be treated more seriously than others, speaking with special authority and legitimacy (Jones and Baumgartner 2005: 5; Best 2013: 19-20). In the context of extreme forms of punishment, and harking back to the works on the penal field, the knowledge (or capital) some death penalty abolitionists distribute will influence their credibility before policymakers such as legislators or voters.

Other less prominent claimsmakers may try to draw attention to a particular issue but fail to convince policymakers to put the issue on their political agenda. In an admittedly very different context, Condry (2015) explained how, with regards to

adolescent to parent violence, an organization, the Tulip Group, had tried in vain to raise policymakers' awareness of the phenomenon. What this suggests is a more general point about the place and influence some claimsmakers have in the field.

Notwithstanding the part claimsmakers play in penal reform, policymakers have their own considerations and experiences, which will orient whether a troubling condition ought to be defined as a social problem, one that justifies attention and possibly reform (Kraft and Furlong 2012: 87; Best 2013a: 19-20). Some may acknowledge the existence of a troublesome condition but decide not to pursue or carry out reform.

Processing information is central to the making of a social problem. Claimsmakers and policymakers gather, sort, prioritize, analyze and interpret different forms of evidence (Jones and Baumgartner 2005). Information-processing includes 'collecting, assembling, interpreting and prioritizing signals from the environment. A signal is simply some detectable change in what is happening '"out there"' (Jones and Baumgartner 2005: 7). Information can originate from government agencies, from the media or academics who study different policy problems, from interest groups or individual activists, as well as from competitors. Some experts may be called upon to share their views during hearings of testimonies, or tasked to complete studies and reports. The incoming information will then be organized, with some parts prioritized over others (Jones and Baumgartner 2005: ix).

The scholarship on 'invisible crimes' sheds additional light on the importance of information gathering and knowledge dissemination (e.g. Davies et al. 1999, 2014). In the context of punishment, what we know about lengthy prison terms, solitary confinement, or community sentences depends on the information collected and made available by interest groups, academics, official sources, or on the

testimonies shared by those who directly experience the sentence. Yet, each type of data may be limited and offer only a partial understanding of the condition at stake. When access to prisons is made harder (Simon 2000; Wacquant 2002; Bosworth et al. 2005), information may become difficult to collect, analyse and disseminate. Information made available by official sources may equally be limited. For instance, particular penalties will only gain limited visibility if official records fail to record the number of sentences handed down over time at a national, state and county level; do not distinguish between different types prison sentences, in particular lengthy prison terms; or fail to list offenders' demographic details and causes of death. These factors may explain why some death penalty abolitionists imagine, conceive and promote LWOP's severity in a certain way.

Conditions are likely to have limited visibility, as in draw scarce attention, when few efforts are made to conceptualize and understand their underlying causes. For instance, some crimes attract limited attention when there are scarce attempts to conceptualise the offence and define what constitutes the underlying breach and harm (Davies et al. 2014). The problem with adolescent to parent violence, Condry and Miles (2014: 257) explain that it has 'remained largely invisible in policing, youth justice and domestic violence policy'. Their findings underscore the lack of academic research, availability of official data, and legislative reform to address the phenomenon. Life imprisonment has similarly gained limited visibility in part because of the incomplete reflections made on the type of 'life' offenders lead (Capers 2012). Whether death penalty abolitionists fail to engage with the meaning of life and death in the context of perpetual incarceration will be one of the focuses of this thesis.

Some punishments will gain visibility through prisoners' testimonies. Their

'lived experience' can illuminate the punitive aspects of their punishment (e.g. Irwin 2009). In their later work, Pamela Davies (Davies et al. 2014) placed at the centre of discussion, the lived experiences of those involved as victims and survivors of crime, offering a broader opportunity to understand the issues most likely to affect people during their lives.

Despite there being ample evidence about it, a troubling situation may remain unattended to and unchanged. Timing is indeed crucial. While experts, claimsmakers, and policymakers are aware of them, certain conditions do not trigger reforms. One reason why claimsmakers and policymakers sideline certain claims is because there are other, more pressing issues. For instance, in the aftermath of the November attacks of 2015, Paris hosted a long-awaited United Nations conference on climate change (Harvey 2015). While the event was held, attention and concerns about the state's security superseded environmental issues. At certain points in time, some social conditions have greater appeal and resonance. A condition may also be deemed problematic at one point in time but then become acceptable, or vice versa at a later point in time. For instance, adolescent to parent violence has only recently become a 'visible' problem (Condry and Miles 2014). Also, in a context of economic decline and budget cuts, recommendations in favour of educating prisoners, and providing them with extensive medical and health care, may find fewer supporters. Attempts to reform gun control immediately after a mass shooting tend to be fruitless in the United States. Timing may also simply signal that policymakers and claimsmakers have no solution to address the problem at that point in time. In short, timing and the broader contextual environment are key and, in the context of extreme forms of punishments, may explain why some death penalty abolitionists portray and instrumentalize LWOP's severity in a certain way.

The timeliness of a claim is often tied to its likelihood of success. The making of a claim and its prioritisation tends to depend on whether it is likely to gain consensual support amongst the wider 'public'. A social phenomenon is at risk of being disregarded where it lacks sufficient saliency and raises significant conflict (Kraft and Furlong 2012: 93, 94; Best 2013a: 73-80). The issue of saliency refers to the fact that the troubling condition is of 'relative importance to the general public', whereas the notion of 'conflict' refers to 'the level of disagreement over it' (Kraft and Furlong 2012: 95). Social phenomena that attract greater salience and lower levels of disagreement are more likely to be placed on policy agendas (Best 2013a: 40-47, 59). For instance, it is largely agreed that preventing accidents in the transportation sector is important. By contrast, topics such a same-sex marriage, gun control, or abortion continue to raise high levels of disagreement, and, as a consequence, reforms are less likely to be introduced. The growing level of agreement over removing the death penalty may explain why, by contrast, little attention has been given to LWOP. This may explain why some opponents to the death penalty propose LWOP as a replacement.

Again, the group that constitutes 'the public' and the extent to which 'consensus' is achieved should be closely and carefully considered. Consensual social reactions are rather rare, and invoking them downplays the importance of culture wars (McRobbie and Thornton 1995; Garland 2008: 17). Also, such notions tend to disregard entrenched social inequalities, based on gender, class and race. Dominating, yet discriminatory, views are often considered to reflect 'public consensus'. For instance, violence against women, and even more so against minority women (Ritchie 2012), is surely salient and affects large numbers of the population but rarely is identified as a social problem demanding action because of structural gender

inequalities. Also, and as argued by Condry (2015), some social phenomenon may become more or less apparent within certain groups of individuals but remain confined to that specific environment. In the context of extreme punishments, it is important to investigate who agrees over LWOP.

There may, finally, be more pragmatic reasons for deciding not to address and reform certain conditions. Interest groups, including those who challenge the death penalty, rely on donors and benefactors for funding. They are careful to choose battles that will not compromise such financial support. Policymakers, particularly those who are elected, will also be wary of focusing on topics that will compromise their re-election. The influence of voters and financial supporters should not be underestimated. Policymakers and interest groups, including death penalty abolitionists, all have vested interests (Jones and Baumgartner 2005).

Visibility helps to understand how LWOP's severity has been normalized. In their work on 'invisible' crimes, Davies et al. (2014: 5) even speak of the 'normalization of the problem' when acts are taken-for-granted and sidelined from reform. Like normalization through routinization, the limited visibility of a penalty in political, legal, and media debates casts a degree of legitimacy and acceptability on it. It directly affects understandings of its severity. Rather than being placed at the forefront of political or legal debates and headlines, such a condition becomes peripheral and secondary. When a punishment fails to be prioritized for reform, its severity is more likely to appear normal. Inversely, because certain penalties are not deemed sufficiently severe or grave at a specific point in time, they fail to warrant campaigning, collecting information, conducting research, compiling official statistics, and producing expert opinions and recommendations.

Where individuals or groups with influence and power in the penal field, agree

or concede that a particular sanction is not sufficiently problematic to merit their immediate attention, this concurrence may help normalize a punishment's severity. Whereas normalization as routinization shapes severity through over exposure, here it is the under exposure which moulds ideas about degrees of punitiveness. Once again, these propositions need to be cautiously mitigated. Whether a condition is deemed normal or not is a question of perspective and experience. Those who serve a punishment for instance may experience and conceive the punishment's severity very differently, regardless of the fact that little is being done or said about it. While larger and more influential interest groups may decide not to make claims and provoke reform, possibly suggesting the matter is not reform-worthy, smaller and less prominent actors may challenge the condition and raise awareness of it. Attention to these quieter voices becomes key when considering a condition's degree of visibility.

There may also be no causal ties between degrees of visibility and the shaping of a sentence's severity. The fact that little is known, said or done about a given punishment does not say much about its intensity. The task is to reveal the factors that have kept the condition barely visible. Attention to visibility engages us to explore the ways through which a punishment, objectionable to some, has been eclipsed from public debate and penal reforms. A lack of research, statistics, campaigning and policymaking may explain how a severe form of punishment has been normalized.

Uncovering how a punishment such as LWOP has limited visibility helps illuminate the part played by interest groups in such normalizing processes, in particular in collecting, sharing and disseminating information and understandings about the penalty. At the same time, it forces us to explore and engage with the reasons given by claimsmakers for choosing not to campaign against a specific punishment at a particular point in time. For instance, to understand why LWOP has

received so little critical attention we must examine why interest groups or activists have chosen not to challenge it before legislators, voters or, judges and juries. Timing, as well as practical justifications, may explain why claimsmakers who oppose the death penalty have elected not to draw attention to this particular punishment. Other issues, deemed graver and more pressing, may further clarify why, while aware of the existence of another problematic mode of repression, some actors have nonetheless privileged certain battles over others.

Works on visibility hint at, but fail to provide comprehensive analytical tools to investigate, the importance of rhetorical representations. How have actors who oppose the death penalty framed LWOP? Which aspect is emphasized and what features tend to be left out? Certain claims will gain more traction than others in part because of how a social condition is portrayed. To address this gap, and to further explore how particular representations help normalize a punishment's degrees of punitiveness, I turn to works that have explored different forms of 'denial'.

3. Normalization through denial

The notion of 'denial' refers, inter alia, to the different rhetorical devices employed to avoid other people's suffering. The concept reflects personal states or reactions in which suffering is not acknowledged. Denial illustrates patterns of under-reaction. These reactions often entail distorting or misrepresenting certain aspects of a condition. It must, however, be emphasized that denial is not a stable state. No single person or group is entirely or permanently a denier. There are always elements of partial acknowledgement and partial denial. People also adjust their accounts depending on whom they address and engage with.

Cohen (2001) explored how victims, bystanders and perpetrators denied the

human rights atrocities they had experienced, witnessed or committed. Cohen identified three forms of denial. The first type, literal denial, refers to claims that nothing happened: 'There was no massacre here'; 'They are all lying'; 'We didn't notice anything'. The condition is outright denied. For Garland (2008), this form of denial amounts to an inappropriate absence of moral reaction. It is not an outburst but rather the 'hysterical (or deliberate) silence, a determination (conscious or unconscious) not to speak of the disturbing events or episodes' (Garland 2008: 25). In the context of punishments, while the scale of life sentences tends to be acknowledged, the pains associated with lengthy incarceration are often muted (Nilsen 2007; Capers 2012).

Rather than denying the raw facts of a condition, we may instead contest their meaning. 'Interpretive' denial does not reject that a condition is problematic but rather challenges how objectionable it is. A condition is described as not being as problematic as it seems ('It's not as bad as you think'). The existence of a problem is recognized, but 'its cognitive interpretation and moral implication are denied, evaded or disputed' (Cohen 2002: 13). Such processes of reinterpretation often rely on discursive tools like euphemism and legalism. Euphemism, for instance, helps mask acts of severe cruelty. Its function, Cohen (2001: 107) argues, is to 'mask, sanitize and confer respectability'. Through legal jargon, violations of human rights are given a 'neutral or respectable status' (Cohen 2001: 107). An example would be to refer to 'collateral damage' instead of 'killing civilians', or to the 'return of migrants' rather than 'forcible expulsion'. The way mass incarceration is often described as a concerning aspect of the criminal justice system tends to focus on its scale: there are too many prisons, too many prisoners, and it costs too much. Rarely do such discourses evoke the implications of mass incarceration, in terms of overcrowding

and inhumane conditions (Simon 2014a). Similarly, some death penalty abolitionists may refer to LWOP solely in terms of its efficiency and costs, distracting attention from the punishment's degree of severity. The use of such palliative terminology is at risk of insulating the audience from the harms and injuries at stake.

Attachment to legal phraseology can also be alienating and serve to draw attention away from certain realities (Cohen 2001: 107):

> Powerful forms of interpretative denial come from the language of legality itself. Countries with democratic credentials sensitive to their international image now offer legalistic defences, draws from the accredited human rights discourse.

For instance, when sentencers, on the basis of case law or penal codes, describe life imprisonment as preserving offenders' natural lives, they detract attention from the type of life offenders will endure (Nilsen 2007). When death penalty abolitionists rely on rules and regulations to distinguish the traditional death penalty from LWOP, they may also eclipse the extent of the latter's severity.

The third form of denial, 'implicatory' denial means the condition is acknowledged but we offer a set of justifications to minimize its gravity ('What happened can be justified'). This rhetorical device does not question the facts or their conventional meaning. Instead, their psychological, political or moral implications are minimized or muted. When officials, for instance, diminish the cruelty of their acts, they avert their responsibility to intervene (Cohen 2001; Welch 2007). When US planes bombed a *Médécins Sans Frontières's* (MSF) hospital in Afghanistan in November 2015, they first admitted they were responsible for an air strike, which had caused 'collateral damage' to the MSF hospital (see in Grierson et al. 2015). Later, the US forces sought to minimize and justify their act by saying they were targeting insurgents.

American army general John Campbell stated (cited in Grierson et al. 2015):

> US forces conducted an air strike in Kunduz city at 2.15am (local), Oct 3, against insurgents who were directly firing upon US service members advising and assisting Afghan Security Forces in the city of Kunduz. The strike was conducted in the vicinity of a Doctors Without Borders medical facility.

In the debate on the death penalty, some death penalty abolitionists may justify reverting to LWOP, presenting it as a means to a greater end or as an efficient sentencing tool to protect society.

Cohen's concept of denial draws on David Matza and Gresham Sykes's (1957) study of delinquents' techniques to neutralize the moral bind of the law and commit an offence. Certain techniques of neutralization are particularly relevant to exploring the normalization of LWOP's severity. Neutralization is grounded in the belief that offenders are aware of the wrongfulness of their actions to engage in criminal activity. They develop ways to neutralize the guilt associated with it and to blunt the moral force of the law. Through these techniques, social controls that are intended to check or inhibit deviant motivational patterns become inefficient, they are 'rendered inoperative, and the individual is freed to engage in delinquency without serious damage to his self-image' (Sykes and Matza 1957: 667).

The techniques of neutralization that allow offenders to engage in wrongdoing include different forms of denial, namely the denial of responsibility, injury, and of the victim. Offenders deny their responsibility by claiming their behaviour was accidental or the result of forces beyond their control. They see themselves as 'victims' of circumstances. The denial of injury focuses on the extent of the harm or injury caused. Offenders can excuse their behaviour if they believe no one was 'really' harmed. For instance, marijuana users will claim that smoking is neither socially destructive nor harmful to the individual (Peretti−Watel 2003). Sometimes, offenders admit that their actions do cause harm but neutralize moral indignation by

claiming the victim does not deserve a 'victim' status. They either contend the latter acted improperly and thus deserved everything that happened to them, or frame their actions as a form of rightful retaliation. The denial of the victim also occurs if the victim is absent or unknown. In these circumstances, the offender can easily ignore the rights of the victim because she or he is not around to rouse the offender's conscience (Maruna and Copes 2005: 233). The denial of the victim and denial of injury are very similar (Maruna and Copes 2005: 284). When offenders deny people their victim status, they tend to deny the amount of harm done.

These rhetorical practices can be applied to a broad set of actors, since neutralization happens all the time. It is a 'human feature' (Cohen 2001: 249). Shadd Maruna and Heith Copes (2005: 285) even speak of the '"normality of neutralizations"'. Techniques have been patterned amongst social workers, defence attorneys and positivist social scientists (Matza 1964: 61). Cohen (1985) found that administrators of criminal justice systems employed a wide array of neutralizations to rationalize and justify human rights violations. Furthermore, the idea that 'good people' do not employ forms of denial is simply unsubstantiated. There are many examples of how people revert to neutralization techniques routinely in their self-accounts, including victims of crime who seek to protect their self-identify from the threat of shame (Ahmed et al. 2001). Describing neutralization techniques as evidence of criminal personalities would be a misreading of Sykes and Matza's work. As Moshe Hazani (1991: 146) has argued, the theory has 'universal applicability'. Also, Maruna and Copes (2005) suggest moving away from the assumption that all neutralizations are necessarily 'bad'. Some may simply be worse 'or more toxic' than others (Maruna and Copes 2005: 292). As such, some death penalty abolitionists, regardless of their good intentions at heart, may have reverted to different techniques

of neutralization that have helped to normalize LWOP.

The different neutralization techniques and forms of denial not only tend to misrepresent, eclipse or distort matters. They are also at risk of overshadowing and superseding conflicting experiences. In her work on 'imaginary penalities', Pat Carlen (2008) explored how the creation of such imaginaries operated on two levels, distorting certain realities and eclipsing other contrasting perceptions. Carlen (2008) found most striking the general attitude of the prison staff towards the aims of incarceration. On the one hand, prison staff recognized that prisons' rehabilitative goals had little chances of success. On the other hand they performed their duties 'as if' such goals were achievable. She observed that (Carlen 2008: 6):

> Agents charged with the authorisation, development and/or implementation of a system of punishment address themselves to its principles and persist in manufacturing an elaborate system of costly institutional practices 'as if' all objectives are realisable.

It is not uncommon for penal practitioners or institutions to claim to be doing one thing when they may be doing something different. For instance, there is often a gap between prison policies and actual prison conditions. Authorities imply that reforms to prisons are being made whilst in reality the carceral conditions are worsening as evidenced by prison staff and prisoners' testimonies. What is novel in Carlen's study is that prison staff knew the aims of incarceration (to rehabilitate prisoners) were unrealistic, yet acted as if prisons were capable of fulfilling their rehabilitative purposes. To achieve this, staff created a variety of 'imaginaries'. They imagined the social world that surrounded them. For instance, offenders were treated as if they were serving lengthy prison terms when in fact they had been sentenced to short prison terms. The availability of resources was also imagined. Prison staff pretended programs were available behind bars and that communities would provide support upon release.

The creation of imaginaries has real effects, Carlen argues (2008). In her case study, she found it had triggered 'financial and social costs, influenc[ed] sentencing outcomes and provid[ed] a rationale for the existence and perpetuation of short-term imprisonment and more prisons' (Carlen 2008: 5). Crucially, the process meant suppressing other forms of competing and distracting knowledge. It was not that the prison staff ignored or did not know that rehabilitation was pointless. Rather, the staff acknowledged there was a rehabilitative deficit but denied it at the same time. To get on with their work they had to suppress that 'other' form of knowledge and act as if these problems did not exist. They were forced to accept and deny the saliency of the prison's formal objectives as well as the conditions outside of prison that made such objectives unrealistic.

Creating imaginaries essentially becomes a battle over the production and dissemination of certain forms of knowledge. Some ideas about penal policies and practices inhibit other imaginative perceptions. Because of such selective processes, certain imaginaries about prisoners, inhabiting imaginary prisons, and serving imaginary sentences, become dominant. The selective mechanisms that underlie the creation of imaginaries help normalize dominant representations at the expense of other discourses and experiences. While imaginary penalties obstruct new forms knowledge, they can be opposed by alternative perspectives. Joe Sim (2008) for instance demonstrated how the role of the prison had been elevated thanks to an imaginary account that idealized prison staff and vilified inmates. These ideals were however disrupted by prisoners' capacity to offer alternative versions, which recounted the frequent brutality of life behind bars. In sum, imaginaries are not permanent. Their fragility lies in the fact that they are constantly challenged by competing visions. Drawing attention to those other perceptions, investigating how

they are excluded, and providing them with a platform therefore becomes essential.

How does the concept of denial help us to understand how LWOP's severity has become normalized? Because denial is so common and widespread, it a useful concept to explore how, in what rhetorical ways, death penalty abolitionists have framed LWOP's particular degree of punitiveness. Different forms of denial may directly shape understandings of the punishment's severity. For instance, some aspect of the sanction may be literally denied ('Prisoners sentenced to LWOP do not die behind bars'). Alternatively, the degree of its intensity may be denied ('Serving LWOP is not that bad'; 'Prisoners enjoy access to programs for the remainder of their natural lives'). Others may claim the punishment and its particular punitive features are in fact well deserved ('These are the worst of the worst, they deserve a harsh punishment').

Indirectly, techniques of neutralization may also trump the sentence's severity. Denying offenders' victim status, arguing they are responsible for their own turpitude and deserving of harsh treatment, eclipses the amount of harm their punishment entails. Similarly, appealing to higher loyalties, namely, that LWOP is a means to achieve a greater end such as removing the death penalty, may suggest that the former is inevitably less severe than the latter. Other neutralization techniques may also be at play, such as denying the extent of responsibility for the implementation and widespread use of the punishment. This form of denial disengages actors from the harm the sentence causes.

Finally, an investigation into the imaginaries created about LWOP's severity not only sheds light on the ways and techniques employed by certain interest groups and activists to frame and eventually deny the punishment's degree of punitiveness. It also helps to identify which other conflicting understandings and visions have been

minimized and overlooked. Such an exploration unveils which visions have come to predominate legal and political discourses and which perceptions have been overshadowed.

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Within the overarching and structuring frame of the penal field, this study explores whether and how certain progressive interest groups and individuals who oppose the death penalty in California have facilitated and activated the normalization of LWOP's severity. In order to understand their part in the routinization, limited visibility and denial of the punishment's severity, the analytical frame of the penal field forces us to ask the following questions: which actors are involved in debates about LWOP and which agents are absent from such discussions? What type of expertise do they hold, and how has it shaped their representations of the punishment's severity? What positions have they held within the penal field and what relationships do they have with one another? What is the nature of the knowledge or capital they have battled to accumulate to preserve or improve their position? Which, if any, external factors have influenced and oriented their behaviours and actions?

This study further investigates whether these actors have altered the composition of the penal field, adjusted to other players or sought to influence them. By exploring the alliances developed by abolitionists, this research sheds light on those other players who may hold either higher or lower positions in the penal field. Some actors may bear greater responsibility for the routine application of LWOP sentences, their limited visibility, and the rhetorical distortion of the punishment's extreme severity. This study draws attention to the less dominant actors, namely prisoners and activists who hold competing views and knowledge about LWOP. The next chapter outlines the methods and methodological tools this study has relied on.

CHAPTER 3—A FLYER, A GANGSTERMOBILE AND A WIRELESS BRA: DOING RESEARCH IN CALIFORNIA

I. INTRODUCTION

Doing empirical research in California was quite an adventure. At times, such as when I drove through the desert to reach a high-security facility located outside Los Angeles, it was terrifying. At others, it was exhilarating. I remember feeling elated when, after weeks of waiting and hoping that prisoners would respond to the questions I had sent out via a local newspaper, the administrator of the University California-Berkeley, Center for the Study of Law and Society (CSLS), invited me to collect 'dozens' of letters that had arrived. One key lesson has been: things rarely go as planned. In terms of methods and methodology, this study has taught me how to use an array of research tools; to be creative when using them; and more generally, to remain flexible and adjustable because the original methodological frame is more than likely to change due to unexpected events and realities.

Which methods befit an investigation on how LWOP's severity has been normalized? In order to respond to the research questions and to fulfil the various aims of the study, I adopted a mixed methods approach. In 2014, I spent four months in California to complete fieldwork while a visiting student at the CSLS. The project's methodological frame was reviewed and approved by the University of Oxford's Inter-Departmental Research Ethics Committee, Social Sciences and Humanities Division. The methods combined an analysis of doctrinal writings, primary and secondary legal sources, official reports and statistics, newspaper articles, and of archival documents; 58 semi-structured interviews with individuals with historical, legal and political expert knowledge on the ties between the death

penalty and LWOP in California; and 299 letters from prisoners who were serving LWOP in Californian prisons. Each methodological tool helped to identify some of the settings in which normalizing mechanisms had been activated, namely Congress, the broader political sphere and courtrooms. Within each legal and political setting, this mixed method approach was helpful to identify the actors who facilitated processes of normalization, and to discuss the part played by death penalty abolitionists. These tools of investigation finally illuminated competing views about the punishment.

Because reflexivity is 'of paramount importance' when doing qualitative research (Greener 2011: 106; see also Bachman and Schutt: 2010: 287-8), this chapter sets out the different methods employed, details how and where data were collected, before discussing the ways in which the information was analyzed, compared and interpreted. This chapter further highlights the difficulties encountered, and notes the ethical and personal dilemmas that arose. Facts and figures tend to shield the criminological researcher, notably by attending to the various qualms about objectivity and appearing sufficiently 'scientific'. Only few acknowledge in print the personal and emotional difficulties experienced when doing their research (with exceptions, e.g. Liebling 1999; Bosworth 2001). Yet, doing research on punishment, in particular its impact on individuals who share details of their lives and everyday problems, is far from effortless. Rather it is confusing, disempowering, frustrating and emotionally draining. The following sections detail the different methods employed to collect relevant data: documentary research, interviews and research with letters.

II. DOCUMENTARY RESEARCH

Every research project probably begins sitting at a desk, surrounded by books,

scholarly articles and other documents, as well as endless lists of notes and questions. Such an exploration often involves staring at a computer screen for many hours. This study began in the safe haven of the Centre for Criminology in Oxford. There is something quite comforting about doing documentary research. Scholarly writings, state and organizations' reports are tangible and visible *things*. When they appear on online search tools, or have a place on a library shelf, they are reassuring, suggesting that somewhere, subject to rigorous and dedicated investigation, there are answers to the research question(s).

In the early days of the DPhil, my desk looked like this.

Through SOLO, the catalogue of the major collections of the libraries of the University of Oxford, I was able to identify and examine relevant doctrinal books and articles; a list I further completed in California using WestlawNext Online Legal Research (WestlawNext). On both research interfaces, I searched for 'life without the possibility of parole', 'LWOP', and 'life sentence', yet most relevant writings relating to LWOP came up when searching 'death penalty' or 'capital punishment'. The documents collected and analyzed for this study included archival documents, online sources, primary legal sources and official data. They were all gathered following an iterative process, where the initial documents referenced other sources. Interviewees, as well as prisoner participants, further pointed to, and at times shared, additional

documents.

1. Archival documents

The scholarship on LWOP is often ahistorical, briefly situating the punishment's origins in the late 1970s (see Chapter 4). Gottschalk (2012) stressed that little is known as to when, and in what circumstances, life without parole was introduced on a state-by-state basis. To trace LWOP's roots in California I examined archival documents,[18] identified through the Online Archive of California, the Internet Archive, and the Assembly Clerk's Archive.[19] I reverted to process-tracing techniques to review documents from the 1900s until the mid-1990s, which included legislative debates on the death penalty; Senate, Assembly and other special committees' reports on capital punishment and relevant penal policies; penal reformers' pamphlets and flyers; as well as newspaper clippings.[20] Channelled attention was given to those documents that echoed support and/or possible contestation for LWOP. Focused consideration was also given to documents relating to the two most prominent organizations involved in the 2012 SAFE Campaign; the American Civil Liberties Union-North California (ACLU-NC) and Death Penalty Focus (DPF).[21]

Based on these resources, I was able to trace the historical origins of the punishment, identify which actors were involved in the legislative debates pertaining to the death penalty and its alternative punishment, and the reasons why it was first

[18] I went to the following archives during my time in California: The California State Library; the California State Archives; UC Berkeley - Bancroft Library Archives; Loyola Marymount University - William H. Hannon Library's Department of Archives and Special Collections; UCLA University Archives, California Historical Society Collections; and the Hoover Institution Archives at Stanford University.
[19] Legislation dating back to 1850 can be viewed on this platform: http://clerk.assembly.ca.gov [accessed 7 May 2016].
[20] I completed additional searches for newspaper clippings using WesltawNext and ProQuest.
[21] The California Historical Society in San Francisco holds archival documents of the ACLU-NC. DPF kindly made available their historical annual reports, flyers and pamphlets.

introduced. Newspaper clippings also gave a sense of the wider context in which such discussions were held. The archival data suggest LWOP did not emerge in the 1970s as is commonly proposed in criminological accounts of the history of the punishment, nor did it emerge fully formed in the early twentieth century (Chapter 4). Instead, it was established in the early 1930s and 1940s for crimes other than first-degree murders and continued to evolve until the 1990s to become the sentence we now know, one with no possibility of review. As such, the archival research not only helped revise chronologies, it also provided a unique opportunity to challenge commonly accepted epistemological assumptions in the study of LWOP and its ties to the death penalty.

Delving into archives was particularly exhilarating, yet required quite a lot of traveling, and adjusting to restricted opening hours and sophisticated research tools, which, given time constraints,[22] would not have been possible without the help of exceptionally patient and dedicated librarians and archivists. I often took photographs of the relevant documents with my telephone, subject to prior approval, in addition to taking manuscript notes. After each archival session, I organized the pictures according to their date of collection, location and author.

The task of doing archival research and making sense of documents of the past is complicated. First, there were very few archival files specially addressing LWOP, meaning I had to look into the history of the death penalty to trace the origins of its alternative sentence. Further, none included the experiences of prisoners. Virtually all the manuscripts, leaflets and transcripts had been written from the point of view of journalists, legislators and penal reformers more broadly. Also, there were very few official reports and figures that provided the number and duration of LWOP

[22] In addition to my limited time in California, archives were only opened during the week, not necessarily every day, and for limited hours only. Certain archival files were stored in external facilities, requiring a few days to be made available.

sentences. As such, the archives were often incomplete, partial, one sided and disordered, making it quite challenging to reconstruct and get a sense of what LWOP was like in its early days. Such research triggered insecurities about 'evidence' and reliable 'proof', possibly due to certain epistemological traditions within the criminological discipline (Bosworth 2000). Like Mary Bosworth (2000; 2001) I turned to *Le goût de l'archive* in which French historian Arlette Farge (1989) relied on archival documents to study crime and disorder in the eighteenth century. In her discussion on archival investigations, the historian recommended accepting the fact that some documents will appear whilst others will not (Farge 1989: 10–11). Boxes of files and manuscripts, she argued, may merely offer patchy and unclear patterns but may nonetheless make it possible to catch a glimpse 'of the unknown world where the unwanted the miserable and the bad play their part in a living and unstable society' (Farge 1989: 11). When consolidated, and after contextualizing them in the social and political climate of the time, the collected archival pieces have illuminated aspects of the punishment's distant past.

2. Online-sources, legal data, and official data

With regards to the 2012 SAFE Campaign, documents and testimonies were found on the Campaign's own website, and details about Proposition 34 were available on the University of Hastings' 'California Ballot Measures Database'. Online platforms that share prisoners' voices, such as Solitary Watch, the Prison Activist Resource Center and the Prison Book Collective, were also consulted. Along with some of the archival documents, these online sources helped identify a second setting, namely the broader political sphere, in which some opponents to the death penalty had campaigned in favor for LWOP before voters (see Chapter 5).

As explained in Chapter 2, normalization can be illustrated by a certain routinized and regular application of a punishment. While the California Department of Corrections and Rehabilitation's (CDCR) website provides a wealth of information on incarceration and crime rates, there is very little publicly available data on LWOP, such as the number of sentences handed down each year, their duration, the type of crimes sanctioned by the sentence or the demographics of offenders serving it. For this reason, I sent Public Information Requests under the California Public Records Act (California Public Records Act 1968) to different district attorneys' offices, asking for the following information: between 1980 and 2012, for what type of crimes were LWOP sentences handed down? In how many cases did the prosecutor seek LWOP and the death penalty respectively? How many times were the cases brought to trial (as opposed to plea bargained and settled)? How many trials resulted in LWOP and death sentences respectively?[23] Most of the offices that responded and provided the most detailed information were those where I had interviewed their district attorney. Some analysts, in particular at Santa Clara, Alameda and Los Angeles counties, were extremely helpful, clarifying certain aspects of the law and criminal procedure. I was able to clarify further and to narrow the information requests by speaking with each of them over the telephone and exchanging emails.

Two interviewees shared particularly relevant official data that was not publicly available. Ashley Nellis, who completed a report for The Sentencing Project, *Life Goes On* (2013), let me use the information she had collected from the CDCR on LWOP. A Senator's researcher also sent official data that had been collected for a bill the team had worked on, which specified the number of prisoners serving LWOP per county, as well as the age and gender of the prisoners. The documentary research

[23] Because of the amount of information the requests produced, I narrowed the scope of the data to 2008-2014.

finally included the collation and analysis of primary legal sources (laws, statutes, codes, policy debates, court decisions and governmental reports) as well as secondary sources including criminal and sentencing law, most of which I found on WestlawNext.

Despite the wealth of information provided by documentary sources, interviewing those who, in the late 1970s had opposed the death penalty was indispensable in order to 'penetrate behind the public façade, and to know who thinks or who said what (often impossible to tell from the press)' (Seldon 1996: 165). Moreover, to reconstruct the processes through which LWOP had become central to abolitionist strategies, culminating with the SAFE Campaign in 2012, it was crucial to interview those who had been involved in the movement.

III. INTERVIEWING ABOLITIONISTS

Interviews with people with power and influence are generally referred to as 'elite interviews' (Dexter 2006: 19). David Richards (1996: 199) defines elite interviewees as

> a group of individuals, who hold, or have held, a privileged position in society and, as such, as far as a political scientist is concerned, are likely to have had more influence on political outcomes than general members of the public.

The term 'elite', which often presupposes a particular positioning in society, is not unproblematic; it is 'loaded' (Annison 2012: 252). For this study, the notion is used to describe those actors with a specific, if not unique, access to information and knowledge (Woliver 2002; Dexter 2006: 19). Some individuals 'have unique experiences as insiders, enabling them to comment upon events so evidence, provide interpretations and suggest fruitful lines of further inquiry' (Woliver 2002: 85–86). As such, they are capable of providing first-hand information that is neither recorded

nor publicly available. They can also help interpret documents or key historical events. As explained by Kim Rogers (1987: 172), 'interviewing [political activists] was necessary simply in order to determine what had happened in a number of events'. Moreover, specialists' sense of historical consciousness often adds weight, passion and significance to their stories (Rogers 1987: 177-179).

Elite interviews are also an important opportunity to understand actors' personal backgrounds and motivations. Through interviews, their interpretations and perceptions of events and social phenomena also come to light, and are useful to gain a sense of the beliefs and traditions that influenced their aims and actions. In the words of Richards (1996: 199–200), elite interviews offer,

> [a]n insight into the mind-set of the actor/s who have played a role in shaping the society in which we live and an interviewee's subjective analysis of a particular episode or situation.

The interviews were arranged and conducted in California between January and May 2014. I conducted some in person, either in cafés or at the interviewees' work place, in San Francisco, Sacramento, Berkeley and Oakland. For practical and financial reasons, the majority were conducted over the telephone. I used a recorder, subject to respondents' prior approval. Interviews varied in terms of their duration—from twenty minutes to over an hour and a half—as well as in terms of emphasis and degree of detail. Moreover, two written responses by email were received and several follow-up emails were exchanged.

'Death penalty abolitionists' is a broad category that includes actors with different forms of expertise with regards to extreme forms of punishment, including academics, district attorneys, defence lawyers, judges, legislators, interest groups or individual lobbyists and activists. In total, I completed 58 [24] interviews with

[24] Of the 58 interviews, three supported the death penalty (on both moral and practical grounds) and three were not morally opposed to it but doubtful of its practical use.

academics, legal practitioners and representatives of leading Californian non-governmental organizations. More specifically, the interviews were conducted with the following actors: ten death penalty abolitionists who had been actively involved in the 2012 SAFE Campaign; six death penalty abolitionists supportive, but not actively involved in the Campaign, who shared expert knowledge on the political and legal ties between the death penalty and LWOP; 16 death penalty abolitionists who were critical of the Campaign; three supporters of the death penalty who were also opposed to the Campaign; and 23 actors with particular knowledge on the a) historical origins of LWOP; b) legal and political ties between LWOP and the death penalty; and c) official statistics on LWOP and the death penalty. The latter category of interviewees included six district Attorneys[25] and one California Supreme Court Justice, eight academics, and eight researchers and analysts.

1. Obtaining interviews

The interviewees were selected following a 'purposive' approach (Ritchie and Lewis 2003: 78–80). They were chosen because they had specific knowledge and expertise, and held 'particular features or characteristics that will enable detailed exploration and understanding of the central themes and puzzles which the researcher wishes to study' (Ritchie and Lewis 2003: 78). The original list included actors who had been particularly active and vocal during the 2012 SAFE Campaign. I first contacted Elizabeth Zitrin and Jeanne Woodworth—both involved and active in the SAFE Campaign—whom I had briefly met in Oxford in November 2013 after their presentation at Wadham College. The list was then continually expanded, reverting to 'snowball sampling' (Ritchie and Lewis 2003: 94–95); interviewees would

[25] Three were opposed the death penalty; three were not morally against capital punishment but believed the system was broken beyond repair, in particular because of its costs.

recommend I speak to 'so-and-so', and often offered to e-introduce me. The world of death penalty abolitionists, at least in California, is rather small, and suggestions to contact other actors were crucial to securing interviews within a short time frame. While other factors may have helped convince interviewees to take part in the study, such personalized e-introductions played a significant part.

Before reaching out to interviewees, I sought recommendations and advice from my supervisors and colleagues on how to best convey the importance and legitimacy of the research. The invitations were sent from my Oxford email address, using the email header to specify that the research was conducted with the University of Oxford, and the name of the individual who had recommended I contact that interviewee. The emails were concise, specifying in brief the purpose of the research and the importance of interviewing that individual *in particular*. All the details about the project, in particular relating to ethics, were shared in person or over the telephone.

2. Preparing and conducting interviews

Preparing for interviews is essential (Lilleker 2003: 210). It entails acquiring information about the interviewee and the subject matter (Richards 1996: 202) and becoming familiar with the values, terminology and significant reference points, such as legislative changes, penal code, and other key actors in the field, likely to be used by the respondents. The original list of semi-structured questions changed over time, some were left out and most were amended and refined. The questions also became shorter, and the terms used more focused and specific. Time was in nearly all cases a pressing issue. I thus reorganized the questions into blocks, ensuring they included the historical and thematic issues I wished to discuss. At the beginning of each

interview, I presented the blocks of questions, laying out the overall structure of the interview and giving a sense of its length. As suggested by Neil Stephens (Stephens et al. 2011: 300) structuring interviews, in particular when conducted over the telephone, was essential:

> The interviewer may wish to consider using a slightly more structured interviewing approach, with a number of questions written in advance to ensure they are clearly spoken and direct the respondent accurately (…) Of course only a proportion of questions can be prepared in advance as many will only become apparent in the interview situation as the respondent's account unfolds.

Interviews over the telephone helped me focus on the answers, think ahead, and take notes, without having to worry about losing eye contact and unwillingly appearing distracted or inattentive.

At the start of each interview, I covered the nature and purpose of the study, its outcomes (dissertation and possible publications), confidentiality arrangements, and emphasized interviewees' right to withdraw from the study at any time. I further made sure to specify the fieldwork would be written-up and disseminated in accordance with the standards of good practice in criminology, and that the project had been approved by the University of Oxford's research ethics committee in December 2013. I further encouraged respondents to raise any questions or concerns. When conducted over the phone, I made sure to ask whether the person consented to being interviewed and digitally recorded, and such consent was then recorded. Following these measures, I was confident of interviewees' informed consent before proceeding.

To conduct the interview, I followed an 'understanding stranger' approach (Dexter 2006: 41), that is, receiving and showing understanding for respondents' explanations for their actions and views, and recognizing the difficulties to explain them. This approach required engaging in 'critical empathy' (Annison 2012: 257), which speaks to the efforts made to take the interviewee seriously and be sympathetic

to his or her views and recollections while at the same time making sure to ask for clarifications, and drawing attention to contradictions and contrasting perspectives. I made sure to stress I was open-minded and genuinely interested in hearing their views. Some interviewees insisted I understand the past as they had experienced it, often stressing how their involvement in different campaigns or trials had had an impact on their own personal lives. It was essential and at times challenging to strike a balance between being 'understanding' and not seeming to validate their explanations.

Successful interviewing requires establishing a certain level of rapport and trust (Woliver 2002; Quinlan 2011). While some interviewees answered certain questions at greater length than others, no one categorically refused to answer a question. Many were willing to repeat and clarify. I also found that providing space and time to think about the question was crucial, in particular when trying to reconstruct historical events (Dexter 2006: 96). While 'successful', the rapport and trust building raised the following dilemmas.

3. Student status, gender and foreignness

It is not uncommon during elite interviews to experience a form of power dynamic, where the researcher is placed in a subordinate position (Neal and McLaughlin 2009: 694–695). In my experience, some interviewees did, at times, 'control and dominate the interview' (Richards 1996), delivering a lecture-type answer rather than engaging with the questions I was asking. In this study, the power relation was, however, never static. If anything, it constantly, and often unpredictably, shifted from one side to the other (Neal and McLaughlin 2009). Three elements in particular shaped and oriented such dynamics: my student status, being a woman, and being a foreigner.

Reminders or references to my student status would often permeate the interviews: ‘How long have you been working on this paper?’; ‘Will you be graded?’; ‘I hope you get a good mark’. One interviewee jokingly commented on my email signature that mentioned I was a member of the New York and Paris bars, ‘I too have attended many bars in Paris and New York’, which was slightly unnerving. At the same time, I was aware these queries were probably signals of underlying forms of angst or mistrust: was I sufficiently experienced to faithfully process and relate their statements? Some scholars suggest researchers should adjust their appearances with the likely expectations of the interviewee (e.g. Richards 1996). With that in mind, I often specified I was a qualified lawyer in the United States and had worked as a legal practitioner for a number of years. This resonated particularly well with defence lawyers and district attorneys. I also noticed I used techniques taught when working in law firms, such as lowering the tone of my voice, using sparsely worded sentences, and making sure I did not up-talk (i.e. when your voice gets higher at the end of a statement). At the same time, my student status and inexperience as a researcher also seemed to make some interviewees comfortable and less wary of being judged.

When recounting historical events, I was often told ‘at the time, when you weren’t even born…’ or, ‘your parents may recall that in the 1970s but surely you wouldn’t’, similarly shifting the power balance. While such questions brought up memories of historical worth, they also sometimes revived negative emotions, such as frustration or regret. For some, this was tied to their direct involvement with the reintroduction of the death penalty in the late 1970s or its later use. Others described feeling powerless in preventing it from happening. Some interviewees also described feeling uncomfortable with the 2012 SAFE Campaign and a few of its campaigners. As such, interviews brought back to the surface feelings of exclusion and isolation.

These emotions, while hard to describe precisely, nonetheless drew the respondents closer, illustrating perhaps the 'unsettled nature of the power dynamic' during interviews (Neal and McLaughlin 2009: 703, see also Annison 2012: 260-261). No interviewee displayed signs of genuine distress or discomfort sharing such memories. Protecting respondents from any form of emotional harm the research questions may cause was indeed paramount (Annison 2012: 263).

Being a woman definitely shaped certain interviews. Scholars have researched the ways in which the researcher-researched relationship is fraught with power dynamics tied to gender (Oakley 1981; Stanley and Wise 1983). One interviewee accepted to answer my questions but warned he would be eating a sandwich in his car whilst driving. When I asked him to stop the car for obvious safety purposes, his response was 'don't worry about me darlin', I'm used to doing this'. At the same time, being a woman helped built trust with certain female interviewees, in particular when sharing experiences of sexism in the legal world.

Being a foreigner was often a topic of discussion: when and how had France repealed the death penalty? Did life sentences exist? How much crime was committed and of what sort? Queries regarding the similarities and differences between the French penal system and that of California and the United States more broadly were also raised. While being French and studying in the United Kingdom was often an icebreaker, a way to build rapport, it also created something of a distance. On a number of occasions, I was told that as a French citizen, I could not fully understand American politics and abolitionist efforts: 'in California, things were very different'. On these occasions, the 'stranger' part of the interview method superseded the 'understanding' side of it. To reassure the interviewees, I would stress I had lived and studied in the United States, and was currently affiliated to UC-Berkeley, and that I

had worked for an American law firm, emphasizing my 'American ties'. While the interviews and documents would shed light on the motivations and ways in which LWOP had been normalized, they would not illustrate what exactly about the punishment had been made to seem normal. In order to complete the missing part of the picture, and to include contrasting views, collecting prisoners' first-hand accounts was essential.

IV. INTERVIEWING PRISONERS

1. Prisoners' accounts

Criminologists have relied on offenders' narratives to study criminal behaviour (Bennett 1981; Sampson and Laub 1993) and to explore the qualitative nature and degree of severity of punishments (e.g. Shalev 2009; Crewe 2009; Liebling 2011; Bosworth 2014). Scholars have shown how prisoners' views provide authentic details that only those serving prison or death sentences can impart (e.g. Crewe et al. 2014; Crewe 2015). In the words of Janet Maybin (2000: 151) on her research on death row penfriends:

> Data collected about the experience of this unusual group of letter writers has its own intrinsic interest in offering a rare glimpse of life on death row from the perspective of prisoners themselves.

Narratives are defined as spatially and temporally situated statements that relate events or actions experienced by one or more protagonists (Presser 2009: 178). Traditionally written or oral texts, narratives give great importance to the meaning of 'lived experiences' (Liebling 1999). For instance, research on women's experience in prison has followed a lived experience methodological approach (Owen 1998; Bosworth 1999). By exposing women's individual experiences, these works have

rendered women visible, and in so doing have enlarged the picture and corrected certain oversights or inaccuracies. Importantly, narratives also mediate some of the norms and processes that have helped to shape such experiences (Scott 1991).

While often referred to as 'life stories', such accounts generally only relate selections, or partial snapshots of lived experiences. For this particular study, some of the questions asked prisoners to describe their experience at the time of writing. The prison in which they were held, the number of years they had spent in prison, and their age, all informed and shaped their accounts. Because the temporal parameters were not strict, participants also wrote about their previous experiences, including their crime, the trial(s), and their original understanding of the punishment and how it had evolved over time.

For the purpose of this study, their accounts were highly relevant and significant for the following reasons. Prisoners' views of the punishment was the starting point, the 'puzzle' that made us stop and pause, and wonder whether normalizing LWOP was contentious. Their perspectives offer a new and important lens through which to comprehend, but also reconsider, a long-lasting socio-penal phenomenon. In other words, an exploration of normalization without including prisoners' epistemologies about the punishment, their conflicting views, is unlikely to bring about penal reform. Solely exposing the views of those who believe LWOP is a tolerable and acceptable alternative to the death penalty would risk reinforcing the *status quo* rather than re-evaluating it.

Their testimonies also inform the general population about what happens behind prison walls (Ross 2003; Bosworth et al. 2005). Prisoners' accounts shed light on the particular aspects of the punishment that have been made to seem normal. While interviews with death penalty abolitionists, as well as legal sources and official data,

all provide important and relevant information pertaining to the normalization of LWOP, they also offer a limited understanding of the qualitatively punitive features of the punishment. Further, studies that privilege grand narratives and theories tend to miss out on what happens in prison and are poor indicators of experiences. As Nicola Lacey (2008: 26) points out, much of the literature on 'late-modern or neo-liberal penalty is too schematic, and risks elevating an explanatory framework largely informed by the specificities of the US situation to the status of a general theory.' As Ben Crewe reminds us (2015: 51), a distinctive 'characteristic of much "big picture" penal scholarship is that it stops at the gates of the prison, or breaches its surface somewhat barely or briefly'. Also, 'big theoretical accounts' tend to be less nuanced. Yet, the reality of life in prison is often far from being homogenous and consistent. Some prisoners prefer being alone whilst others may prefer cell sharing; some inmates may suffer from the lack of educational and vocational programs whilst others may find them infantilizing.

This is not to suggest that works on LWOP, or punishment more generally that privilege theoretical explorations or privilege quantitative analyses, lack significance or relevance with regards to the normalization of LWOP. However, these understandings would be made more compelling if read in conjunction with prisoners' views of the practice and experience of penal power. The amount of punishment meted out by the state is indeed a key to indicator of normalization (see Chapter 2). Yet, imprisonment rates say little about how punitive a punishment can be, as some states can punish only a few but in highly punitive manners, or punish many but provide decent carceral conditions. Prisoners' accounts not only reveal how severe the punishment is, they can also shed light on normalizing mechanisms which have shaped their lived experiences (Scott 1991). As such, they can corroborate and,

when analysed alongside other material, confirm findings that have emerged from other sources.

Additionally, combining theoretical approaches with prisoners' accounts is helpful to revisit certain prevalent assumptions about punitiveness. Prisoners' different experiences can challenge long-lasting epistemological categorization of extreme punishment, with life-long prison sentences placed to one side and those that qualify as sentences to death on the other (see Chapter 7).

Finally, an exploration of the normalization of LWOP sentences that excludes prisoners' accounts is at risk of rendering those who are subject to life-term sentences indistinguishable from one another, eclipsing the very people who experience life and death, and blunting nuances of race, ethnicity and gender. For all these reasons, it was essential to include, draw and build on, inmates' written experiences of the punishment. How, then, can we best collect such life stories? Some researchers rely on publications that originate from prisoners themselves (Irwin 2009; Hartman 2013), referred to as to as 'convict criminology' (Ross 2003). Generally, they also revert to in-person interviews (Crewe 2015); this study relied on letters from prisoners, which, as I will now discuss are relevant to investigate how LWOP's severity has been normalized.

2. Doing research with letters

Accessing prison in the US has become increasingly difficult (Simon 2000; Wacquant 2002). As *New York Times* journalist, Michael Schwirtz (2015), puts it, reporting on prisoners 'is like looking through a keyhole: it is very difficult to get reliable information about what is going on inside a corrections facility'. For these practical reasons, I chose another method to reach out to prisoners and collect their views and

insights on the punishment they were serving. Before leaving Oxford, I had prepared a flyer detailing the semi-structured questions I would have asked in a traditional interview. The document offered a list of guiding inquiries to help prisoners describe their experience of LWOP. The questions were addressed to prisoners serving LWOP in California who were older than 18, thereby excluding juvenile inmates. As such, participants were selected following a 'purposive' approach (see above). In the flyer, I covered the nature and purpose of the study, its outcomes (dissertation and possible publications), confidentiality arrangements, and their right to withdraw from the study at any time. The document further specified that prisoners were completely free to refuse to enter the study or that they could withdraw their accounts at any time. All participants were asked to sign their letters and add that they consented to participate in the study. The flyer was then published in the *San Francisco Bayview*, a newspaper distributed in prisons across the state.

San Francisco BayView

Sharing your experience of life without parole – your voice matters!

Hi! My name is Marion and I'm a doctoral student from Oxford University (United Kingdom) conducting research on people sentenced to life without parole in California.

I am really interested in getting your personal views on the punishment you are serving, because your voice matters!

Would you be willing to describe, in your own words, your experience of LWOP? "The Other Death Penalty Project," directed by Ken Hartman, has kindly agreed to support this project.

Anything you write will be anonymized and remain confidential.

Deadline to submit: March 31, 2014.

Project description

In your own words, and in whichever style you wish to share it, please describe your experience of LWOP.

For example, you could describe:

- what you see, feel, taste or hear,
- what you find to be the most difficult part of your sentence,
- what, if any, are some of the pleasures you experience,
- what you find to be the hardest about your sentence, physically? psychologically?

- who, if anyone, or what, helps you to cope with your sentence,
- the prison you're currently held in and whether it differs from any other prisons you have been in.

IMPORTANT – READ CAREFULLY

1. I don't need to know about your crime, this project is really just about your experience of the sentence.

2. Please start your letter with the following sentence:

"I _____ (name in BLOCK CAPITALS) agree to take part in this research interview. I am at least 18 when signing this document. I have read the Participant Information form"

3. It would be great to know more about you, so could you also please include the following information:

Age:
Age when sentenced:
Gender:
How would you best describe your ethnic origins?

4. Don't forget to sign and date your letter!

PRACTICALITIES

Please send your letter to the following address:

Marion Vannier
In care of the CSLS

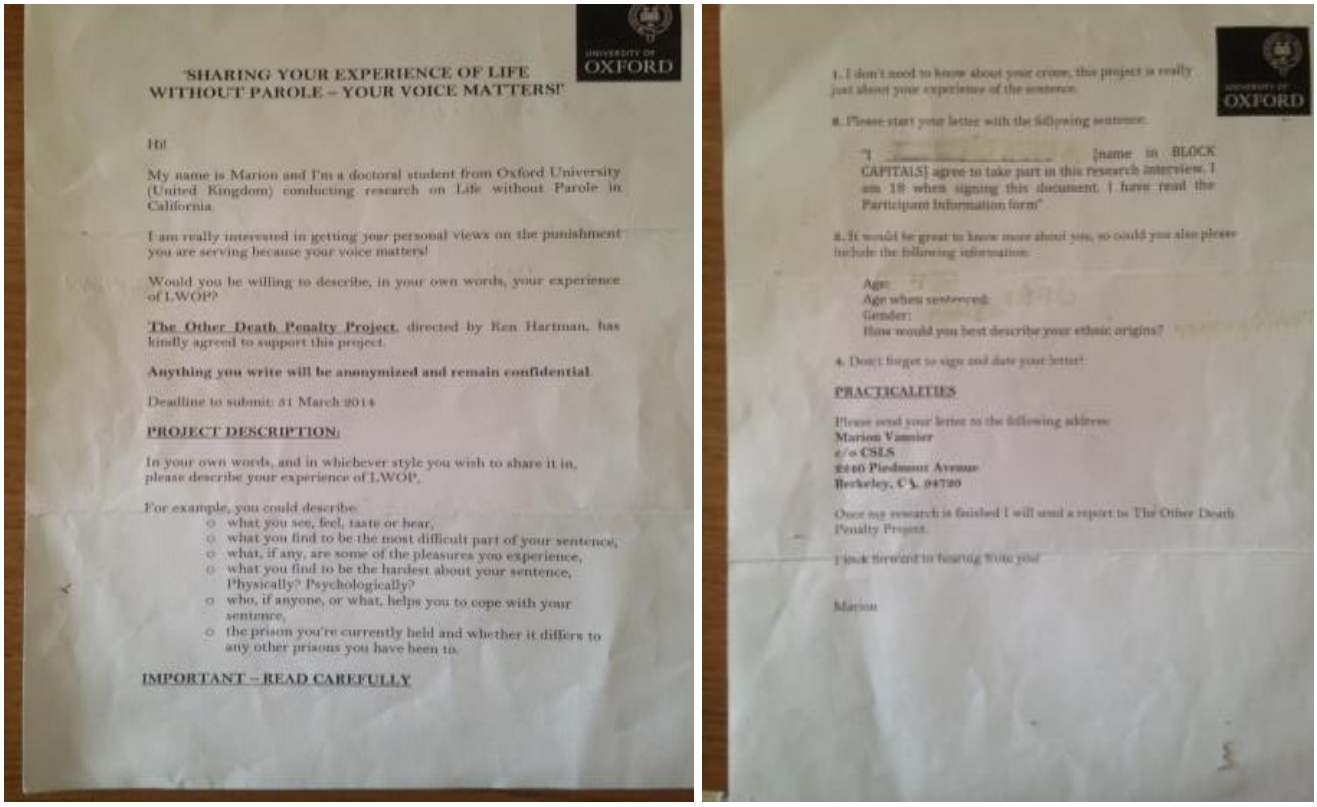
See LIFE WITHOUT, page 17

...o Now a California Coalition for Women Prisoners present...

Publication in the *San Francisco BayView*

Kenneth Hartman, the President of The Other Death Penalty Project (ODPP) also

distributed the flyer from behind bars and via different mailing lists and newsletters, to LWOP prisoners and The ODPP members. The ODPP's role was clearly paramount in convincing prisoners to participate in the study. Many participants mentioned the organization or its president in their letters, and even attached in their envelopes the flyer they had received from the organization. Others wrote that they had been convinced by friends behind bars to send their personalized accounts. Prisoners may also have decided to take part in the study for they felt it acknowledged their existence and humanity (see Bosworth et al. 2005: 255). For many, the research was described as an opportunity to trigger reform; in sharing their lived experiences they remained hopeful it could make a difference (see also Bosworth 1999; Bosworth et al. 2005). Gregory (59 years old, White, Salinas), for instance, wrote '[p]erhaps someday like you can relay to the general public that a convicted killer can change'.



'SHARING YOUR EXPERIENCE OF LIFE WITHOUT PAROLE – YOUR VOICE MATTERS!'

Hi!

My name is Marion and I'm a doctoral student from Oxford University (United Kingdom) conducting research on Life without Parole in California.

I am really interested in getting *your* personal views on the punishment you are serving because your voice matters!

Would you be willing to describe, in your own words, your experience of LWOP?

The Other Death Penalty Project, directed by Ken Hartman, has kindly agreed to support this project.

Anything you write will be anonymized and remain confidential.

Deadline to submit: 31 March 2014

PROJECT DESCRIPTION:

In your own words, and in whichever style you wish to share it in, please describe your experience of LWOP.

For example, you could describe:

- what you see, feel, taste or hear,
- what you find to be the most difficult part of your sentence,
- what, if any, are some of the pleasures you experience,
- what you find to be the hardest about your sentence, Physically? Psychologically?
- who, if anyone, or what, helps you to cope with your sentence,
- the prison you're currently held and whether it differs to any other prisons you have been to.

IMPORTANT – READ CAREFULLY

1. I don't need to know about your crime, this project is really just about your experience of the sentence.

2. Please start your letter with the following sentence:

"I _____ [name in BLOCK CAPITALS] agree to take part in this research interview. I am 18 when signing this document. I have read the Participant Information form"

3. It would be great to know more about you, so could you also please include the following information:

Age:
Age when sentenced:
Gender:
How would you best describe your ethnic origins?

4. Don't forget to sign and date your letter!

PRACTICALITIES

Please send your letter to the following address:
Marion Vannier
c/o CSLS
2240 Piedmont Avenue
Berkeley, CA. 94720

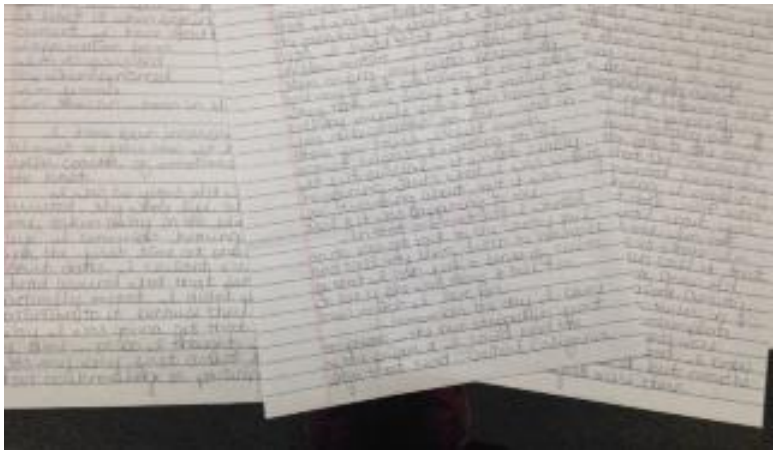
Once my research is finished I will send a report to The Other Death Penalty Project.

I look forward to hearing from you!

Marion

The flyer that was distributed to prisoners.

At that point in the study, it felt like throwing a message in a bottle out to sea. There was no certainty prisoners would be willing to share their experiences of this punishment. For two long weeks, I received nothing. Then, one day, the administrator at the CSLS sent an email saying the mailbox we had set up was full.

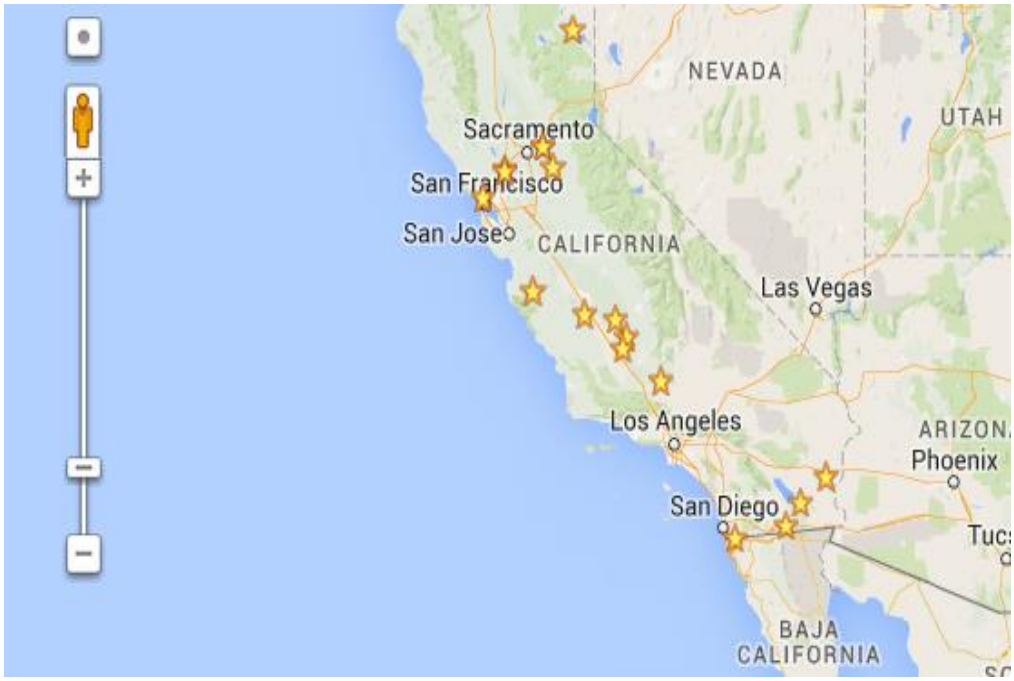


Example of a letter

By the time I left California in May 2014, 327 prisoners had sent letters. Some were held in other states, even in other countries. Nineteen (19) letters were sent from prisoners serving lengthy prison sentences rather than LWOP. They either shared their views on the punishment or drew analogies to the sentence they were held for. For the purpose of this thesis, I did not include their testimonies in the analytical chapters. However, I have drawn on their accounts in the concluding chapter.

A total of 299 men and women incarcerated in over fifteen different prisons across California have volunteered to share their views on the punishment.[26] Fifty-two women chose to participate in the research, which, in 2013, amounted to a little under a third of all the women sentenced to LWOP in California (Pishko 2015). A total of 275 men shared their experiences of serving the punishment.

[26] The 28 additional letters were sent from prisoners serving LWOP outside of California.



Origins of letters

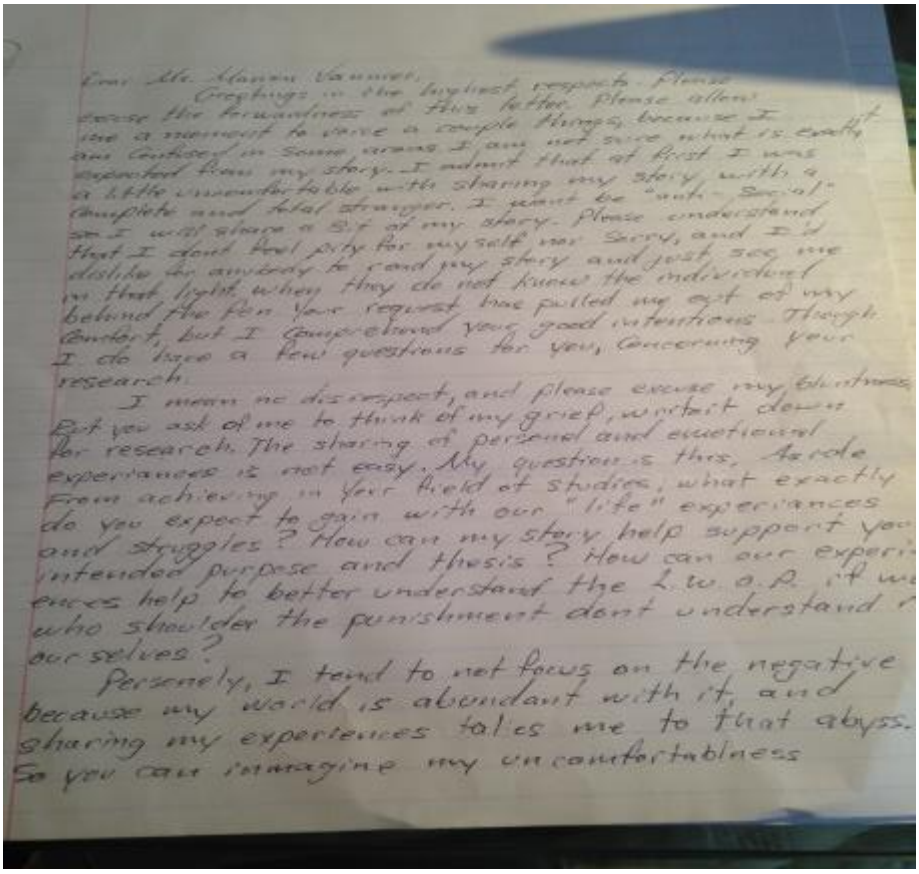
The letters vary in length, and the majority are hand-written, though a few are typed. While the participants are clearly a self-selected group, there is sufficient variety in terms of ethnic backgrounds,[27] gender, age and personal situation to suggest that they represent a wide range of experiences. In the few paragraphs below, I discuss the pros and cons of doing research with letters.

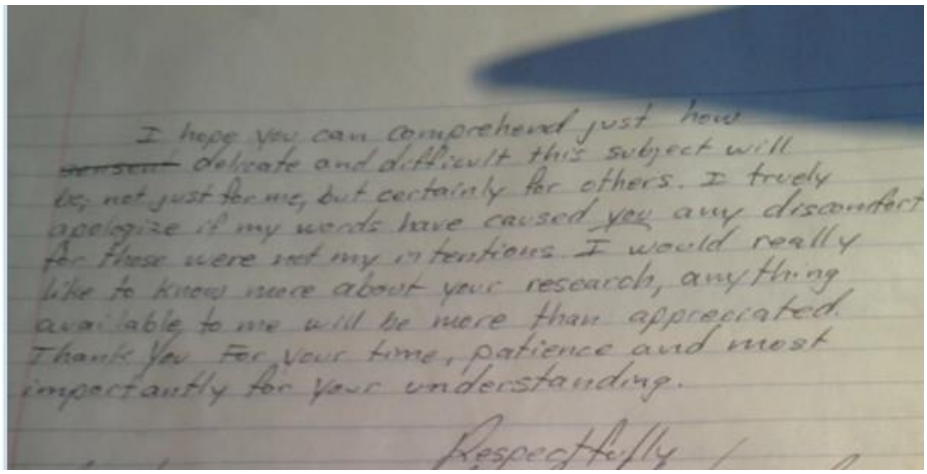
Letters shed light on the social and historical contexts in which they are written. Like photographs, letters offer a snapshot in time and space of certain events and phenomenon. When participants write about their experience of punishment, they offer a personal viewpoint of what it is to serve LWOP in California. In Margaret Jolly and Liz Stanley's (2005: 101) words, they are illustrations of the 'particular lives lived in specific social contexts and historical circumstances'. Their letters are best conceived as one-off testimonies, structured by the questions. Social scientists have tended to shy away from letters for they are considered to be too elusive and

[27] On the racialized application of the punishment (see Capers 2012).

messy (see Jolly and Stanley 2005). In certain disciplines, however, such as literature, the arts or history, letters are often treated as holding useful facts and offering relevant evidence about events or people (Scott 1991; Stanley 2004). In criminology, Bosworth for instance (Bosworth 1999; see also Bosworth et al. 2005) has used letters to explore US imprisonment and immigration detention.

Doing research using prisoners' letters is far from an ideal methodological tool. It makes it difficult to rectify misunderstanding and misinterpretation (Bosworth et al. 2005: 252). If the questions are unclear, the researcher is unable to address any query on the spot as could be done in a face-to-face interview. This type of methodology also raises literacy issues, and it is at risk of excluding prisoners who cannot write, feel uncomfortable or have trouble with, writing. In this study, some participants wrote they felt uncomfortable sharing their thoughts with a total stranger. In the words of Sebastian (35 years old, Mexican American, Corcoran):


Dear Mr. Hanna Vannet,
Greetings in the highest respects. Please
excuse the forwardness of this letter. Please allow
me a moment to have a couple things, because I
am curious in some areas I am not sure what is exactly
expected from my story. I admit that at first I was
a little uncomfortable with sharing my story, with a
complete and total stranger. I want to be "out-Social"
so I will share a bit of my story. Please understand
that I dont feel pity for myself nor sorry, and I do
dislike the anybody to read my story and just see me
in that light when they do not know the individual
behind the pen. Your request has pulled my gut at my
comfort, but I comprehend your good intentions. Though
I do have a few questions for you, concerning your
research.
I mean no disrespect, and please excuse my bluntness
But you ask of me to think of my grief, worst down
for research. The sharing of personal and emotional
experiances is not easy. My question is this, Aside
From achieving in your field of studies, what exactly
do you expect to gain with our "life" experiances
and struggles? How can my story help support your
intended purpose and thesis? How can our experi-
ences help to better understand the L.W.O.P. if we
who shoulder the punishment dont understand
our selves?
Personely, I tend to not focus on the negative
because my world is abundant with it, and
sharing my experiences takes me to that abyss.
So you can imagine my uncomfortableness


I hope you can comprehend just how ~~[illegible]~~ delicate and difficult this subject will be, not just for me, but certainly for others. I truely apologize if my words have caused you any discomfort for these were not my intentions. I would really like to know more about your research, anything available to me will be more than appreciated. Thank You for your time, patience and most importantly for your understanding.

Respectfully

Finding words to describe what they felt was, at times, overwhelming. To overcome such frustrations, some participants wrote their letters in Spanish whilst others asked another inmate to write for them.[28] For instance, one participant explained that she was writing on behalf of another inmate who, due to physical disability, could not write but nevertheless wanted to share her experience. Letters can also prompt different, at times irreconcilable experiences of punishment, none of which produce an absolute or generalizable 'truth'. For instance, what matters to one inmate serving LWOP may be of lesser importance for another. Relying on letters can also limit the amount of information that is shared. It will depend on how much, participants are willing to share.

In this particular study, eight letters were highly similar. While critics might argue that relying on duplicates is manipulative and at risk of falsifying findings, a blanket rejection of such letters would however mean missing important contributions. I have included similar letters for the following reasons. First, none of the 'duplicates' were actually identical. They always included distinguishing specificities, including the author's name, his or her age, ethnic origins, and personal background. Second, writing is an extremely difficult task for many to complete.

[28] I asked a friend and colleague who was fluent in Spanish to translate the said letters.

Copying the structure and formulas is essentially borrowing technical skills from a more confident and literate writer. Third, these letters are illustrative of prisoners' desire and hope to have their voices heard. These participants may believe that only particular versions and stories get people's attention; accounts that do not 'fit' a set of expectations are at risk of being ignored. As such, mimicking what is believed to best draw attention is revelatory of prisoners' powerlessness and not necessarily an example of misinformation and manipulation.

Despite these apparent limitations, letters include authentic and rich details that only those who experience a phenomenon can share. For instance, the letters written by the self-selected group of men and women serving LWOP in California in 2014 offer a unique, contemporary and apposite epistemological perspective of the environment that surrounds them. The richness of their narratives lies as much in the diversity and dissimilarities of their individualized representations, as it does in the commonalities and shared understandings of such realities. What these correspondences represent is a disruption of certain ostensible truths, in their own unique and meaningful ways.

There are different reasons why correspondences are capable of eliciting such rich and detailed data. Letters are one of only few ways to communicate with the outside world (other than limited, expensive phone calls, and occasional visits). Therefore 'writing and receiving letters takes on a central role in prisoners' lives' (Maybin 2000: 151). It can provide a purpose or reference point during endless days (Maybin 2000: 158). Letters also tend to provide a safer environment than face-to-face communications by allowing participants to open up. The distance between the writer and the reader further encourages individuals to share more personal and intimate information (Maybin 2000: 168). This method of research also provides the

space and time for participants to increase the flow of information (Maybin 2000; Bosworth et al. 2005). They are not constrained by stringent time requirements, which are often imposed on interviews and which tend to create a stressful atmosphere.

As such, doing research with mail gives participants the opportunity to take time to reflect before replying, or to draft multiple versions of their accounts. Some may choose not to write when in a particular state of mind (Maybin 2000: 168–169), respond to certain questions at length, exclude some and include their own. In all these ways, doing research using letters in the context of research on punishment has the propensity to empower prisoners and reduce the power inequalities inherent in research processes (Bosworth et al. 2005: 254).

In addition to eliciting rich and important details, letters, and more specifically the envelopes that contain them, provide the space to include other documents. Participants attached to their accounts other documents, including official sources that would probably not have been available in the public domain. In so doing they unlocked access to official records and internal reports. For instance, a few prisoners sent Board of Prison Term letters they had received in 1993, informing them they were no longer eligible to have their sentence reviewed. Had these documents not been sent to me, I would have assumed LWOP had always been what it is today, a sentence where prisoners are ineligible to any form of review. Finally, letters are particularly useful, practically, to comprehend a world that has increasingly become difficult to access. It is a way of reaching out to a larger number of participants—who are held in geographically spread out prisons—than the researcher could have included in face-to-face interviews.

V. ETHICAL CONSIDERATIONS

1. Anonymity and confidentiality

The actors I interviewed over the phone were either given a document or orally specified that the anonymity of their comments would be assured and their confidentiality safeguarded. The flyer included similar terms. Some abolitionists expressly agreed to have their real names used. Only one asked not to be recorded, and three specifically requested to remain anonymous. Most explained they were not sharing anything they had not publicly shared elsewhere and as such did not need to be anonymized. At times, however, it was essential to anonymize certain quotes, in particular when at risk of stigmatizing the interviewee, or fuelling animosity and tension with other actors in the field.

Affording interviewees anonymity should they request it, whether abolitionists or prisoners, is key (Woliver 2002; Dexter 2006). Ensuring the anonymity of their testimonies was particularly important given that many of the participants worked in courtrooms, universities, Congress or prominent interest groups. I was particularly cautious because a new initiative has been filed for the November 2016 general elections in which some of the interviewees are involved. It was thus crucial to prevent testimonies from potentially damaging interviewees' reputation or standing in their professional environments. Moreover, the death penalty field is a rather small one; people know each other, or of each other. Some respondents asked me who else I had spoken to, and what we had talked about. Other times, I was politely 'warned off' meeting with particular actors who were likely to be critical of the 2012 Campaign. These warnings involved discrediting the potential interviewee in particular by sharing personal information about that person in question: 'I wouldn't speak to so

and so because you know she or he has done this, or was involved in this … His or her position on the death penalty is thus likely to be biased'.

I did not want to fuel disagreements or ongoing tensions. For instance, some interviewees had participated in the Campaign but shared they later had regretted it. They wanted their testimonies to remain anonymous for they feared being judged and reprimanded by their peers, and risked being excluded from further abolitionist efforts. One interviewee described the bullying she had been exposed to for speaking out against the Campaign. There was a sense that the camp to which activists were assigned depended on the support they demonstrated the Campaign. In not being 'one of us', they were at risk of being lumped as 'one of them', namely supporters of the death penalty. In sum, it was thus key not only to keep the interviewees' anonymity in the written doctoral thesis but also while conducting the research.

Participants from within the prisons, with only few exceptions, chose to have their real names used. Yet, mail screening and monitoring are barriers to using letters and carry with them a certain degree of risk for authors (see also Bosworth et al. 2005: 260). Some participants wrote they feared being identified by prison staff and suffering negative consequences, and for this reason preferred not to take part in the project. Because of these concerns, I anonymized each and every account. While this decision could be criticized for removing a part of their agency, and to a certain degree making them invisible, I preferred not to take any risk, in particular given the sensitive information they were sharing.

A few months after I left in June 2014, the CDCR implemented a new policy that would increase the control of documents being sent in and out of prisons. The new rule banned publications in California prisons that 'indicate an association with

groups that are oppositional to authority and society'.[29] For Mary Ratcliff, the editor of the *San Francisco BayView* through which I had sent my flyer, '[w]hoever wrote the new regulations must have had us at the *BayView* in mind', (Ratcliff cited in Britton 2014). Her newspaper has 'a large number of subscribers in prison and among the public and offers inmates an opportunity for dialogue with the public'. Through letters and articles from prisoners, 'we report on what's happening where journalists are not allowed to go', Ratcliff explained. 'The new regulations seek to end the dialogue, to cut off access to knowledge' (Ratcliff cited in Britton 2014). Ratcliff further shared that she had been notified in April 2014 that the warden of a maximum-security prison had censored the July 2013 issue of the newspaper because 'it discussed individuals incarcerated within the Federal Bureau of Prisons' (Ratcliff cited in Britton 2014). This new rule reassured me that I had made the right decision to keep all prisoner participants anonymous.

Anonymizing was not a sufficient tool to avoid particular voices and perspectives from being recognizable. I thus had to be particularly cautious when using direct quotes not to identity those respondents who had requested to be anonymized. To ensure that those I quoted could not be identified (Josselson 2007; Neal and McLaughlin 2009), I edited particularly distinctive words; at times privileging publicly available quotes, notably in newspaper articles or reports, when it conveyed the same view as in the interview; or choosing quotes from observers that described an actor's actions rather than citing that individual directly. Special care was taken with contextual or personal information, which could have revealed the identity of the interviewees, without compromising the integrity of the data.

While prisoners' names were changed, I specified the time they had spent in

[29] The regulation was included amongst the six pages of proposed 'Obscene Material Regulations', which revolve around censorship of pornography.

prison, their age, ethnic origins when specified, and the prison in which they were held in order to humanize them. I have kept a separate subject enrolments log showing codes, names, pseudonyms and location. The letters, written transcripts and recordings, are all maintained in strict confidence and kept in a locked filing cabinet. All information has been handled in accordance with the UK Data Protection Act 1998.

2. Personal integrity: 'A GangsterMobile and A Wireless Bra'

There is a fine line between showing genuine interest, which may make the interviewee more willing to engage with the interviewer, and misleading him or her by action or omission (on the explicit and implicit contract with interviewees, see Josselson 2007: 5–6). For instance, I would always share, when asked, my views about LWOP. Conducting research ethically, I found, often came down to personal integrity and moral stances rather than solely abiding by university or institutional ethics rules (Josselson 2007; Annison 2012). For instance, I personally felt very much indebted to Kevin Cooper, who was held on death row in San Quentin, and to Kenneth Hartmann, who served his LWOP sentence in Lancaster, outside of Los Angeles. For this reason, I chose to visit them in prison. Nothing went quite as planned and expected. The following few paragraphs give a short account of these visits based on my field notes.

a) Kenneth Hartman

I first went to meet with Kenneth Hartman in Lancaster state prison. After nearly missing my flight to Los Angeles, I went to pick up the car I had rented, having specified I wanted a small, black car with manual transmission. Given the destination of my trip, I wished to go in as discretely as possible. When seeing my French

drivers' license, the man at the counter enthusiastically decided I had to experience the real Californian 'dream' car. He handed me a set of a glittering keys and soon discovered I was to drive a convertible, white, automatic Ford Mustang, the quintessential 'GangsterMobile'.

The GangsterMobile

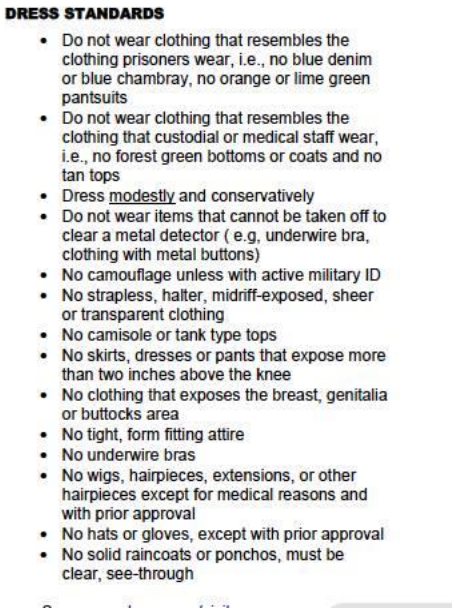
Staring at the car with slight confusion, I reminded myself, with a touch of fatalism, I was heading to a high-security prison facility. However, I could not see myself returning the keys and explaining that in order to go inside such a facility I would need something more subtle and discreet. After an unsuccessful attempt to locate the device that would open the trunk of the car, I stuffed my small suitcase on the passengers' seat, and sat behind what felt like an exceptionally high wheel, or perhaps an exceptionally low seat. With both arms unnaturally outstretched and a foot on each pedal, I embarked in what must have been a most comical jolting exit. It must have been quite alarming for the lady collecting the exit tickets asked to verify my drivers' license once again. Stepping outside her small booth, she whispered how to use the pedals; I could not have been more grateful.[30]

[30] I had never driven an automatic vehicle before.

The navigating system estimated the trip to last a little less than two hours. Soon after leaving the Los Angeles outskirts, the road poured out, endlessly.

I reached my destination without noticing I had been driving alongside a high security facility for the last few miles. It was not until after parking the car that I noticed the watchtowers and surrounding barbwires.

As I nervously walked towards the reception centre under a scorching hot sun, I felt reassured to have meticulously followed the dress-code for visitors: no 'transparent' clothing, no underwire bras, no skirts that revealed 'more than two inches above the knee'.



DRESS STANDARDS

- Do not wear clothing that resembles the clothing prisoners wear, i.e., no blue denim or blue chambray, no orange or lime green pantsuits
- Do not wear clothing that resembles the clothing that custodial or medical staff wear, i.e., no forest green bottoms or coats and no tan tops
- Dress modestly and conservatively
- Do not wear items that cannot be taken off to clear a metal detector (e.g, underwire bra, clothing with metal buttons)
- No camouflage unless with active military ID
- No strapless, halter, midriff-exposed, sheer or transparent clothing
- No camisole or tank type tops
- No skirts, dresses or pants that expose more than two inches above the knee
- No clothing that exposes the breast, genitalia or buttocks area
- No tight, form fitting attire
- No underwire bras
- No wigs, hairpieces, extensions, or other hairpieces except for medical reasons and with prior approval
- No hats or gloves, except with prior approval
- No solid raincoats or ponchos, must be clear, see-through

(CDCR 2011)

My hope to discretely enter the visitors' room soon evaporated when a loud voice singled me out, 'you, the newbie, come fill your paper work'. After being 'processed' (i.e. locking away purses, car keys, removing shoes, and walking through a metal detector), and carrying a sole plastic bag[31] with one dollar bills, a small group of visiting parents and friends were taken to a gate. While waiting for it to open, another fence, behind us, was shut and locked. The sensation of being locked in did not seem to concern the other well-accustomed visitors. Once the gate opened, we were told to walk a few meters on a cemented path alongside white indistinguishable buildings.

The visitors' space was a large room with bay windows to the right and vending machines to the left. Prisoners were called in one by one through a small door to the far left. Chairs were lined up in pairs, all facing the same way, just like in a theatre. It was, I was told, to ensure privacy. While waiting for Ken, I realised I had no idea what he looked like. Had I met him outside prison walls, I would have looked him up on the internet. I trusted he would somehow guess who I was. A tall, bald man with a

[31] The type you use in airports to carry liquids.

small beard approached me and shook my hand. We spoke for about an hour, about life inside and outside prison, and about his daughter, Alia. Ken asked about the project, and inquired whether prisoners had responded to the flyer. We used the few dollars I had been allowed to bring to buy a few snacks from the vending machines. During this conversation, I was able to thank him in person for all his help. I regret not having been able to thank the other participants in person. I have however circulated, through the *San Francisco BayView*, and via the same mailing lists, a thank you note and two follow-up documents. I have no way of knowing whether they have been received or read. By the end of this doctoral project, I have promised The Other Death Penalty Project to send a short report, and will send individualized cards to each participant.

b) Kevin Cooper[32]

One of the most prominent voices from death row to have spoken against the SAFE Campaign 2012 was Kevin Cooper. Cooper had written an open letter to Jeanne Woodford, the former Warden who had supervised his near-execution, denouncing her hypocrisy for switching sides (Cooper 2012). He also decried the nature of the alternative punishment and criticised the strategy that would compromise death row prisoners' remaining appeals (see Chapter 6). San Quentin was much closer to Berkeley than I expected. After driving a mere 25 minutes, I entered the prison compound. The scenery, I had been told, was quite spectacular. Perched on the top of a small peninsula, San Quentin faces the Pacific Ocean. Unsurprisingly, real estate investors have tried to acquire this piece of land, precisely because of its exceptional

[32] Cooper is an African American sentenced to death and he would be one of the first inmates to be executed should the death penalty resume in California. His case was recently reviewed by the Inter-American Commission on Human Rights (2015), which found that the United States had violated the American Declaration of the Rights and Duties of Man, and a number of instances where Cooper's due process rights had been violated. The Commission recommended his trial and sentence be reviewed.

location (White 2009).

I sat in the 'Tube' (Comfort 2003, 2008), a long corridor where to one side, families waiting to visit short and long term prisoners face those who are there to visit death row inmates. Mainly women, young and old, and often with small children, waited patiently on wooden railway station-type benches. The wait seemed quite long yet no one showed signs of impatience. In the middle of the two lines, there was a little door, from which prison staff would occasionally appear to call out the names of those to be processed. I accompanied two women who campaigned for Kevin's innocence and release.

Once the processing was completed, we were told to head outside, towards the visitors' room. There was no gate to let us in, or lock us inside. Instead we walked through the staff's parking, between a gift shop and loud breaking waves. In the background there rose an odd-looking industrial-type tower: the gas chamber I was told. As we entered the visitors' room, there were five or six cages lined-up that reminded me of those shark cages. Some prisoners were already sitting with family members. To the far left, a few vending machines sold the least healthy and appealing food I had ever seen. We nonetheless hurried to buy as much as we could for Kevin; in comparison to prison food it would apparently be 'a treat'.

We were brought to our visitor's cage where four chairs faced each other. As we sat down, Cooper was brought in. The tall Black man with greying braids placed his hands through a hatch to be unshackled. There I was, locked inside a cage, itself located inside a locked room with impenetrable windows, with a person deemed to be 'the worst of the worst'. As Kevin ate, he talked about California, its lingering forms of slavery and racism. His views on LWOP were categorical: it amounted to sentencing large portions of African American and other minorities to die. We spoke

of life on death row; he asked me about France. While we spoke, I realized we were all bent and leaning forward, our four bodies touching one another. Before our time was up, Cooper asked to take a picture to immortalize this moment. Through the bars of the cage, a prison staff took a few snapshots of Kevin and myself, as well as with the other two women. We were given a copy of the pictures at the exit.

VI. CONCLUSION: MAKING SENSE OF THE DATA

1. Validity and reliability

For Janet Chan (1992: 19), researchers should beware of taking data at face value. Some of the information provided by interviewees may be incorrect, partial or unclear, in particular when involving the recollection of past events (Portelli 1991). These concerns point to the difficulty of evaluating the validity and reliability of data (Chan 1992: 19; Ritchie and Lewis 2003). A dominant perception is that neutral and objective sources increase the degree of reliability and validity of the data. Testimonies, whether in writing or shared orally in the course of an interview, are necessarily subjective and personalized, where meaning is created and adjusted

(Portelli 2015). Prisoners' perspectives are often treated with suspicion, viewed as tailored, partial and manipulative, the claim being that prisoners may have incentives to relate particular stories which in turn could call into question the authenticity of their accounts (Presser 2009: 181).

Yet, the same could be said of any form of data collected and used by criminologists, such as victims' statements, state reports or statistics. All present problems of veracity and interest as in they all are tailored and modulated for a particular purpose and to reach a certain audience (Skinner 1970). To speak of 'objective' sources is thus misleading. If anything, scepticism about prisoners' accounts should be approached within a broader concern for trust of all crime and punishment data. Put differently, their representational perspectives, like all perspectives, shed light on some things while missing others.

While relying on a mix of both approaches, this study drew more extensively on qualitative data, such as prisoners' letters or interview transcripts, which generally do not 'speak for themselves' (Fontana and Frey 2005: 713). Qualitative sources are reliable to the extent that they represent the perception of that one interviewee or participant, filtered by his or her emotional and cognitive understandings and reported through a particular set of personal verbal usages (Dexter 2006). To increase the validity of the findings (Noaks and Wincup 2004: 9), the different sources of information, as well as the data itself, were triangulated (Hoyle 2000; Berg 2007: 7), a method that 'assumes that the different sources of information will help both to confirm and to improve the clarity, or precision, of a research finding' (Ritchie and Lewis 2003: 358). Triangulating the collected data in this study meant comparing and cross referencing the information contained in the interviews with the information included in the letters and other documentary sources, including quantitative data

(between-method triangulation). It also entailed comparing perspectives within each different sets of data (i.e. among interviewees, and between prisoners), cross-checking for internal consistency (within-method triangulation).

Comparing perspectives (whether 'within' or 'between') avoids having to take one form of resource as establishing 'the truth'. In coordinating different viewpoints, it was possible to build a greater and more convincing understanding of the normalization mechanisms at play. At the same time, particular attention was given to conflicting narratives. Rather than privileging one over the other, I treated them as shedding light on different meanings. As such, this method was used to examine the same phenomenon from multiple perspectives, thereby enriching 'our understanding by allowing for new or deeper dimensions to emerge' (Jick 1979: 604).

2. Interpretation

As social scientists, criminologists can be concerned with issues of objectivity and evidence. The choice between quantitative and qualitative methods, a split perhaps more marked in the United States than in Britain (see Bosworth 2001: 434), is often rife with mutual accusations of bias, sample size and political positionality. Qualitative data are often described as 'messy' and 'unwieldy' (Ritchie and Lewis 2003: 202). Describing how the information was interpreted is thus essential.

I first went through the thousands of pages of archival documents identifying historical key points and legislative turning points, paying particular attention to when the death penalty was debated and LWOP mentioned before Congressmen. With regards to the interviews and letters, I used an 'informal' approach, as described by Anssi Peräkylä (2005: 870) and also used by Harry Annison (2012):

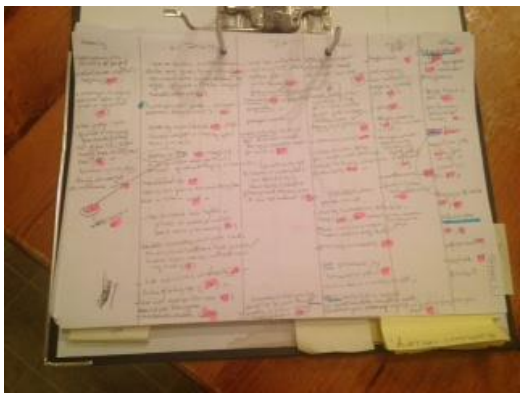
> By reading and rereading their empirical materials, they try to pin down [the] key themes and, thereby, to draw a picture of the presuppositions and meanings

that constitute the cultural world of which the textural material is a specimen.

I deliberately began with the prisoners' letters before transcribing the abolitionists' interviews and returning to the official documents as part of an effort to destabilize the general valorisation of documents and elite interviews to the detriment of prisoners' accounts. I first filed each letter in plastic sheets and organized them in folders in accordance with the prison they had been sent from.

Letters organized in accordance with prison of origin

I then read and re-read the letters, trying to pin point key topics from the sample (Peräkylä, 2005: 870). I was able to contrast and combine their different accounts, paying close attention to any conflicting narratives. This rather informal approach did not lack rigor. I used A4 sheets of paper, split in different columns, each referring to a theme identified after the first reading. I noted the letter's reference number (e.g. LM12_Calipatria) under the relevant section.



I analyzed letters by groups, depending on the prisons from where they had been sent. This way I was better able to hold in my mind, compare and combine the varying

narratives presented. I then used a second reading to reconsider my first interpretation of the texts and classification, and finally transcribed the relevant extracts of each letter I had referenced in the charts.

It is essential for the researcher to describe and acknowledge what exactly they are doing with prisoners' accounts: is it representing their testimonies with total verisimilitude in the likes of an anthology (e.g. *Too Cruel Not Unusual Enough* 2013; *Writing for their lives* 2006)? Or is it interpreting and building on selections of these written accounts, the same way it would select and analyze portions of interview transcripts? I was aware that in selecting extracts, I was not sharing the identical narrative written by the participants (see on the ethics of narrative research Josselson 2007). Instead, I was including and combining extracts within another narrative, that of the doctoral thesis (see Stanley 2004: 205). When typing-up the quotes rather than taking a photographic picture of the handwritten selection, I was also modifying the visual appearance of prisoners' testimonies. The prisoners' letters were not edited to correct errors of syntax or spelling mistakes. Where there is emphasis in the original I have left it in and have not inserted any emphasis myself.

Once I had analyzed the letters, I transcribed the interviews and coded them using NVivo software, to then label any relevant words or groups of words accordingly. I used additional 'nodes', which I derived from the literary review, the prisoners' letters and from the archival documents to refine the analysis. Following a grounded theory approach (Birks and Mills 2011: 1-15)—where theories that explain social processes or actions are generated from data—thematic findings were identified inductively. At the same time, the conceptual frame articulated around the 'field' and guided by notions of 'visibility', 'routinization' and 'denial', informed my approach (see Chapter 2). In other words, the study did not pursue a 'pure' grounded

theory for there was an original analytical arch and thus included a component of deductive analysis (Noaks and Wincup 2004: 123). Remaining open and alert to emerging and unanticipated themes was key. As such, the analytical approach was multidimensional, both inductive and deductive, with the data both enriching and refining the concepts originally identified.

Overall, the interpretative stage of the study involved constant and repeated comparisons as well as refining the themes initially identified. Throughout the analysis, I relied on concepts from existing works to assist the theoretical integration of the generated findings while adding explanatory power to the study. I also collected more data, mainly criminal legislation and official statistics, to contrast, complete and compare with the themes emerging from the letters and the interviews. As I continued drawing together these refined and revised understandings, additional repeatable regularities emerged, from which theoretical explanations continued to crystallize (Kaplan 1998). Moreover, presenting draft papers to my supervisors or at conferences and at the Centre for Criminology, offered additional opportunities to review my interpretations, pointing to inconsistencies and highlighting the topics that needed further clarification. These various sources of feedback most importantly helped me add nuances to the findings. Together, they form the pith and marrow of the following four empirical chapters.

CHAPTER 4—BEFORE CONGRESS: LOBBYING FOR LWOP

I. INTRODUCTION

In 1994, Sarah Kruzan shot her stepfather who had for years forced her to work as a child prostitute and had repeatedly abused her. She was 16 years old when she committed the crime.[33] Under the 1990 'Crime Victims Justice Reform Act' (Wilson and Campbell 1990)—an omnibus bill that increased the penalty for juveniles convicted of first degree murder to life without parole—Kruzan was sentenced to LWOP. Her case became the focus of national and international judicial reform groups. In 2005, Human Rights Watch (HRW), and Amnesty International co-released a report *The Rest of their Lives* focusing on the issue of sentencing juveniles to LWOP (HRW and Amnesty International 2005), and in 2009, in the follow-up report, *When I Die… They'll Send Me Home* (HRW 2008), HRW produced and released a video of Sara Kruzan. A campaign to 'Save Sara Kruzan' was launched in 2009. Meanwhile, between 2007 and 2009, HRW and the National Center of Youth Law, along with Senator Leland Yee, introduced three bills that purported to repeal LWOP for juveniles. All three attempts were unsuccessful and it was not until January 2012 that California passed a bill altering the 1990 tough-on-crime law.[34] The legislation differed from the earlier bills as it did not offer to repeal LWOP for youth offenders. Instead, it proposed giving those who had been sentenced to LWOP, and who have already served 25 years, an opportunity to have their case considered for

[33] Sarah Kruzan was granted clemency by Governor Schwarzenegger and her sentence was commuted to 25 years to life with the possibility of parole in 2011. In 2013 her sentence was reduced to second-degree murder and Kruzan was released on parole from the Central California Women's facility after having served 19 years (Klein 2013).

[34] As we later discuss in Chapter 6 the legislative story of the 2012 bill (SB 9) is to be read alongside two Supreme Court decisions that have narrowed the application of LWOP for juveniles (*Graham v Florida* (2010); *Miller v Alabama* (2012).

parole (Yee 2012).

To pass the bill, some activists and policymakers described having come across 'anti-death penalty messaging', that is lobbyists' parallel efforts to convince legislators to repeal capital punishment (Interview #18, 2014; Interview #19, 2014). At one point, the juvenile parole bill was pending at the same time as some anti-death penalty legislation. Certain opponents to capital punishment worried that the parole bill would undercut their abolitionist efforts, and were described as being 'hesitant' and 'concerned' (Interview #18, 2014; Interview #19, 2014). Part of the policy reform strategy thus entailed reassuring death penalty abolitionists by clarifying that the juvenile parole bill would not impede their efforts, and stressing that the bill concerned a category of offenders for whom the Supreme Court had already repealed the death penalty (*Roper v Simmons* 2005). Efforts to curtail the scope of LWOP for juveniles, in other words, would not affect abolitionist endeavors to repeal capital punishment for adults.

Other than the 2012 juvenile parole bill, there have been very few attempts in California to narrow the application of LWOP. The vast majority of legislative amendments implemented since the introduction of the punishment in the late 1970s have sought to widen its scope and reach beyond pre-existing capital crimes, both to categories of offenders (e.g. habitual felons, juveniles) and to types of offences (e.g. sex crimes, second-degree murder). Moreover, California's legislature has continuously expanded the number of special circumstances for which 'first-degree' murder can be elevated to 'capital' murder, and thereby become eligible to death or LWOP. At the same time, the United States Supreme Court has progressively limited the scope of capital punishment, banning death sentences from cases involving certain crimes and offenders (*Roper v Simmons* 2005) for juveniles; *Kennedy v Louisiana*

2008, for sex crimes). In this context, the different legislative amendments made to LWOP taken separately, and to LWOP and death sentences combined, have essentially turned the punishment into the principal extreme sentence.

In the legislative setting—where LWOP's reach has been consistently expanded and has only rarely been called into question—it is unclear where death penalty abolitionists stand with regards to LWOP. The legislative story of the 2012 juvenile parole bill (Yee 2012) suggests that some opponents to capital punishment seem to worry when attempts to narrow the scope of the alternative punishment are made, and at times appear reluctant to take part in efforts calling into question the alternative sentence to capital punishment. Whether these reactions have contributed to preventing LWOP from being considered for reform is the focus of this chapter.

Little is known about the historical origins of LWOP. When was the idea of imprisoning offenders with no prospect of review first introduced? In what context and for what purpose was the punishment imagined? How was LWOP's severity then represented and described? Many, if not all, of these questions have yet to be answered. According to recent scholarship, the punishment was introduced in the late 1970s, in the aftermath of Supreme Court decisions that repealed then re-introduced the death penalty (Appleton and Grøver 2007; Ogletree and Sarat 2012). However, as highlighted by Gottschalk (2012: 260), there is no comprehensive account 'that compares and contrasts when, why, and how individual states came to enact LWOP statutes'. Moreover, the scholars who have suggested death penalty abolitionists had helped normalize LWOP, have privileged a rather ahistorical approach to their claim (e.g. Steiker and Steiker 2008; Gottschalk 2012). Neglecting a historical investigation of the origins of LWOP risks overlooking a number of nuances and complexities and may oversimplify matters, and as such generate alarmist conclusions about the part

played by opponents to capital punishment. Therefore, a long-term view into the legislative origins of LWOP is necessary.

This chapter examines the period during which the idea of sentencing offenders to life imprisonment with no possibility of review first emerged, starting in the early 1900s and culminating in its enactment for capital murder in 1978 in the Californian Penal Code. It focuses on the interactions between anti-death penalty experts and legislators within the California Congress. The primary data stems from archival records belonging to a range of Californian congressmen, organizations and newspapers, as well as assembly and senate transcripts and reports. I also relied on an interview conducted with Donald Heller who drafted the last and currently applicable capital statute in 1978.

The themes that have emerged from this historical investigation correspond to consecutive periods of time. The first two sections of the chapter discuss the extent to which certain anti-death penalty experts may have inspired some Californian legislators with the idea of a sentence with limited avenues of parole. In the first section, I examine how the punishment was introduced and presented in the early 1900s as a progressive attempt to repeal the death penalty. Anti-death penalty criminologists such as August Vollmer and Noel Sullivan offered legislators who opposed capital punishment a 'way' to pursue their abolitionist endeavours. They relied on statistical data and utilitarian, rather than moral, arguments. With the mediatisation of certain crimes, LWOP was not introduced as a substitute for the death penalty. Instead, it was enacted as an augmented alternative punishment to death sentences for trainwreckings and kidnappings in the early 1930s and 1940s, serving punitive rather than progressive agendas.

The second section covers the time period starting in the 1950s and ending in

the late 1970s when LWOP was introduced for a third type of crime, capital murder. In the wake of the Chessman case, anti-death penalty experts, including criminologists and psychological experts, reverted to more reformative arguments. They claimed that LWOP should be substituted for death sentences because it kept prisoners alive, who could then be rehabilitated. The punishment was however introduced as an alternative to capital murder in 1978. Whereas LWOP was imagined as a progressive reform, it was introduced each time to serve punitive ideals. In the third and concluding section, I reflect on the normalizing processes that have turned LWOP into a punishment that is rarely the object of progressive reforms, concentrating on the role of experts testifying against the death penalty. In essence, this chapter draws attention to LWOP's capacity to befit radically opposed penal reformatory agendas, arguing that the punishment can serve progressive reformative endeavours as much as it can satisfy punitive and incapacitative goals.

II. THE UTILITARIAN FUNCTION OF LWOP: EFFICIENT SENTENCING

Certain anti-death penalty experts such as criminologists Maynard Shipley (Shipley et al. 1902; Shipley 1911a-b), and Vollmer (1931) and Sullivan (1932; see also California League to Abolish Capital Punishment (CLACP) 1932) promoted LWOP as a way to repeal the death penalty. They justified the punishment on the grounds that it would efficiently lock up those criminals that would otherwise escape justice. Relying on this utilitarian perspective, legislators opposing capital punishment proposed bills that would substitute death sentences with 'life without' penalties. These progressive endeavours failed. Due to a handful of sensationalized crimes and subsequent public panic, LWOP was instead introduced as part of a set of punitive

policies that sought to augment the alternative sentences to the death penalty.

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A little over thirty years after introducing capital punishment in the first Californian penal code (1872), spiritual leaders, legal professionals, and academics—each group including criminologists (Shipley et al. 1902; Vollmer 1931)—questioned the utility of death sentences and sought to share their expert opinion with Californian congressmen. Echoing the approach taken by earlier abolitionists such as Cesare Beccaria (1764) and Jeremy Bentham (1830), who argued against the death penalty because it was neither a useful nor a necessary form of punishment, these experts focused more on demonstrating its inefficiency than on questioning its morality or denouncing its cruelty.

Maynard Shipley, a Stanford-educated scientist who became a member of Congress in the early 1920s, was interested in criminology, regularly sharing and publishing his findings in a number of settings, including the *Journal of the American Institute of Criminal Law and Criminology* (Shipley 1911a; see also Shipley 1911b; Allen deFord 1955). In 1902, Shipley asked a group of legal professionals, penologists, academics, and clergy members to reflect on whether the death penalty, as part of the wider criminal justice system, was efficient. He inquired as to whether it should be replaced by another form of punishment (Shipley et al. 1902). A few years later, the Los Angeles-based organization, The Anti-Capital Punishment League, in its 1915 pamphlet *Does the Death Penalty Deter: Expert Testimony of Science, Experience, Ascertained Facts, and Figures* (Anti-Capital Punishment League 1915) argued that executions did not deter, as evidenced by the declining number of crimes in a state that had abolished their death statutes, and by the scarcity of death sentences handed out in retentionists states where the number of crimes remained significant.

In his 1931 pamphlet entitled *The Case Against Capital Punishment in*

California: A Special Message to the California Legislature, August Vollmer, a reputed criminologist '[r]ecognized throughout the nation as an outstanding authority on crime prevention and police administration' (Vollmer 1931: foreword), who had also published in the *Journal of the American Institute of Criminal Law and Criminology* (Vollmer 1922, 1933; see also Vollmer 1936), and who regularly shared his findings before Congress (*The Washington Post* 1924; Coontz 1929; Millard 1932; *The New York Times* 1935), highlighted that between 1926 and 1930, there had been 2070 arrests for murder that led to 46 executions. For Vollmer, this meant that 2024 criminals had escaped capital punishment. In light of these 'hard facts', Vollmer concluded that the death penalty was 'broken' and could not deter (Vollmer 1931). As 'Berkeley Chief of Police and Noted Criminologist', Vollmer sought to be distinguished from 'sob-sisters' and 'sentimental abolitionists' (Vollmer 1931). He emphasized that his argument was 'rational', 'dispassionate', and 'voiced solely in the interest of a wholesome administration of justice' (Vollmer 1931). He concluded, giving emphasis to his position as police officer, that he opposed the death penalty for 'practical reasons' (Vollmer 1931).

According to a number of experts testifying in Congress, capital punishment was not efficiently implemented because jurors refused to impose death sentences. In the words of Vollmer (1931), '[a]s long as jurors are men, they will not revert to the death penalty'. They preferred life sentences. According to different penological experts, such forms of punishment had become 'mere fictions' (Shipley et al. 1902; see also Shipley 1911a). For certain individuals participating in the debate, the inefficient application of the death penalty combined with the perceived leniency of life sentences together failed to protect society. For instance, The Anti-Capital Punishment League (1915) asked '[w]ould it be preposterous to say that the security

which the murderer enjoys is due to Capital Punishment?'. Vollmer (1931) likewise submitted that the barbarity of the death penalty had destroyed the certainty of the punishment, eventually protecting criminals rather than society. He argued that a penalty that is not applied 'obstructs the effective enforcement of the law and more often protects the criminal than society.' For him, capital sentences had essentially become a 'shield' for criminals (Vollmer 1931).

A number of opponents to capital punishment therefore agreed that the death penalty should be replaced by a punishment that would be severe, yet applied with certainty and regularity. The substitute for capital sentences had to be efficient. In 1902, Reverend Morrison, referred to as an 'authority in penology' from England, wrote to Shipley, 'where penal codes are too severe, they are not enforced and when too lenient they encourage private vengeance' (Shipley et al. 1902). Vollmer made a similar point in his 1931 pamphlet:

> WE DO NOT NEED TO KILL MEN IN CALIFORNIA TO COMMAND RESPECT FOR LAW. WE NEED PENALTIES WHICH JURIES WILL ENFORCE WITH PROMPTNESS AND REGULATORY – PENALTIES WHICH WILL REACH HOME (capitalized in text).

Similarly, in an address given over the radio in 1932 entitled *What Shall We do with Murder?* the President of the California League Against Capital Punishment (CLACP), Noel Sullivan, asserted, '[i]t is time now to wipe out the illusion and find an adequate penalty which our juries can and will enforce' (Sullivan 1932, underlined in text).

The replacement punishment was not immediately referred to as 'life without possibility of parole', as parole was only an emerging concept itself (Messinger et al. 1985). In 1902, many of Shipley's interviewees recommended 'indefinite or indeterminate sentence', where the 'murderer [would] only be released when he is cured' (in Shipley et al. 1902; see also Shipley 1911a-b). Some, such as John Lytle,

the representative of the General Society of the Pennsylvania Prison Society, referred to 'imprisonment with no hope of ever getting out', which he believed to be 'a greater punishment than hanging' (in Shipley et al. 1902). Others spoke of life without 'pardon' rather than 'parole', which entailed limiting governors' power to release (Shipley et al. 1902). Criminologists Vollmer and Sullivan explicitly referred to the concept of 'life without the possibility of parole' (Vollmer 1931; Sullivan 1932).

From their perspective, LWOP or its equivalent would preserve efficient sentencing. Lytle had told Shipley that it would ensure 'more convictions and less murders' (in Shipley et al. 1902). In a document entitled 'Questions and Answers– Relationship of Capital Punishment to Murder Rates', Sullivan affirmed that LWOP 'would ensure swiftness and certainty, protect society by locking up dangerous killers for life rather than permitting them to go free after a short period of years' (CLACP 1932).

LWOP also promised to be efficiently applied because jurors would not hesitate to hand it down. Sullivan explained that the punishment 'will give jurors a penalty which they will be willing to use, instead of one which forces them to imitate the murderer' (CLACP 1932). The sentence struck a balance between tolerable harshness and abhorrent cruelty (Sullivan 1932):

> [LWOP] lacks the abhorrent feature of snapping men into eternity on the gallows; it is not a penalty which will blot the lives of jurors, guards, wardens, newspapermen, doctors and every other citizen who is forced, by capital punishment, to participate in "state murder".

Vollmer (1931) similarly described life without the possibility of parole as 'sufficiently drastic to act as a deterrent' while not being 'repellent to a civilized community and hence will be enforced with popularity'. This perception of LWOP stood in stark contrast to the very purpose of parole, a concept introduced in California in 1893 to alleviate prison overcrowding in the late nineteenth century

(Berecochea 1982; Messinger et al. 1985: 91; Simon 1993). While prison reformers had introduced parole to reduce overcrowding, LWOP was presented by some of the experts sharing their views with legislators as a means to send more criminals, who would otherwise avoid punishment, to prison.

At the same time, LWOP was not meant to feed just any particular type of offender into carceral facilities. Earlier experts imagined the sentence to be restricted to specific crimes and criminals, essentially habitual killers. Moreover, the punishment was not necessarily meant to be permanent. According to Shipley, the punishment was to be restricted to murderers and would only last 'up until he is cured' (in Shipley et al. 1902). Sullivan distinguished between crimes committed in the heat of passion by those who are 'not criminals in the ordinary sense', and others committed by the 'professional gunman and killer, the moral degenerate and the highwayman who kills in the commission of crime' (CLACP 1932). LWOP would incarcerate the 'professional killer' for 'his natural life' (CLACP 1932). For other experts, the denial of parole should not be as severe so as to affect governors' power to pardon as this would prevent innocents from being released (Lawes 1940).

Not all death penalty abolitionists who shared their expert opinion with congressmen supported LWOP. Some questioned whether it marked any form of progress. Early on, a few specialists expressed their discomfort. One of Shipley's addressees referenced the author of the first known English work on criminology in 1902, Havelock Ellis, who wrote 'I am in favour of the eventual abolition of capital punishment, I do not see that the routine substitution of life-long imprisonment (as in some European countries) marks any substantial progress' (Shipley et al. 1902). Despite supporting the replacement of the death penalty by LWOP, the chair of the Los Angeles Bar Sub-Committee Association on Capital Punishment, Saul Klein

(1929), also shared his unease about LWOP: it was introduced, he explained, 'solely for the purpose of appeasing the 'hard brother' who [did] not really understand the crime problem and want[ed] a murderer hung or put away for life without hope.' While Klein confirmed his support for policies that would replace the death penalty with LWOP, he also specified that once capital punishment would be repealed, the committee he chaired would seek to educate 'the public' on LWOP (Klein 1929).

In an unsigned archival document from the late 1920s, entitled 'Capital Punishment and the No-Parole Question', addressed to senator Herbert C. Jones, a death penalty opponent shared their doubts about inserting a 'no-parole' clause in bills that would abolish the death penalty and replace it with LWOP (Anonymous 1927). The document stressed that the question of 'no-parole' was frequently debated among opponents to the death penalty. In the mind of those who pushed for LWOP, bills that would include such clauses would increase the chances of repealing the death penalty (Anonymous 1927):

> The question the most often asked by those working for the abolition of capital punishment in California was: "Why do you not have a no-parole clauses added to the bill you are sponsoring in the Legislature?" And they add, "Your bill would pass with so much less opposition."

While bills with no-parole clauses may have been more likely to be successful, the writer felt such a strategy was however imprudent (Anonymous 1927):

> The answer is [a no-parole bill] undoubtedly would [pass]. But we cannot for the following reasons.

A no-parole clause would make miscarriages of justice irrevocable (Anonymous 1927):

> In California, technicalities of law have prevented the reopening of criminal cases in which conviction was obtained through perjured evidence. Great injustice has been done individuals because of such laws, but all too often the laws remain. Judge, then, the great injustice possible if we convict individuals under a faulty judicial system and shut them off from possibility of pardon or parole.

Moreover, capital punishment and the parole question were deemed to be two

separate and distinct problems, and colliding the two issues together would lead to practical administration difficulties (Anonymous 1927):

> The whole parole question is one which should be decided by experts who make their recommendations only after thorough investigation and careful analysis of all available evidence. To attempt to combine the parole problem with the abolition of capital punishment is unfair to our law-making body, for it forces them to consider two separate problems as one, thus making a logical and intelligent solution of either impossible.

In the letter to senator Jones, the author stressed that parole was a reliable institution for only few first-degree murderers had been paroled. To support their claim, the writer relied on data from New York state because 'corresponding statistics from California [were] not available' (Anonymous 1927):

> In 38 years, from 1889 to 1927, only three pardons and six commutations were granted in New York State.

The author specified, '[w]e hear much of paroling murderers, but as a matter of fact how many of us can recall even one man convicted of first-degree murder, ever being paroled?' (Anonymous 1927). Finally, the author reminded that legal experts and academics had considered such no-parole clause bills 'unconstitutional' in California (Anonymous 1927):

> A no-parole clause is unconstitutional and violative of Article 7 section 1 of the California Constitution. This is the opinion of Mr. Saul S. Klein, former Chairman of the Los Angeles Bar Association sub-committee to investigate capital punishment. The Law Department of Columbia University also held such a clause unconstitutional in a similar case.

Notwithstanding these critiques and hesitations, Sullivan and Vollmer somehow succeeded in offering a new strategy, a new idea, for legislators who opposed capital punishment. Attorney Klein, the chair of the Los Angeles Bar Association Subcommittee on Capital Punishment would later refer to this as '"a way"' in which 'to accomplish the major task of abolishing the "Death Penalty"' (Klein 1929). In an interview conducted in 1983, Joseph Gunterman, a representative of the Friends

Committee Legislation of California (FCL),[35] similarly suggested that those supporting LWOP 'may have provided *a way* for some legislators who were politically uncertain to say "Okay, I can do it now because I have something on which I can base an argument with my constituents"' (Gunterman 1983: 17, emphasis added).

A trend emerged in the late 1920s and early 1930s. A number of legislators relied on the hard facts and the utilitarian frame provided by Vollmer and Sullivan to propose bills that sought to repeal the death penalty and substitute it with LWOP (Senate Committee on Judiciary 1960). Assemblyman William Hornblower and Senator George Rochester submitted their first 'anti-hanging' bill in 1929, described as having relied on Vollmer's testimony and findings (Jones 1931; Millard 1932). Not all bills put forward LWOP as the sole punishment available for certain crimes; they offered a set of alternatives for judges to choose from. The Fellom bill of 1927 for instance, which sought to replace death sentences by 'confinement in the state prison for life', and was introduced at the request of CLACP.

These efforts were however unsuccessful (Senate Committee on Judiciary 1960). The punishment was not introduced as a *substitute* for death sentences but instead was enacted as an augmented *alternative* to the death penalty. California enacted in 1933 its Little Lindbergh Law with regards to kidnappings, which included both capital and LWOP sentences. The state then added LWOP for trainwreckings in 1941, a crime for which the state already provided the death penalty.[36] For proponents of the death penalty, LWOP ensured criminals would not 'get off with a prison sentence' (Bradford 1933). Together, the death penalty and LWOP increased 'the

[35] The FCL, a lobbying organization founded by Quaker members of the Religious Society of Friends in Washington D.C. in 1943 and branched out to California in 1952, was committed to repealing the death penalty and raising awareness of available alternatives.
[36] The state had also introduced the punishment for habitual felons in 1927.

severity of the penalties formerly provided' (California Legislature 1941). It also decreased the gap between life sentences and capital sentences, reviving the hope that jurors would be less taken aback to hand out the latter form of punishment.

Vollmer, Sullivan and Shipley's data, findings and arguments had been shared with a number of congressmen, possibly inspiring the more punitive policymakers. Yet, the media coverage and sensationalism of certain crimes was pivotal to instrumentalizing the punishment, and transforming its purpose from offering a lenient substitute to serving as an augmented alternative. The completion of the First Transcontinental Railroad in 1869 connected California to the rest of the country and greatly contributed to the state's social, political, and economic development (Daniels 2001; Starr 2007). Such new inventions also exposed the state to new crimes.[37] Trains brought with them trainwrecking for the purpose of robbing passengers and property, a crime which grew rapidly over the years and gained increasing media coverage (Barrows 1900). Californian newspaper headlines rapidly picked up on the phenomenon, referring to train wreckers as 'devilish' (Editorial Departments 1894), 'heartless' criminals (Barrows 1900). By wrecking the train, they made their victims 'more helpless' (Barrows 1900). The press at times suggested that train wreckers deserved to be 'exterminated like a mad dog or a deadly reptile' (Editorial Departments 1894). Around the same time, particularly following the Lindbergh case, in which war hero Charles Lindberg's baby son was taken from his bed to never be returned, kidnappings also received greater attention (Bradford 1933; Fischer and McGuire 1934). The Lindberg case is often pointed to as an example of an early form of moral panic whipped up by the media (Jenkins 2004: 50), creating an emotional response that generated punitive sentiment (Blackwell 1932; Fischer and McGuire

[37] Other reasons for the high levels of crime in California (Boessenecker 1999) include the Gold Rush (Ford 1910), the transience of the population (Friedman 1975), the availability of weapons, and even the state's attractive climate (Ford 1910).

1934).

Notwithstanding such media attention, juries seldom sentenced offenders to death, governors used their pardoning power and the authority in charge of parole regularly released prisoners (Editorial Departments 1894; Berecochea 1982; Simon 1993). Even serious offenders were pardoned (McKanna 1992). What was at the time described as 'sentimentalism', eventually fuelled a widespread fear and a sense of panic. Some journalists argued that robbers and kidnappers were escaping justice, drawing attention to the resulting emergence and rise of vigilante committees or civilian justice (Keenan, 1934; David 1934). Local groups emerged, seeking to enforce justice themselves. For instance, Los Angeles County organized 'reception committees', which combined surveillance and reporting of criminals, making sure they would not to be able to run free (Bradford 1933; David 1934; Blew 1972). It was to address these reactions that legislators introduced LWOP.

III. THE HUMANITARIAN JUSTIFICATION FOR LWOP: PRESERVING THE RIGHT TO LIFE

In the 1950s and 1960s, some death penalty abolitionists continued to try to convince members of the Californian Congress to replace capital sentences with LWOP. In addition to deploying a utilitarian rationale, whereby the punishment would be efficiently applied, they emphasized a humanitarian justification. Life sentences with no possibility of parole preserved the 'Right to Life', they argued, a component of which was reforming prisoners. This switch occurred in a context where the death penalty was increasingly called into question and rehabilitation had become the guiding penal rationale. By the 1970s, both liberals and conservatives would however call the rehabilitative system into question. Discarding the humanitarian justification

for LWOP, both anti- and pro- death penalty legislators embraced the punishment in order to serve their respective penal reforms.

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In the mid-1950s, the death penalty became the subject of heated debates in Congress for three main reasons: the 1953 report of the United Kingdom's Royal Commission, which directly called capital punishment into question, had been distributed across the world (Assembly Subcommittee on Capital Punishment 1956a; Senate Committee on Judiciary 1960); the number of death sentences was declining (US Department of Justice, Bureau of Prisons 1966); and the Chessman and Graham cases had spurred a widespread frustration and disillusion of the death penalty system (Assembly Subcommittee on Capital Punishment 1956a-b; Senate Committee on Judiciary 1960; see also Haines 1996). The 1953 Royal Commission called into question the death penalty and provided fresh documentation that 'civilized' countries were repealing their death penalty statutes without the number of crimes subsequently and inevitably increasing (Haines 1996; Hood and Hoyle 2015: 44–45). The number of executions was also declining across the United States. Despite following a similar trend, executions in California remained exceptionally high, trailing only Texas and Georgia (US Department of Justice, Bureau of Prisons 1966). The state had sent more people to death than all of the 12 north-central states combined. In 1960, California had executed the most individuals across the country, with 9 of the 15 executions conducted in the 11 western states having taken place in the Golden state (US Department of Justice, Bureau of Prisons 1966). By 1965, California held the highest number of death row inmates (US Department of Justice, Bureau of Prisons 1966).

In the late 1950s, two Californian cases received a great deal of media coverage, which spurred an additional disillusionment about the death penalty and empathy for the condemned. Barbara Graham had been executed in a gas chamber despite

repeatedly claiming her innocence (Haines 1996: 13); and Caryl Chessman, although a brutal rapist and kidnapper, had not killed his victims.[38] The cases triggered unprecedented compassion for the condemned (Haines 1996: 13). Chessman, in particular, gained widespread support, including from Eleanor Roosevelt (Alarcon 1988). The case also provoked great frustration amongst Californians as it had been delayed by numerous appeals, raising doubts about the efficiency of capital punishment. The adjournments caused by Governor Brown's reprieves further accentuated doubts over the use and efficiency of the capital punishment system in California (Alarcon 1988). Together, these factors reactivated legislative debates over the death penalty. In 1956, the chairman of the Assembly Interim Committee for the Judiciary Subcommittee on Capital Punishment, Lester McMillan, sent out a survey asking 'informed and interested persons' for their opinions on whether the death penalty should be abolished (Assembly Subcommittee on Capital Punishment 1956b). The Assembly Subcommittee then held hearings in San Francisco and Los Angeles in 1956, and subsequently drafted for assemblymen the *Report of the Subcommittee of the Judiciary Committee on Capital Punishment Pertaining to the Problems of the Death Penalty and its Administration in California* (Assembly Subcommittee on Capital Punishment 1956a). In 1960, the Senate Judiciary Committee similarly held special hearings on a bill seeking to substitute the death penalty with LWOP (Senate Committee on Judiciary 1960).

During these hearings, a number of individual specialists shared their wide-ranging expertise on capital punishment and alternative forms of sentences, including legal practitioners, prison wardens, anti-death penalty organizations, religious representatives, and academics (Assembly Subcommittee on Capital Punishment

[38] He had been condemned to die under the Little Lindbergh Law.

1956a-b; Senate Committee on Judiciary 1960; McGee 1981). In line with previous experts, specialists in the 1950s, 1960s and 1970s relied on official statistics to demonstrate that capital sentences did not deter criminals from committing crimes and that the number of abolitionist states and countries was growing, isolating California from a worldwide and national abolitionist trend. Their interventions differed from those of Shipley, Sullivan and Vollmer in that they turned to the broader international context, repeatedly referring to the 1953 Royal Commission report (Assembly Subcommittee on Capital Punishment 1956a; Senate Committee on Judiciary 1960). These debates also evolved for a greater variety of experts testified before congressmen, offering different vantage points to discuss capital punishment and possible substitutes.

In addition to arguing that capital punishment in California was inefficient, advocates opposing the death penalty heavily relied on the argument that death sentences violated the fundamental 'right to life'. The concept had three components: the sanctity of life, the civilization of the state, and the rehabilitation of prisoners. From a spiritual perspective, it was often argued that humans were not entitled to kill others. For instance, professor of criminology Austin MacCormick of the University of California at Berkeley explained to the Assembly Subcommittee on Capital Punishment in 1956, '[i]t is the whole question of the humanitarian approach to life that views life as a sacred thing, and that says that man has no right to take other people's lives' (Assembly Subcommittee on Capital Punishment 1956a). Before the Senate Judiciary Committee in 1960, several religious figures similarly promoted the religious sanctity of life (Senate Committee on Judiciary 1960: 65).

The right to life bore a second meaning: keeping prisoners alive was necessary to befit the civilization of the state and the dignity of its citizens. The death penalty

was often depicted as a remnant of the past, halting states in time and impeding their progress and modernization (Assembly Subcommittee on Capital Punishment 1956a: Professor MacCormick). As a progressive state, it was repeatedly argued that California should therefore repeal the death penalty (testimonies of George Davis, from The People Against Capital Punishment and Phyliss Kirk of the California Committee for the Abolition of Capital Punishment, Southern California Branch, cited in Senate Committee on Judiciary 1960: 88, 100). Capital punishment further stained the citizens in the name of whom executions were carried out. In 1956, the Sheriff in Santa Clara County, Melvin Hawley, worried, 'we too have on our hands part of the guilt' (Assembly Subcommittee on Capital Punishment 1956a: 87). Attorney Reardon pleaded, '[r]emember, when we hang them, gentlemen, we hang them in the name of the people of the State of California. That means you, and that means me, also' (Senate Committee on Judiciary 1960: 24; see also at 90 testimony of Phyliss Kirk of the California Committee for the Abolition of Capital Punishment, Southern California Branch).

Finally, and as would increasingly become central to discussions relating to LWOP, preserving the right to life would allow for the rehabilitation of criminals, deemed to be the cornerstone of the criminal justice system at the time (Martinson 1974; Allen 1981; Tonry 2013: 149). To be morally acceptable, a punishment would have to provide an opportunity for individuals to redeem themselves. Prison reformers believed they could transform criminals—individuals who had temporarily gone astray—into law-abiding citizens. In California, as in much of the United States, judges, lawyers, and politicians through the late 1960s embraced this penal rationale (Simon 1993; Simon 2014a: 37). Parole had been recast to fit this rehabilitative ideal, and indeterminate sentencing—a system where prison sentences did not include

specific end-dates—had been introduced under the assumption that, with time, prisoners could change (Messinger et al. 1985; Simon 1993; Simon 2014a).

Experts and organizations thus stressed the importance of rehabilitation and repeatedly argued that executions did not fit this reformative endeavour. Before the Senate Judiciary Committee in 1960, the Council of Churches representative stressed that the Christian Church believed in the redemption of individuals, 'what criminologists call "rehabilitation"'. 'Society itself', he explained, 'is charged with the responsibility of trying to rehabilitate offenders'. 'Our task', the religious representative continued, 'must be to redeem, to rehabilitate with the hope that we can return these men to society again in ways that will be useful' (Senate Committee on Judiciary 1960: 78-79). According to Trevor Thomas of the FCL, the death penalty could not fit any system of legitimate penalty, as it was 'a contradiction of the very term [penalty] that implies punishment and rehabilitation' (Assembly Subcommittee on Capital Punishment 1956a: 2, underlined in text). Quoting Harvard criminologist Sheldon Glueck, Thomas further stressed that the death penalty stalled the administration of criminal justice, which involved rehabilitating criminals (Assembly Subcommittee on Capital Punishment 1956a: 2).

By contrast, LWOP was often characterised as a sentence that preserved the life of prisoners. In the 1960s, the punishment meant that prisoners would be ineligible for parole but not indefinitely. It also did not prevent them from appealing or having their sentence commuted or pardoned by the governor. In other words, in the 1950s and 1960s, it was rather unlikely that they would die behind bars. There are few official statistics on LWOP sentences from that period, making it difficult to determine how many sentences were actually commuted, whether inmates were released and after how long. In 1977 Senator Deukmejian mentioned that between

1950 and 1960, 95 LWOP sentences had been handed down, and of that total, 80 to 84% had been commuted to life with the possibility of parole. He added that, with reference to information provided by the Department of Corrections, of the portion of LWOP sentences commuted to life *with* parole, 43% had been released by December 1976 (Deukmejian 1977a; Senate Committee on Judiciary 1977a). According to other documents, it appears that inmates serving life sentences became eligible for parole after 7 years and served on average 12 years before being released.

Nonetheless, those promoting LWOP before legislators either avoided going into much detail, or at times appeared confused as to the type of life and rehabilitation prisoners serving LWOP would be provided. Dr MacCormick, who was asked in 1956 whether LWOP would be more 'humane' than death sentences, deflected the question, responding that the pains and fear experienced by the prisoner were not the crux of the problem. It was the 'humanitarian approach to life that views life as a sacred thing' that mattered (Assembly Subcommittee on Capital Punishment 1956a: 56). Another example of policy advocates' hesitations is the testimony of an expert in psychology, Dr Stainbrook, from the University of South California, who explained that he could envisage supporting LWOP as some people he believed would never change (Senate Committee on Judiciary 1960: 94). But when asked whether he would review his stance should the death penalty be abolished, the medical expert argued that it would be 'absurd to keep people locked up for no reason at all', even more so if the person had been rehabilitated (Senate Committee on Judiciary 1960: 95). Stainbrook concluded that neither LWOP nor the death penalty was preferable if they both prevented rehabilitation. In his words, '[t]here's no reason to lock me up or give me the death penalty or anything else if I'm going to be completely rehabilitated once I'm purged of my consuming hate' (Senate Committee on Judiciary 1960: 96).

Legislators supporting capital punishment also asked for more details about LWOP prisoners' life (Senate Committee on Judiciary 1960: 52):

> We want to picture the life of the man who is going to be committed without benefit of parole.
>
> We'd have to figure out what we would want to do with those.

Douglas Rigg, a prison warden from Minnesota, suggested that LWOP prisoners be held in maximum-security facilities, describing the strict and dire conditions to which they would be exposed (Senate Committee on Judiciary 1960: 52). Others, such as former warden of San Quentin, Clinton Duffy, recommended that the state implement '[a] constructive program wherein prisoners can participate in activities, wherein they can develop and benefit by the program that is before them, wherein they can gear themselves toward rehabilitation' (Senate Committee on Judiciary 1960: 12).

Some experts testifying before senators and assemblymen were more dubious about LWOP and referred to a new concept, 'the hope of being released'. They did not question whether denying prisoners' hope would be inhumane or cruel for prisoners. Rather, they worried that the punishment would destabilize the management of prisons (Assembly Subcommittee on Capital Punishment 1956a-b; Senate Committee on Judiciary 1960; Assembly Committee on Criminal Procedure 1961a). Prison experts, in particular, were concerned about the kind of penal population LWOP would produce. They asked whether significantly reducing prospects of release would undermine the logic of rehabilitation, creating havoc and insecurity within prison walls. In 1956 before the Assembly Subcommittee on Capital Punishment, former Superintendent of the California Institution for Men at Chino, Kenyon Scudder, spoke against LWOP, criticizing it for taking 'away hope' and turning 'a man into a beast'.[39] Richard McGee (1981), the Director of the Department

[39] Scudder's book, *Prisoners are People*, (1968) established him as one of the most prominent voices in favor of the rehabilitative orientation.

of Corrections, questioned the wisdom of such a sentence. He referred to the few kidnappers held in San Quentin and said he was 'glad' there were no more, as they could potentially be a 'disturbing influence' (Assembly Subcommittee on Capital Punishment 1956b). Ellery Cuff, Public Defender in Los Angeles county, believed that a verdict of LWOP would be 'unwise' because it would take away all incentive to behave, and 'create serious problems for prison administration' (Assembly Subcommittee on Capital Punishment 1956b).

Others felt LWOP was simply unnecessary. The parole system was deemed efficient and the Adult Authority perceived as a trustworthy institution. Life sentences *with* the possibility of parole sufficed and could effectively supplant the death penalty. Trevor Thomas of the FCL for example presented official statistics to Californian assemblymen showing that murderers sentenced to life but eligible to parole had the lowest rate of recidivism (Assembly Subcommittee on Capital Punishment 1956b). Prison official Scudder also praised the work of the department of correction for rehabilitating prisoners, finding that those who were in for first-degree murders had 'some of the best work and parole records' (Assembly Subcommittee on Capital Punishment 1956b). The representative of the Council of Churches expressed his fervent trust in the Adult Authority who decides parole (Senate Committee on Judiciary 1960: 79).

By 1960, legislators opposing the death penalty had introduced sixteen bills that offered to replace death sentences with LWOP sentences (Senate Committee on Judiciary 1960). Governor Brown himself had turned to the legislature to repeal the death penalty but failed to obtain the required majority vote. At the same time, violent crimes increased at a disturbing rate and recidivism among violent offenders remained high (Gurr 1981). A number of sensationalized cases further overshadowed

any remnants of empathy fostered by the Chessman case. Sirhan-Sirhan assassinated Robert Kennedy in 1968, Charles Manson and his followers had been found guilty of the brutal murder of Sharon Tate in 1969 (Cohen 1969), and the Zodiac Killer's serial killings in the late 1960s remained unresolved (Russo 2007). The rise of violent crimes and the mediatisation of such brutal acts together propelled a widespread fear of crime, which turned into a growing punitive sentiment (Simon 2014a).

In this context, the anti-death penalty debate began to wane in the legislature. The FCL representative Gunterman remembered having had to convince legislator McMillan to drop his bill in 1968 because 'the combination of circumstances was too great and another defeat wouldn't help us any' (Gunterman 1983: 25). He recalled, '[f]rom the Caryl Chessman session on, it became less and less, and sometimes I would be there in the hallways working on a bill, and feeling terribly lonely' (Gunterman 1983: 19).

A new abolitionist strategy emerged, which involved challenging capital punishment in courtrooms on constitutional grounds (Haines 1996: 13-14, 25). Gunterman explained '[a]t that time we were really putting our hopes in the courts. (…) even though we had anti-death penalty bills in each year, the push was not behind them' (Gunterman 1983: 18). Lawyers who led the legal battles collaborated with two organizations, the National Association for the Advancement of Colored People-Legal Defense Fund and Educational Fund and the ACLU (Dorsen 1968; Epstein and Kobylka 1992; Haines 1996). This strategic move proved to be successful, provoking a wave of high court decisions that destabilized the death penalty across the country. In *People v Anderson* (1972) the Supreme Court of California held that the death penalty violated section 6 of Article 1 of the California Constitution, which prohibits the infliction of cruel or unusual punishments. A few

months later, the United States Supreme Court decided in *Furman v Georgia* (1972) that the death penalty, in certain criminal cases, gave uncontrolled discretion to judges or juries, in violation of the nation's constitution.

While these legal battles succeeded in undermining the death penalty, they also provoked ripple effects in the legislative arena. Legislators who supported capital punishment now perceived the United States and California Supreme courts as having encroached on their legislative power. As a result, and riding on the popular punitive drift triggered by the Sirhan-Sirhan, Manson and Zodiac cases, Republican Senator George Deukmejian became committed to reinstate the death penalty and to limit the judicial power to interfere in capital punishment matters. He first reverted to the Initiative System, a voting mechanism introduced by Hiram Johnson in 1911 during the wake of the Progressive Era, whereby a petition signed by a certain minimum of registered voters can then be placed as a proposition for voting, and, if successful, be turned into law (Grodin 1989: 102-107; Starr 2007). The Proposition he introduced in the early 1970s reinstated the death penalty and declared it to be neither cruel nor unusual, thereby curbing Californian courts' potential future attempts to challenge the death penalty's constitutionality. The state's Constitution was amended by adding Article I, section 27:

> All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.
>
> The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offences be deemed to contravene any other provision of this constitution.

Voters approved Deukmejian's Proposition by 67.5% on 7 November 1972. Empowered by this popular high support, Deukmejian swiftly introduced and passed a bill in 1973, reinstating a mandatory form of death penalty in California (Deukmejian 1972).

In an attempt to counter these punitive policies, anti-death penalty lobbyists continued advocating for LWOP in Congress on the grounds that it would preserve prisoners' lives and allow them to be rehabilitated. LWOP was not intended to be a permanent form of punishment to prison, one that would be too similar to the death penalty. For instance, during the 1972 hearings before the Senate Committee of the Judiciary, Bishop Haden of the Episcopal Diocese of Northern California suggested granting more attention to rehabilitation rather than to 'pure confinement' (Senate Committee on Judiciary 1972: 109). Otherwise, he claimed, LWOP would be too similar to the death penalty, '[t]aking out a person out of society, and simply confining him or killing him is to abdicate our responsibility to try to rehabilitate him' (Senate Committee on Judiciary 1972: 110, 111). The Chairman of the San Francisco Committee Against Capital Punishment similarly opposed any form of permanent incarceration that prevented rehabilitation; '[w]hat is meant by '[life imprisonment in lieu of]', he explained, 'is that people who have killed should be punished; however, one killing does not deserve another'. It was key, according to Professor Blaney of Social Ethics, Stockton California, to 'restore, preserve and nurture the humanity of the imprisoned' (Senate Committee on Judiciary 1972: 142).

By the 1970s, this vision of LWOP conflicted with the actual decline of the rehabilitation ideal (Simon 2014a: 36, 37). The morality and efficiency of the system had indeed been increasingly called into question. Up until the 1960s academic social scientists, legal scholars and social workers had uncritically accepted progressive and humane correctional programs. In the early 1970s, however, penal philosophers began criticising the morality of treating prisoners as 'objects' to be fixed, and imposing treatment regardless of whether they consented to it (Martinson 1974; Allen 1981). Francis Allen (1981: 51), for instance, exposed how rehabilitation infringed upon

civil liberties values and on prisoners' autonomy. In *The Decline of the Rehabilitative Ideal* (1981), he argued that the penal rationale had been embraced as signalling progress when neither the means nor the ends of rehabilitation had ever been specified with care. He asked whether the purpose was to protect society by reducing offenders' propensity to reoffend or whether the aim was to enhance the development of offenders by offering them skills, guidance and opportunities. Allen (1981: 52) also questioned what 'treatment' prisoners were actually given. The report prepared by the American Friends Service Committee on Crime and Punishment (1971) similarly pointed to the unanticipated, inhumane consequences of well-intentioned reforms.

Further, from a practical perspective, faith in rehabilitation dwindled, in part, due to the rise of violent crimes (Martinson 1974; Rothman 1980: 379-421; Gurr 1981). In California, congressmen shared their doubts as to the value and efficiency of prison programs (Assembly Committee on Criminal Justice 1975a; Assembly Committee on Criminal Justice 1975b). Former Governor's Executive Secretary (1962–1964) Arthur Alarcon remembered how rehabilitation had been the cornerstone of indeterminate sentencing but during the 'era of cuts', vocational and educational programs had been progressively dropped: '[y]ou can't rehabilitate without a budget, and without trained people' (Alarcon 1988: 206). As a result the best option that could be offered was to 'warehouse' prisoners (Alarcon 1988: 205):

> One of the big slogans at the time was "you can't rehabilitate somebody who is not habilitated in the first place. These people can be locked up if you want. We'll warehouse them if you want, but we can't do anything. Don't expect us to accomplish anything in prison."

While many of the legislators who opposed the death penalty also fervently supported LWOP, they had construed the rationale for the punishment differently than expert claimsmakers. They sought to demonstrate that the sentence was a constitutionally

sound substitute rather than underscoring its propensity to rehabilitate prisoners. They relied on the new 'death-is-different' concept introduced in *Furman* (1972). According to the United States Supreme Court, death was construed as 'an unusually severe punishment, unusual in its pain, in its finality, and in its enormity', and therefore violated the Constitution (*Furman* at 287-289). Within this frame, policymakers opposing capital punishment argued that, by contrast, LWOP sentences were constitutionally valid. In the 1973 hearings report drafted by Assembly Criminal Justice Committee, life prisoners were described as being 'civilly dead' (Assembly Committee on Criminal Justice 1973: 17):

> [The convict] is so stripped of his civil rights as to be termed "civilly dead," P.C. §2601, it might seem that he is deprived of the essentials of life and citizenship even if he is permitted to live.

Civil deaths were deemed constitutional because they did not extinguish all other fundamental rights such as 'immunity from cruel and unusual punishment', the ability to file writs of *habeas corpus*, religious freedom, access to courts to overturn convictions, or proving innocence (Assembly Committee on Criminal Justice 1973: 17). The Assembly Committee further submitted that lifers generally had the opportunity to work to provide financial restitution to the victim's family while those sentenced to death could not (Assembly Committee on Criminal Justice 1973: 34):

> [Convicts on death row] are not permitted to offset the costs of their confinement by taking part in prison industries programs, nor can they engage in any profitable work that would permit restitution to victims.

Further, inmates sentenced to LWOP would eventually regain civil life as they would more likely than not be commuted and released either by the Adult Authority or by the governor (Cheatwood 1988: 49).

By the mid-1970s, states across the country had re-implemented the death penalty, spurring a second wave of Supreme Court cases. The United States Supreme Court decided in *Gregg v Georgia* (1976) that mandatory capital statutes, such as the

one reinstated in California, violated the Eighth Amendment. In line with the United States Supreme Court's decision, the California Supreme Court found in *Rockwell v Superior Court* (1976) that California's statute did not meet the constitutional criteria set by *Gregg*.

After *Gregg* and *Rockwell*, the situation in the legislature radically changed as LWOP became essential to both pro- and anti-death penalty legislators. Legislators supporting the death penalty needed to abide by the US Supreme Court's requirements, as capital sentences could no longer be mandatory. They had to provide a procedure whereby jurors and judges would be able to consider the mitigating circumstances of each particular case to decide whether or not to sentence an offender to death. Where, in light of such evidence, a sentence to death was considered inappropriate, they had to be able to opt for a reduced alternative sentence. Therefore, determining the punishment offenders would be sentenced to if they escaped the death penalty became crucial. Proponents of the death penalty could either revert to traditional life sentences, as was the case prior to Deukmejian's 1972 bill, or, alongside trainwreckings and kidnapping laws, introduce a form of life sentence that reduced prisoners' opportunities of release. While making sure not to over-promote LWOP—and risk providing additional support to those seeking to use it as a substitute for the death penalty—capital punishment supporters opted for a heightened, and already available, version of life sentences.

In this context, legislators who opposed capital punishment continued pushing for LWOP as a substitute rather than as an alternative for the death penalty, and rarely emphasized the punishment's propensity to rehabilitate prisoners. Rather, they promoted the 'humanity' of the punishment on the grounds that, by keeping prisoners alive, LWOP sentences would avoid irreversibly executing innocents. As long as

prisoners were alive, errors could be corrected (Senate Committee on Judiciary 1977a-c). In a somewhat desperate attempt to gain support from other congressmen, some opponents of capital punishment even proposed bills that would aggravate the features of LWOP (e.g. Marks 1996: 260). Senator Milton Marks' bill, for instance, offered to limit the governor's power to commute LWOP sentences (Senate Committee on Judiciary 1977b). The purpose was to prevent 'the release from prison of a person receiving that penalty during his lifetime – and to provide this penalty as an alternative to death' (Senate Committee on Judiciary 1977b).

Some experts who opposed the death penalty tried to draw congressmen's attention to the pitfalls raised by LWOP. In 1977, the ACLU-NC shared a memorandum, reminding that under California law, and since the 1913 Parole Act, the state was required to provide prisoners a hope of release (The ACLU-NC 1977: 3). The organization further pointed to the fact that the California Supreme Court was committed to enhance laws that promoted prisoners' rehabilitation (The ACLU-NC 1977: 3). The denial of hope would be aggravated if the governor's power to commute were to be limited, as provided under Senator Marks' bill (Senate Committee on Judiciary 1977b). The FCL sent a letter to Senator Song, the Chairman of the Senate Judiciary Committee, stressing that such a constitutional amendment would remove 'an important check and balance in the present justice concept.' It would ultimately raise 'serious constitutional questions involving cruel and unusual punishment' (FCL 1977). Some, but few, anti-death penalty lobbyists also warned against the introduction of such a punishment on the grounds that it was likely to open the door to more incarceration. In its 1977 letter, the FCL addressed a letter to the Senate Committee, commenting on Senator Marks' bill (FCL 1977) that would replace the death penalty with LWOP for all first-degree murder convictions. The

organization worried that the push for such a punishment would open the door to expanding permanent incarceration in the future and accelerate the 'warehousing' of individuals, a phenomenon that the FCL condemned (FCL 1977).

These practical concerns, like those raised in the 1950s and 1960s by prison officials, resonated amongst legislators. The Senate Judiciary Committee raised a number of questions demonstrating its awareness of the issues that could arise should LWOP replace the death penalty or should the governor's commutation power be limited (Senate Committee on Judiciary 1977a-c). The Committee members seemed concerned that LWOP sentences would increase the number of individuals 'with no hope of eventual release', turning them into 'new and exceedingly dangerous' inmates (Senate Committee on Judiciary 1977b-c). Without hope, prisoners would no longer have any incentive to behave behind bars. Denying prisoners the possibility of having their sentence commuted by the governor would aggravate the risk of misbehaviour. Legislators questioned whether the growing number and nature of LWOP sentences would destabilize prison management. The committee therefore suggested reducing LWOP to a life sentence with no parole for fifteen or twenty years (Senate Committee on Judiciary 1977a-b).

The majority of congressmen, fuelled by a generalized 'fear of crime' (Simon 2014a: 21, 27), responded favourably to Deukmejian's suggestion and, through a two-third majority vote, enacted a new death penalty law in 1977 (Deukmejian 1977b). This law introduced LWOP as the alternative to the death penalty for capital murders. The punishment was then perceived as ensuring that perpetrators would never be released, that they would be permanently locked up (Interview #9 Heller 2014). A little over a year later, the 1977 death penalty law was repealed as it was deemed to be too 'weak' (Interview #9 Heller 2014). The new legal instrument broadly

expanded the categories of cases in which LWOP and death sentences could be imposed. The fiscal analyst estimated the law would increase prison population (Briggs 1978: 33):

> The measure would increase the number of persons in California prisons, and thereby increase the costs to the state of operating the prison system. The increase in the prison population would result in part from an increase in the number of individuals sentenced to [LWOP].

Proposition 7 of 1978, popularly called the 'Briggs Initiative' after its author, Senator Briggs, was passed by a 72% majority (Briggs 1978). In this final phase, which confirmed LWOP as the alternative to capital punishment, policy advocates opposing capital punishment, whether they had concerns about LWOP or not, had simply no say in the discussion. In the words of the 1978 statute drafter, Don Heller (Interview #9 Heller 2014):

> There was never a debate because the person who drafted the bill was me, myself and I. (…) there was no debate, not a legislative body debating the pros and cons of everyone of those sections.

IV. CONCLUSION: PRESERVING THE STATUS QUO

As this historical investigation has shown, LWOP functions equally well under an abolitionist utilitarian model, committed to efficient sentencing, as well as under a welfarist model, grounded in rehabilitative concerns. The punishment however, also fits a more punitive frame, which aims at securing the death penalty in the penal code and increasing the alternative to capital sentences. Harking back Robert Martinson's claim about the rehabilitative programs in the 1970s that 'nothing works', LWOP was originally conceived as a punishment that could work under any penal model. From its origins, the punishment was in many respects flexible and malleable, capable of combining punitive and progressive features. The death penalty may be a polarized issue, as Californian state senator and appellate court judge from the 1970s Judge

Rattigan once said: '[y]ou're either for it, or against it'; '[t]here are only two sides, and no shading' (Rattigan 1978: 8). Yet, both sides embraced and imagined LWOP so as to serve radically opposed political agendas.

From its inception, LWOP was construed as a 'secondary' form of punishment. Rather than stemming from a clear set of goals, it emerged as the mere by-product of other strategies, namely abolishing or securing the death penalty. In the early to mid-1900s, Shipley, Vollmer and Sullivan promoted LWOP as a 'way', as Klein would coin it, to repeal the death penalty. Some abolitionist legislators relied on this strategy from the late 1920s up until the 1970s, proposing bills that would substitute capital sentences with LWOP. The punishment was then instrumentalized as part of pro-death penalty strategies, further exacerbating the punishment's secondary character. When the punishment was introduced for trainwrecking and kidnapping in the 1930s and 1940s, the aim was to increase the available penalties for highly mediatized crimes. In the aftermath of both *Furman* and *Gregg* in the mid-1970s, LWOP switched from being part of a common punitive endeavour, increasing the harshness of sentencing combinations, to specifically securing the death penalty. As death penalty statutes could no longer provide mandatory death sentences, supporters of capital punishment had no other choice but to provide judges and juries with an alternative form of punishment. In light of the particularly punitive popular sentiment that had emerged in the 1970s, they opted for a heightened, and already available, version of life sentences. As such, it is not that LWOP was absent from policymakers and claimsmakers' agenda. Rather, as informed by this historical investigation, the punishment only gained visibility and traction in Congress when discussions about substituting or preserving the death penalty arose. In sum, the historical legislative story of LWOP is one that has emerged and developed in the shadows of the death

penalty.

This historical investigation into LWOP's origins further shows how ideas about the death penalty's severity have, from the outset, capped understandings of LWOP's punitive features. Conceived as a lesser evil in comparison to the death penalty, LWOP was barely if ever considered as an evil in and of itself. Because the focus had always been on repealing or securing the death penalty, there has been little engagement with the question of whether or not LWOP was actually an appropriate and legitimate form of punishment. In the late 1920s there is no archival trace of LWOP, of its qualitative nature, its degree of severity, being assessed or discussed. Even in the context of the Chessman case in the mid-1950s, which had spurred lengthy debates about capital punishment, very little attention was given to LWOP, to the meaning of being denied parole. Later, in the wake of the 1970s United States Supreme Court cases, both pro- and anti-death penalty legislators had come to embrace the alternative form of sentence to pursue their respective goals. In this context, again there was little engagement with the punishment's level of severity. And in the final phase, which consecrated LWOP as the alternative to capital punishment in 1978, advocates who opposed the death penalty simply had no say in the discussion.

The meaning ascribed to LWOP, and shared by many anti-death penalty experts, before congressmen concentrated on its practical rather than punitive, nature. Experts in the 1930s promoted the punishment's efficiency. With reliance on statistics and other official data, earlier opponents to the death penalty argued that such an alternative form of punishment would ensure the swift implementation of justice, successfully protecting society. Jurors would be provided with a sentencing tool they would no longer fear to use. Later, in the 1950s and 1960s, legislators and experts

justified reverting to LWOP on more humanitarian grounds, articulated in terms of 'right to life' and 'civil death'. The punishment was predominantly construed as one that kept prisoners alive. As such, it preserved most of their fundamental rights and enabled prisoners' rehabilitation in view of their release. At the same time, opponents to the death penalty who promoted LWOP before the legislature did not seem to really know or be willing to investigate the type of life prisoners would lead or the opportunities for rehabilitation they would be exposed to. The effect of being denied hope of review was the main aspect of prisoners' lives, some, mainly prison officials, engaged with, for it could threaten prison management. The main qualitative aspect of the punishment on which experts and legislators reflected on was eventually tied back to practical and managerial considerations.

Not only has LWOP, from its origins, been instrumental to death penalty policies; its fate has also been tied to that of capital punishment. By reverting to the Initiative Process in 1972 and curbing courts' power in matters pertaining to capital punishment, attempts to reform the death penalty would essentially have to go through the legislature or through a legislative public vote.[40] As a result, LWOP's destiny as a legislative matter has been essentially tied to decisions pertaining to the death penalty. Any effort to repeal, limit or expand the death penalty would likely impact LWOP.

Each of the themes that have emerged from this historical investigation—namely the fact that LWOP can befit both punitive and progressive agendas, that it was first imagined as a secondary form of punishment, that its fate was tied to that of capital punishment, and that utilitarian and practical representations were privileged over qualitative accounts pertaining to its severity—explain in part why the

[40] As we shall see, the use of the Initiative Process has essentially displaced the capital punishment debate into the broader political sphere (see Chapter 5).

punishment has rarely if at all been considered for reform. To a certain extent, the challenges to narrowing the application of the punishment for juveniles, as illustrated by the 2012 juvenile parole bill, attest to some of these historical features. Attempts to reduce LWOP's scope or reach continue to be perceived as a threat to capital punishment abolitionist endeavours. For some who oppose the death penalty, reducing the scope of LWOP, or weakening its degree of severity is at risk of creating adverse effects on efforts to repeal capital punishment.

At the same time, and as mentioned in the introduction, after the reintroduction of capital punishment in the late 1970s, the California legislature continuously expanded the number of special circumstances for which an offender could be sentenced to death or LWOP. While these legislative reforms primarily focused on expanding the scope of capital sentences, LWOP's reach, as part of the punitive package, was equally widened. Efforts to curtail capital punishment equally affected LWOP. As the United States Supreme Court progressively narrowed the categories of crime and criminals eligible to capital sentences, LWOP was left as the main recipient of prior death penalty-oriented punitive expansions for categories of crime and offences no longer eligible to death.

In other words, there seems to be an incentive on both sides of the penal reformatory spectrum to keep LWOP as it is. The normalization of LWOP in Congress is illustrated by the convergence of efforts and interests to preserve the punishment's status quo, preventing it from gaining political visibility or becoming a 'social problem' that warrants media, political and academic attention, and propels research, official data, campaigns and ultimately reform.

The question then becomes whether anti-death penalty experts have in any way helped to shape LWOP into such a secondary and malleable punishment, one that is

rarely the object of reform. Earlier death penalty abolitionists have offered a way construing LWOP as a means to achieve a greater end, namely remove the death penalty. From then on those who challenged capital punishment systemically proposed bills that would remove and substitute the death penalty with LWOP. The 'way', in other words, became routinized. Perhaps, echoing Michel Foucault's criticism of criminological knowledge (Foucault 1977: 226; Foucault 1980: 47), the statistical data and utilitarian framing of LWOP shared with congressmen may also have unintentionally inspired more punitive policymakers. The 'way' Vollmer and Sullivan offered to remove the death penalty as well as the pragmatic representations of LWOP, may have made the punishment more vulnerable to capture by penal conservatives calling for more punitive measures.

However, the context in which the punishment was introduced, where certain crimes were highly sensationalised and mediatized, triggering panic and a widespread punitive sentiment, arguably superseded anti-death penalty's utilitarian representations of LWOP. When emphasis was later given to the punishment's capacity to preserve offenders' lives and enable their rehabilitation in the 1960s, such conceptualizations were again superseded, if not eclipsed, by incapacitative endeavours fuelled by early forms of penal populism and a widespread fear of crime. Put differently, populist demands arising from horrific crimes—or rather their instrumentalization by conservative penal reformers such as Deukmejian and Briggs—have contributed to devaluating anti-death penalty abolitionists' expert knowledge about extreme forms of punishments, placing them in a subordinate position in the field. Crime, at key moments in time, can open up space for punitive policies to emerge and the opportunities that arise highlight the importance of defining and representing punishments. Some formulations tend to be more

persuasive than others, in particular when stemming from the more vocal, dominant actors in the field. The ways in which some anti-abolitionists framed LWOP in the 1930s and later in the 1960s were overshadowed by punitive reformers' representations of the death penalty.

Perhaps the part opponents to the death penalty have played in the past had to do with the systematic lack of engagement with, and moral critique of, the punishment's extreme severity. While holding subordinate positions in the field, anti-death penalty actors have from the outset conceded LWOP's moral and punitive soundness, thereby adding weight and legitimacy to the embrace and use of the punishment by those holding dominant positions. In the 1930s, the lack of appreciation of 'no parole' probably had to do with the fact that 'parole' was not even fully functional. In 1950s, 1960s and 1970s, 'parole' was still an emerging concept and that there were significant chances for offenders sentenced to LWOP to be released at some point. Since then, however, the rehabilitative ideal has declined if not entirely disappeared, and LWOP has progressively become a form of perpetual incarceration where prisoners more often than not will die behind bars.

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In the next chapter, I turn to a different setting in which some individuals who oppose the death penalty have relied on LWOP. In the broader political sphere, some death penalty abolitionists have tried to convince the electorate to remove the death penalty. In so doing, the ties between LWOP and capital punishment have been consolidated, with the former persistently being evaluated and measured in comparison to the latter. In addition to disregarding certain epistemologies or contradictory imaginaries about LWOP's degree of severity, dominant activists in the penal field have used the punishment and brought it to the fore to convince a very narrow strand of voters to do

away with the death penalty. LWOP has become pivotal to a form of abolitionism that seeks to replace rather than abolish the death penalty.

CHAPTER 5—BEFORE VOTERS: CAMPAIGNING FOR LWOP

> It isn't a wonder that there's 'little opposition' to the rapid growth or to its seeming support as a sentencing alternative to the death penalty. The sentence of LWOP has been available for the past 35 years and in that time it's been crushed from becoming a political issue except as a humane alternative to the death penalty. It's from this that the sentence of LWOP has gained the appearance of being "normal', "tolerable" and "acceptable". And I believe that the 'widespread acceptance' (…) is partly due to the sense society feels relieved from the moral dilemma and financial cost attached to the death penalty (Martin, aged 57, mixed ethnicities, served 34 years, Mule Creek Prison).

I. INTRODUCTION

For Martin—one of the participants in this study, currently held in Mule Creek prison—LWOP has never become a political issue because it has repeatedly, regularly and routinely been promoted as the humane and cheaper alternative to the death penalty. Members of the Californian society, as a result, feel relieved from the moral dilemma raised by the death penalty. The previous chapter focused on abolitionists who, as lobbyists and experts testifying before Congress, sought to convince legislators to repeal the death penalty. This chapter shifts the attention to another group of individuals death penalty opponents have strived to convince: voters. As I shall explain in the first section, in California, the politics pertaining to the death penalty and its abolition are unique. The Initiative Process, as introduced by Johnson in 1911 and later used by conservative Senator Deukmejian to re-introduce and secure the death penalty in the early 1970s, has shaped abolitionist politics and oriented their approach to LWOP.

There are essentially two abolitionist arguments used to convince voters in the broader political sphere. One strategy privileges a principled approach: the death penalty violates the sacrosanct right to life, and the state is immoral when it kills

human beings. Another stream of abolitionism emphasizes the punishment's lack of efficiency and utility. More recently, this pragmatic stream has funnelled its critique on the costs of the capital procedural system (Sarat 2001). The approaches often overlap, with one eclipsing the other, depending on the wider economic and political context. Most importantly for the purpose of this thesis, they tend to converge or reach similar conclusions when it comes to LWOP.

In this chapter, I explore how the alternative punishment to capital sentences has become pivotal to a particular type of abolitionism, one that seeks to convince voters to *replace* the death penalty rather than to *remove* it. As part of this reformist effort, life without parole has been repeatedly framed as signalling progress and excessive punitiveness at the same time. This particular representation has successfully appealed to a number of different actors in the penal field, some of whom were associated with the punitive turns of the 1980s and 1990s. Unlikely allies have come to champion LWOP.

I focus on abolitionists' efforts to convince voters to repeal the capital statute introduced in 1978 culminating in the 2012 SAFE Campaign. This chapter draws on archival documents, including reports, pamphlets, newsletters and minutes of organizations' meetings, as well as on interviews with some of the individuals involved in the 2012 SAFE Campaign. Because they were two of the most prominent voices during the Campaign, I have focused on two organizations: Death Penalty Focus (DPF) and the American Civil Liberties Union of Northern California (ACLU-NC).[41] How did they seek to influence the electorate? Addressing this question enhances our understanding of LWOP has become central to a particular type of abolitionism and sheds light on how its degree of punitiveness has been normalized.

[41] Also, the ACLU-NC was the third largest donor, contributing $441,371 (National Institute on Money in State Politics 2012).

The argument proceeds in three steps. The first section sets out the political-institutional frame within which the new abolitionism has emerged. Within this frame, DPF and the ACLU-NC have developed a certain understanding of the political reality of abolition in California. In the second section I explore how the two organizations in the late 1980s and 1990s sought to educate the people by correcting misconceptions about the death penalty. Polls indicated LWOP could not only help correct such misunderstandings, it also had the propensity to shift public opinion on capital punishment. The third section explores in depth the lead up to the 2012 SAFE Campaign where the ACLU-NC and DPF introduced for the first time a ballot initiative to repeal the death penalty. It maps the shift from seeking to educate members of society to convincing a specific set of voters. Rather than trying to change the public's views on the death penalty, they gradually sought to include as many perceptions as possible, in particular conflicting ones, to side against capital punishment. LWOP was pivotal to achieving the alignment and conciliation of diverse stances on capital punishment. In this context, voices raised against the strategic promotion of perpetual incarceration were quelled by the repeated sanctification of LWOP as a cheaper, less inhumane, more efficient and swifter form of punishment. In the concluding section, I argue that LWOP has become pivotal to the abolitionist politics of these organizations. To rally a particular strand of voters, campaigners have portrayed the punishment's severity as one that signals progress and extreme punitiveness.

II. THE INITIATIVE PROCESS AND THE POLITICAL REALITY OF ABOLITION IN CALIFORNIA

There are few available avenues to repeal the death penalty in California. The

legislature could have repealed the 1977 statute.[42] However, because the 1978 statute was introduced through an initiative, the Briggs Initiative, the law can only be repealed or amended by voters themselves. Progressive Movement leaders introduced political tools of 'direct democracy' in 1911 to overcome the bias or inertia of legislators (Center for Governmental Studies 2008), one of them being the initiative process. According to this mechanism, voters directly vote on legislation propositions. These bills also specify the conditions under which they can be amended. Unless the proposition specifically allows for amendments through the legislature, [43] which is not the case with the Briggs Initiative, only another ballot measure approved by voters can correct or remove the legislation (Center for Governmental Studies 2008: 2, 10, 116).

The legislature could still impose a moratorium on executions and the governor has the power to grant clemencies and commute death sentences with the agreement of four Members of the California Supreme Court for certain cases. Since 1967, none of the governors of California has used their pardoning gubernatorial power in this way (Carter and Moylan 2009: 9-10; DPIC 2015). The Supreme Court in California could also, in theory, declare the death penalty unconstitutional. In light of what happened in the 1970s, and later with Chief Justice Bird, a majority of the abolitionists I interviewed thought abolition through courts was improbable. A constitutional abolition, they pointed out, was not immune from voters' legislative punitive backlash as had been the case in 1972 and 1978.

For those challenging the death penalty in California in the 1980s until the 2012 SAFE Campaign, the political reality of abolition—what *it is* rather than when what *it*

[42] This is, for instance, what happened in a number of states since 2007 such as New Jersey, New Mexico, Illinois, Connecticut, and Maryland.
[43] California is the only state that prohibits the legislature from amending initiatives without the proponent's permission (Center for Governmental Studies 2008: 10).

ought to be (Alinsky 1971: 12; Page 2011: 51)—was conceived as one that necessitated a ballot initiative. This understanding of the political context emphasizes public opinion and any scientific method capable of measuring it (e.g. polling, focus groups). The other tenant of California's political reality is that since 1977, LWOP has been the alternative to the death penalty. Had the 2012 Proposition 34 been successful, the death penalty would have been removed, leaving what was already there, LWOP. It is the framing and use of LWOP within this particular politico-institutional reality, one that requires a ballot initiative and thus convincing a majority of voters, that I explore.

Unlike statutory proposals that go through the normal legislative process, ballot initiatives are not subject to expert scrutiny (Schrag 1998: 269). The initiative system assumes a civilized and informed electorate. Yet, as Vanessa Barker (2006) argues, the vote comes down to a mere 'yes' or 'no' option. In the context of penal policies, this approach is portrayed as offering a choice between defending victims' rights (voting 'yes') or endorsing criminal violence (voting 'no') (Barker 2006: 14). For Page (2011: 116), the initiative process is thus the 'perfect tool for '"penal populists"'. In California, initiatives have generally been used to introduce or increase punitive policies, in particular in the name of victims' rights (e.g. Victims' Bill of Rights in 1982; Crime Victims Justice Reform Act in 1990; Three Strikes law in 1994, Jessica's Law in 2006; and Marsy's Law in 2008).[44]

The Campaign for the Savings, Accountability, and Full Enforcement (hereinafter, the 'SAFE Campaign') marked an exceptional departure from this trend, as it was the first time penal reformers attempted to gather a majority vote to repeal the death penalty. The Campaign grew out of a legislative effort. In June 2011,

[44] There are some exceptions however. Proposition 36 amended through the initiative process the 'Three Strikes and You're Out' legislation in 2012.

California senator Loni Hancock introduced a bill that would have given voters an opportunity to abolish the death penalty in California (McGreevy 2011; Clark 2011). Jeanne Woodford, as the Executive Director for DPF, and Judy Kerr, the Victim Outreach Coordinator of Crime Victims for Alternatives to the Death Penalty (CCV), testified in support of the bill: 'Woodford emphasized the sentence of life without possibility of parole was an excellent alternative that provides certainty and finality for victims' families' (Joseph 2011: 4). The ACLU-NC's 'Death Penalty Campaign' organized an online petition on the website "change.org" in support of the bill (The ACLU-NC 2011a). The bill, SB 490, failed in the Assembly Appropriations Committee (Sankin 2011). Because of the legislature's inertia with regards to capital punishment, a broad coalition of criminal justice advocates called 'Taxpayers for Justice' launched the SAFE Campaign (Williams 2011). The Campaign collected over 800,000 signatures to qualify for the ballot, exceeding the required threshold of signatures, officially becoming Proposition 34[45] (The ACLU-NC 2012).

The proposed legislative amendment, the SAFE California Act, included four key components. First, life without parole would replace the death penalty as the maximum punishment for any first-degree murder. Second, the measure would have applied retroactively to those already sentenced to death, suspending any pending litigation brought by death row inmates. Third, offenders would have had to work 'within a high-security prison as many hours of faithful labor in each day and every day during his or her term of imprisonment' including wage deductions for victims' restoration funds. Fourth, a fund was to be set up to support police and sheriffs' departments and district attorneys' offices to solve homicide and rape cases. A total of $100 million would be transferred to this special fund and then distributed to local

[45] For initiative statutes, proponents have 150 days to collect signatures that amount to 5% of the entire electorate in the last gubernatorial election. In 2012, the supporters of Proposition 34 had to collect 504,760 signatures to qualify.

law enforcement agencies over the following four years (The SAFE Act, Garcetti 2012).[46]

According to the Legislative Analyst who reviewed Proposition 34, the repeal of the death penalty would have saved approximately $100 million in the first few years (The SAFE Act, Garcetti 2012: 39). Non-bifurcated capital cases would be shorter and less expensive. The cost of capital appellate litigation would also be reduced. By shortening trials, offenders would spend less time in county jails before being sent to state prisons, further cutting county jail costs. The repeal of the death penalty would also reduce the expenses incurred by counties on prosecutors and defence attorneys. Other than trial-related savings, housing inmates in the general population would be less costly than holding offenders on death row (The SAFE Act, Garcetti 2012: 38). In November 2012, 49.84% of voters voted in favour of Proposition 34,[47] missing by a small margin the required majority to repeal the 1978 capital statute. In the following sections, I investigate the period leading up to Proposition 34 (1980-2012), shedding light on how LWOP has been brought to the fore of the abolitionist political strategy in California.

III. EDUCATING THE PEOPLE

The twenty years following the reinstatement of the death penalty in 1978 were marked by a strongly pro-death penalty and punitive political climate. This environment significantly hindered legislative attempts to repeal the death penalty. As illustrated by the widespread support for the Briggs Initiative in 1978, public opinion generally sided with punitive policies. DPF was created during this punitive populist

[46] The fund was the main addition to the original wording of SB 490.
[47] Once an initiative qualifies for the ballot, it becomes a Proposition (Center for Governmental Studies 2008).

era. Along with the ACLU-NC, the organization sought to correct misconceptions about the death penalty, develop grass-root projects and build ties with other opponents to capital punishment. On the basis of polls and academic research, these abolitionist groups discovered that public opinion was malleable. Voters' support for the death penalty could shift when informed about available alternatives like LWOP. On the basis of these sophisticated and scientific findings, DPF and the ACLU-NC developed educational campaigns, progressively orienting their efforts to highlighting the availability of the 'other' punishment.

1. Setting educational goals

The Northern Californian branch of the ACLU was created in 1934, in the wake of a general strike that followed the death of two workers in San Francisco. From early on, the organization intervened in a number of civil rights cases,[48] championing liberties, fairness and justice, and often parting ways with the national office based in New York (Online Archives California, 2011). Its opposition to the death penalty was first and foremost constitutional. From the mid-1970s, the organization completed legal memorandums, sharing with legislators and defence attorneys its expert analysis of the state and nationwide law and jurisprudence. As most of its members were lawyers and legal scholars, the ACLU-NC also filed a number of lawsuits relating to the methods of execution, arguing that the gas chamber, and then the lethal injection, amounted to cruel and unusual punishment.

Moves towards the creation of DPF began in 1987 when a group of lawyers,

[48]The organization's legal efforts included protecting the children of Jehovah's Witnesses from being expelled from school for refusing to salute the American flag; defending workers' rights to go on strike; and challenging restrictive immigration policies. After the Second World War, the organization advocated for the rights of veterans of colour. In the 1960s and 1970s, the ACLU-NC was involved in a number of civil rights cases to defend the rights and liberties of students, and gays and lesbians. In the 1980s and 1990s, it advocated for the rights of immigrants and prisoners (Online Archives California, 2011).

educators, ministers and activists 'came together with a vision of a California without capital punishment' (DPF 2013). A series of meetings was held under the leadership of the ACLU, Northern and Southern branches of California; '[a] strong consensus emerged from these meetings that there was a need for a new organization to educate the public about alternatives to capital punishment' (DPF 2013). The organization was launched on 29 January 1988. Its aim was 'to provide information and education on the death penalty and its alternatives, in the belief that a civilized society has better ways of dealing with violent crime than the use of executions' (DPF 2013). Former Governor Pat Brown announced the creation of the organization before the press. Standing outside the gates of San Quentin with the gas chamber clearly visible in the background, the Democrat political leader declared, '[a] new movement aimed at abolishing capital punishment in California. (…) [DPF] was formed to work for better representation for poor defendants and to abolish the state's death-penalty law' (Todd 1988). The press described the organization as a 'coalition' of 'influential citizens' from legal religious, academic, labour and political communities (Todd 1988; Editorial 1988). The Board of Directors was composed of 'renowned' political, religious, and civic leaders, as wells as legal scholars and attorneys involved in capital litigation and penal reform (DPF 1992a). The first DPF president was Reverend Joseph Morris Doss of St Mark's Church in Palo Alto.

From the outset, members of DPF worked closely with the ACLU Californian branches, borrowing their office spaces, attending workshops organized by ACLU officers, and collaborating on collecting legal resources to assist counsels in capital cases. The original members of the Board of Directors included members of the ACLU. They were also part of similar coalitions in the 1980s, such as the Northern Coalition Against the Death Penalty (Interview #3 Schulter 2015). The Coalition

stressed the importance of coordinating efforts against the death penalty, notably by combining 'legal and non legal components' in the fight against the death penalty (DPF 1983). At the same time, DPF wanted to be distinguished from the ACLU, hence focusing on developing public education campaigns [49] whilst the ACLU concentrated on fighting the death penalty in court.[50] For instance, when the lethal injection was introduced, the DPF Board agreed in 1992 that they would refrain from 'confusing' themselves with the ACLU and instead behave as 'impassioned citizens, NOT as lawyers' (DPF 1992b, emphasis in text).

Amidst a growing punitive political climate that would have significant consequences for the California Supreme Court's approach to the death penalty, both organizations' strategies converged to correct public misconceptions about the death penalty. The premise, DPF President Joe Doss explained, was that the public was misinformed. When given 'accurate' information about capital punishment, the DPF president was confident the 'people of California' would see that the death penalty had 'no value' (cited in DPF 2013). In its *General Information Packet* DPF also highlighted the racial disparities, injustices and costs associated with capital punishment (1992a: 3):

> When the public is informed about the racism, injustice and costs associated with the death penalty, they will join citizens of every other Western industrialized democracy in choosing different responses to violent crime.

To this end, DPF started publishing a quarterly newspaper, *The Sentry*, which was distributed throughout the state and to other organizations working against the death penalty. In order to further appeal to the public, DPF advertised a number of

[49] This is not to downplay DPF's more legal activities. In the 1980s and 1990s, the organization, probably because composed of a large number of lawyers, gave particular emphasis and awarded a large portion of to its resources to the Legal Tracking and Research Project, which sought to monitor and advise defence attorneys on pending death penalty prosecutions in California (DPF 1992a).

[50] Once the death penalty was reinstated in the late 1970s, the ACLU-NC continued to challenge the punishment's constitutionality, arguing in particular the cruel and unusual nature of California's method of injection (*Fierro v Gomez* 1992) on the suffering inflicted by the gas chamber). In the late 1980s, the organization also developed a program to provide legal counsel to prisoners on death row.

newspaper flyers on death penalty issues, including a series of full-page public education advertisements in *The New York Times*, the *San Francisco Bay Guardian* and *L.A. Weekly* (DPF 1992a: 3).

While the ACLU-NC was mainly involved in legal and legislative challenges, the organization also sought to disseminate information about the death penalty within the broader political sphere. The mother organization launched a 'rudimentary' Capital Punishment Project in 1976 (Haines 1996: 49), asking its affiliates to implement it locally. The focus of the Project was to educate people. To this end, the organization and its affiliates were to develop and implement public education and media campaigns around specific death penalty issues, such as fairness in sentencing or the inadequacy of the death penalty as a solution to crime. In the wake of the US Supreme Court's decision, *McCleskey v. Kemp* (1987) ,[51] a large part of the ACLU-NC's educational campaign in the 1980s was to raise awareness about the death penalty's racial bias.

An essential part of DPF's original educational goals was to rectify the image of those serving death sentences. For instance, the organization developed a communications program where members of the public could exchange letters with inmates on death row. It also gathered their biographies and testimonies in an effort to humanize the prisoners and unveil the cruelty of the punishment. During a training workshop both the ACLU-NC and DPF attended in 1997, the Bay Area Death Penalty Action Team highlighted the importance of 'humanizing the condemned', notably by sharing a 'glimpse behind the walls' and 'learn[ing] how, in spite of a demonizing and dehumanizing process, the men and women on death row are still viable living, thinking, feeling human beings' (Bay Area Death penalty Action Team 1997).

[51] While extensively referring to Baldus study (Baldus et al. 1997) which demonstrated the 'racially disproportionate impact' (*McCleskey* at 299) of capital punishment, the Supreme Court found that the study did not sufficiently evidence a racially 'discriminatory purpose' (*McCleskey* at 297).

2. Navigating a 'tough-on-crime' political climate

The 1980s and 1990s were difficult times to pursue abolitionist politics. The DPF and the ACLU-NC faced a number of struggles, severely obstructing their educational efforts. The tough-on-crime rhetoric flourished as newly elected Governor Deukmejian declared in 1983 (cited in Page 2011: 47):

> Protecting citizens from crime and fear of crime is, in my view, government's paramount responsibility. For this reason, I have repeatedly expressed my satisfaction over the increasing percentage of convicted criminals who were being sentenced to prison. I would rather have the state have the problem of housing criminals, than for citizens to have criminals entering their houses.

This approach to crime was paralleled by the rise of the 'Crime Victims' Movement' (Page 2011: 83). Crime victims, organizations and spokespersons had become high-profile political actors within the penal field (Simon 2007: 24). Advocates argued that the criminal justice system cared more about the accused and the convicted than victims. Depicted as particularly vengeful (Simon 2007: 106), the Victims' Rights Movement pushed for legislation that 'stiffen[ed] penalties for perpetrators of rape, murder, domestic violence, and other serious crimes and lengthens and intensifies parole and probation sentences' (Page 2011: 83).

In California, Crime Justice United California (CJUC) was created in 1990 by the CCPOA (Page 2011: 84-87). Essentially a mouthpiece for its main financial contributor (Page 2011: 87), CJUC supported punitive legislation, such as the 'Three Strikes Law'. In the mid-1990s, the organization also sponsored numerous legislative expansions of the death penalty, including through ballot initiatives (e.g. Proposition 115 in 1990). In California, the organization's voice became prominent, and was often identified by the media, academics and politicians as the voice of *all* crime victims, largely eclipsing the voices of victims' relatives who opposed capital punishment (Page 2011: 100-102).

The punitive climate contrasted with a progressive and anti-death penalty Supreme Court. Chief Justice Bird's court heard 68 death penalty cases and overturned 65 of them (Brazil 2000). Because of the Court's frequent reversals of death convictions and long delays imposed on pending capital crime cases, a state-wide campaign was launched against the Bird court (*San Francisco Chronicle*-Editorial 1990). The anti-Bird campaign ran television advertisements where victims' relatives whose murderers had had their sentence overturned by the Supreme Court would testify. The Los Angeles District Attorney, Ira Reiner, proposed a constitutional amendment in 1985 to limit the Supreme Court's authority (Editorial 1988*)*. In 1986, three Supreme Court Justices, including the Chief Justice herself, Rose Bird, were not reconfirmed.[52] Bird was the first and remains the only Chief Justice to have been removed from office by a majority of voters. The Chief Justice was replaced by one of Deukmejian's former colleagues and staunch supporter of the death penalty, Malcolm Lucas. The Lucas Court upheld 181 of the 212 capital cases it heard (Brazil 2000). For Margo Schulter, who worked at the California Coalition Against the Death Penalty, the Supreme Court had turned into a 'death mill' (Interview #3 Schulter 2015). The demise of the Bird Court meant the Court no longer offered a realistic avenue to destabilize the death penalty, forcing abolitionists groups to redirect their efforts and focus on the political rather than the legal sphere.

Particularly horrific and highly mediatized crimes, such as the kidnapping and murder of 14-year old Polly Klaas in 1992, instilled fear and provided additional grounds for punitive political stances, and legitimacy to vengeful crime victims groups. Abolitionists realised that in such a political climate, attempting to introduce any form of anti-death penalty legislation in Congress would be a waste of resources.

[52] In California, Supreme Court Justices are selected by the Governor but are regularly reconfirmed by the voters.

In the words of one the DPF Board members, 'the present political climate in Sacramento prevents legislators from getting anywhere near an anti-death penalty issue' (DPF 1993). Similarly, some of the ACLU–NC members had concluded, 'the California legislature in the past has not been responsive to anti-death penalty legislation' (ACLU-NC 1988). At the time, appealing directly to voters rather than to legislators was equally unimaginable (Interview #3 Schulter 2015). In 1980, the majority of the California Coalition Against the Death Penalty's board, of which both the ACLU and DPF were members, voted against introducing a ballot measure and suggested investing resources on educating the public (California Coalition Against the Death Penalty 1980a):

> Feasibility of such a plan [a death penalty initiative] was broadly discussed. The purpose could be to educate the public about the eveil [sic] of the death penalty as a stimulant to murder. After lengthy discussion such a plan was defeated by a vote of 4 to 6 against, and 4 abstentions. Those opposing felt that time and money could be better spent on other educational approaches, while those in favour felt that the initiative would get us badly needed publicity for our struggle.

Polls also indicated that voters were largely in favour of capital punishment. In 1984, 75% of the public supported the death penalty. Nine years later, the number had increased to 84% (Brazil 1987). In the words of Rust-Tierney, Director of the ACLU-NC Capital Punishment Project in 1993, '[a] major obstacle to our work against the death penalty is the perception that abolitionist are fighting an insurmountable battle of public opinion' (Rust-Tierney 1993a). The DPF Board thus concluded in 1992 'it was not the time to consider an initiative or a legislative vote' (DPF 1992b). Polls, however, revealed something that would from then on shape the politics of abolitionism in California. When given LWOP combined with restitution as an alternative punishment, the public support for the death penalty declined. This discovery would bring LWOP to the fore of abolitionists' educational efforts.

3. Discovering LWOP's propensity to shift public opinion

In 1989, the ACLU, DPF and other abolitionist organizations co-sponsored a polling study by Professor Craig Haney and Aida Hurtado of the University of California, Santa Cruz, for the Field Institute Research Corporation. Amongst the questions they asked, one specifically mentioned LWOP (Haney and Hurtado 1989):

> Suppose as an alternative to the death penalty, prisoners really could be sentenced to life in prison without the possibility of parole and be required to work in prison and give part of their earnings to the families of their victims If this were possible, which would you prefer as a punishment in special circumstance cases?
>
> | | |
> |---|---|
> | Life in prison | 67.3% |
> | Death Penalty | 25.9% |
> | No Opinion/answer | 6.8% |

According to the study, 67% of voters preferred LWOP coupled with restitution to the victim's family. This result marked a significant change from earlier account where over 80% of the public in California supported the death penalty.

A nationwide study conducted in 1993 reached similar conclusions. Dieter, then Director of the DPIC, published his analysis of the study, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty.* Dieter (1993*)* concluded that a 'new phenomenon' had emerged from the polls. Contrary to the widespread belief that the public unwaveringly supports capital punishment, the nationwide polls released by the Green/Lake and the Tarrance Group revealed that the historical support for capital punishment was waning. More specifically, the results demonstrated that, when offered life without the possibility of parole with restitution as an alternative punishment, the public's support for the death penalty dropped to 41%.[53] Support for the death penalty dropped by an even greater margin when a

[53] Amongst the reasons why the public's support for capital punishment had declined included, in order of importance, the danger of executing innocent people, the racial bias in the application of the punishment, and doubts in terms of costs and efficient deterrence (Dieter 1993: 8-10).

sentence of no parole for 25 years with restitution was offered as an alternative (Dieter 1993: 11). For Dieter this demonstrated that the public did not necessarily favour the harshest forms of alternative sentences such as LWOP (Dieter, 1993:11):

> This result challenges the notion that people automatically favour the harshest of all possible sentences, such as the death penalty or life with no parole. Rather, people support reasonable alternatives which attempt to restore equilibrium and justice where it has been fractured in society.

These polls essentially revealed that public opinion was malleable in particular when offered lengthy prison sentences with restitution. They provided 'a strong basis for questioning the notion that the public is solidly behind the death penalty' (Rust-Tierney 1993b). The public support for capital punishment was thus more complex than it seemed (Rust-Tierney 1993b):

> Never concede that public support for the death penalty is solid. Always counter with the observation that public attitudes on this question are more complex than can be discovered from the answer to a simple yes or no question.

For Mike Farrell of DPF, polls indicated voters preferred LWOP. In a letter to the Editor of the Daily News in April 1992, Farrell highlighted (1992, emphasis added):

> In fact, the newsworthy portion of the article was buried toward the end, where it was reported that *a large majority prefer life imprisonment without parole and restitution* to the family of the victim as an alternative to execution in circumstances that certainty include the vast majority of the cases.

At the same time, the 1989 and 1993 studies revealed that Californians and Americans more broadly did not believe LWOP meant what it said. A majority (64%) of the Californian public believed prisoners sentenced to LWOP would eventually be released (Haney and Hurtado 1989). Most agreed with the statement 'life in prison without the possibility of parole does not really guarantee that a prisoner will not be released' (*San Francisco Chronicle*-Editorial 1990). Like the 1989 Californian study, only 4% of Americans in 1993 believed that offenders sentenced to LWOP would be incarcerated for the remainder of their lives, and only 11% thought they would never be released (Dieter 1993: 10). Instead, a large majority of Americans assumed that offenders sentenced to life imprisonment would be released after serving on average

seven years (Dieter 1993). Yet, across the country only a handful of LWOP prisoners had been released. In California, no such prisoners had been released in 25 years (*San Francisco Chronicle*-Editorial 1990). In addition, commutations of LWOP sentences were exceedingly rare. For Dieter (1993: 10), perceptions about LWOP were thus 'far off the mark'.

Academic studies revealed that voters and jurors were mistrustful because they were misinformed about alternative punishments to death sentences. According to a study on knowledge about the death penalty, Bohm et al. (1991: 360) concluded, 'a majority of Americans have taken a very strong position on an issue about which they are substantially uninformed.' For Dieter (1993: 12), the length of life sentences was 'one of society's best kept secrets'. Mike Millman shared an anecdote with other DPF Board members, illustrating how jurors were misinformed about the true duration of LWOP. During an interview session with jurors at a conference on the death penalty in 1989, a member of the panel confided he had voted for death in part because he had been told that a defendant sentenced to LWOP could be considered for parole in 30 years. For Millman, the defendant would have avoided a death sentence if jurors believed the punishment really meant what it says. Millman concluded that misperceptions about LWOP were thus 'frequent and an unfortunate contributor to the death sentences of our clients' (Millman 1989). To educate the people and shift their opinion on the death penalty, shedding light on and redressing certain misconceptions about LWOP, was thus essential.

4. Redressing misconceptions about LWOP

In a letter to ACLU Affiliates, the Capital Punishment Director of the nationwide ACLU argued that, to shift public opinion, abolitionists had to reassure voters that

criminals would not be released into society if sentenced to life-long imprisonment, and that they would provide some restitution (Rust-Tierney 1993, emphasis added):

> When asked comprehensive questions, we come to understand that what the public seeks are two things: *some assurance that the convicted person be out of circulation for a very long time and some assurance that the person "pays"*. When the death penalty is presented as the only option, a majority of the public appears to choose the death penalty as a way of making the person "pay". When however, other more direct ways of paying for the crime are an option, as in the case of restitution, support for the death penalty drops significantly and in some cases shifts to the alternative.

DPF reached similar conclusions, namely that the public had to be educated on LWOP, '[w]e need to do a much better job of educating the public that there really is an available alternative to the death penalty that will both punish the offender and protect society' (DPF 1989). In 1989, the Board prepared a draft of questions and answers to clarify the meaning of LWOP, in particular its duration. They referred to the famed Sirhan-Sirhan and Manson cases to contrast LWOP with life *with* the possibility of review. Whilst these heinous criminals were eligible to have their sentence reviewed, under LWOP the chances of ever being released was highly unlikely (DPF 1989, emphasis added):

> 3. Since these brutal murderers are paroled back onto the streets, why shouldn't these brutal criminals not be executed?
>
> [California] now has laws which provide for Life Without Possibility of Parole so that, if a crime is serious enough to be charged as a capital crime, a guilty person can be given a life sentence without any right to parole.
>
> 4. Aren't these people dangerous until they are dead?
>
> Yes, they are very dangerous people. That is why they need to be kept in secure prisons. If there is to be a parole, responsible authorities need to decide when this will occur. California now has sentences of Life Without Possibility of Parole.
>
> 5. Aren't murderers getting released?
>
> The laws have changed over the years and it used to be that someone could be given a so-called life sentence with the possibility of parole even for the most heinous crime. That is why you periodically have Sirhan Sirhan coming for review, or Charles Manson. You've noticed they have not been released and there is no likelihood they will be. Now, we have the sentence of [LWOP]. *There is no likelihood that someone who has been convicted under this statute will ever be released into the society at large.*

The unlikelihood of ever being released in part had to do with the procedural checks

in place. In the 1990s prisoners sentenced to LWOP still had an opportunity to have their sentences reviewed after serving 30 years by the Board of Prison Terms, then having them commuted by the governor to an ordinary life sentence. However, if convicted to more than one felony, as was the case for most LWOP inmates, the governor would only be able to use his commuting power subject to four out of seven California Supreme Court Justices approving it (DPF 1989, emphasis added):

> 6. But even with LWOP, they can get out?
>
> It's true that there is a statute that says that *after 30 years* if the Board of Prison Terms makes a recommendation to the governor that such a prisoner would have the sentence commuted to an ordinary life sentence; the governor can consider this action [emphasis in text]. But if the prisoner had two prior felonies, which most people with [LWOP] do have, the Governor cannot take any action unless at least four of the seven California Supreme Court justices agree. Even after all that, a prisoner would have to go through parole proceedings and would have virtually no chance of being released any more than Charlie Manson has.

In 'Answering the Hard Questions: An Education Section' (DPF 1996), DPF reiterated some of the answers it had prepared in its earlier 1989 draft document. The organization specified that none of the prisoners sentenced to LWOP had been released since 1977 (DPF 1996, emphasis added):

> Q: Don't we need the DP to prevent the killer from killing again?
>
> **A:** We can do this in California by imposing [LWOP]. Over 1730 men and women have this punishment. The only possible way for an inmate to be released is through clemency granted by the governor, but only after first serving 30 years in prison, or, by court intervention. *No inmate currently serving [LWOP] in California has ever escaped or killed a fellow inmate or guard. No one has been paroled of released from LWOP since 1977.*

In its widely distributed brochure, *Myths and Facts – California's Death Penalty*, DPF continued to highlight certain misconceptions about the death penalty. The pamphlet, which was sent to schools, churches and temples, and various civil rights groups and organizations, drew particular attention to capital punishment's costs, lack of fairness, and racial bias. To rectify some of the 'myths' about the death penalty, the brochure compared the latter to LWOP. In particular, DPF underscored LWOP's procedural swiftness, its capacity to ensure public safety and to reduce costs (DPF

1992a: 2). The organization grounded its financial argument on different journalistic studies. For instance, DPF relied on a study by the *Sacramento Bee* of March 1988 in which the newspaper had reported California would save $90 million per year by abolishing the death penalty. DPF also referred to a body of research (see DPF 1992a: 4) that explored the costs of capital punishment and compared them to that of life sentences (e.g. Spangenberg and Walsh 1989; Tabak and Lane 1989).

MYTHS AND FACTS

California's Death Penalty

MYTH: EXECUTION IS CHEAPER THAN IMPRISONMENT.	**FACT:** It costs more to execute a person than to keep him or her in prison for life. In March of 1988, The Sacramento Bee reported that it costs at least $ 1 million to prosecute a capital case at the trial and appellate levels. The Bee concluded that California could save $90 million a year if the death penalty were abolished. The costly process of appeals is necessary to prevent the execution of innocent people. Even with our system of judicial review in capital cases, 23 innocent people have been executed this century and over 300 innocent people have been convicted of capital crimes.
MYTH: THE DEATH PENALTY IS JUST PUNISHMENT FOR MURDER.	**FACT:** Killing is not a just punishment for killing. We do not burn the homes of arsonists or sexually abuse those who rape; it does not make sense to kill someone who has killed. There is no question that a murderer should be punished - but not by executing him or her.
MYTH: THE DEATH PENALTY DETERS CRIME.	**FACT:** Scientific studies have repeatedly shown that the death penalty does NOT deter crime any more than other punishments. U. S. Supreme Court Justice Thurgood Marshall has said, "The death penalty is no more effective a deterrent than life imprisonment."
MYTH: TO BE SAFE, WE MUST EXECUTE MURDERERS.	**FACT:** Since 1978, California has provided for life sentences without the possibility of parole. That means that the public can be assured that those who commit atrocious murders and receive Life Without Parole will never be free again. In the meantime, executions have a brutalizing effect on society and divert our attention from addressing the root causes of crime.
MYTH: THE DEATH PENALTY IS FAIR.	**FACT:** Local politics, money, race, and where the crime is committed can play a more decisive part in sending a defendant to the death chamber than the circumstances of the crime itself. Additionally, innocent people have been executed and this injustice can NEVER be rectified.
MYTH: RACE HAS NOTHING TO DO WITH CAPITAL PUNISHMENT.	**FACT:** Racism is an important factor in determining who is sentenced to die. In 1987, the U.S. Supreme Court case of McCleskey v. Kemp established that in Georgia, someone who kills a white person is more than four times more likely to be sentenced to death than someone who kills a black person. The race of the defendant as well as the race of his or her victim plays a decisive role in who gets the death penalty. More than half of the individuals on California's death row are people of color.
MYTH: THE DEATH PENALTY OFFERS JUSTICE TO VICTIMS' FAMILIES.	**FACT:** Families of murder victims undergo severe trauma and loss which no one should minimize. But executions do not help family members heal their wounds. The extended process prior to executions prolongs the agony of the family. It would be far more beneficial to the families of murder victims if the funds now being used for the costly process of executions were diverted to provide them with counseling and other assistance.
MYTH: OTHER COUNTRIES USE THE DEATH PENALTY — "LIKE US".	**FACT:** The vast majority of countries in Western Europe and North and South America have abandoned capital punishment. The United States is now in the company of countries like Iran, Iraq, and China who have longstanding records of human rights violations.
MYTH: THE BIBLE SUPPORTS THE DEATH PENALTY	**FACT:** Although isolated passages of the Bible have been invoked in support of the death penalty, most religious groups in the United States regard executions as immoral. Literal interpretations of selected passages from the Bible used to defend capital punishment corrupt the compassionate spirit of Judaism and Christianity - a spirit which urges humane and effective ways of dealing with crime and violence.

(source: DPF 1992a: 2)

In the 1990s, DPF portrayed LWOP as a less inhumane sentence than the death penalty. Its inhumanity was essentially determined by the prison conditions in which inmates were held. Debating the relative benefits of two inhumane punishments was deemed pointless. Instead, DPF argued that efforts should concentrate on removing the death penalty and improving the carceral environment (DPF 1989):

> Q: Isn't it more humane to execute these people than to keep them in prison for life without any possibility of parole?
>
> I think many of our jails and prisons are inhumane places, and there are thousands of criminals serving long sentences inside them. But I don't hear anyone arguing that these prisoners should be executed because it would the most 'humane' thing to do. What we should do is improve jails and prisons across the board and not waste our time debating the relative merits of two inhumane choices.

In *The Catalyst*, the organization's monthly newsletter 'about social issues and the death penalty in California', DPF described LWOP as a 'more humane alternative to the death penalty' (DPF 1998). For DPF, LWOP was 'more in-tune with the evolving worldwide standard of decency' (DPF 1992a: 8). Some members of the California Coalition Against the Death Penalty believed that if LWOP were to replace the death penalty efforts could be launched to curtail it at a later stage (California Coalition Against the Death Penalty 1980b):

> If it is enacted, then we can focus our energy on modifying the provision for life imprisonment, because we will have at least succeeded in preventing any more executions. (H.R. 4419) (Note: this is an opinion from John Fitz, and is not an official position of the Coalition)

However, few abolitionists groups spoke out in favour of LWOP in the 1990s. None of the national abolition groups made an explicit call for any form of alternative life sentences (Haines 1996: 137). Most, in fact, resisted participating in discussions on LWOP because of a 'principled antagonism for the punishment' (Haines 1996: 138). The ACLU-NC very rarely referred to LWOP's relative severity and inhumanity. For Herbert Haines (1996: 140-141), the ACLU's nationwide position towards prisoners

and Eighth Amendment issues 'made it highly unlikely the LWOP would even be deemed a matter worth discussing'. Yet, the ACLU director of the Capital Punishment Project, Henry Schwarzschild was opposed to LWOP on moral grounds (Haines 1996: 139). Similarly, scholar Hugo Bedau (1973) who wrote *The Case Against the Death Penalty* for the ACLU, preferred life without the 'probability' of parole rather than true LWOP (see in Haines 1996: 139). Those who sought to promote LWOP would face severe criticism (Haines 1996: 138). In an interview with Haines in 1994, Dieter recounted that his 1993 report on the alternatives to the death penalty had caused quite some turmoil. Dieter had been urged '"to tone down the parts about life-without-parole" for fear that this would come across as the sentence of choice' (Dieter, cited in Haines 1996: 138).

It was unlikely organizations involved in the anti-death penalty movement would 'make specific alternatives to the death penalty a part of their official mission in the near future' for the issue was a 'minefield' that risked dividing abolitionists (Haines 1996: 142). Yet, Haines predicted that at some point 'target audiences' would however want to know what activists were *for* (Haines 1996: 143). Suggestions for alternatives to the death penalty would require a movement-wide agreement, to share a same vision in order to make progress (Haines 1996: 142-143). In his concluding chapter, Haines imagined LWOP could play a role in the 'arsenal of pragmatic abolitionists' (Haines 1996: 207). While the timing was 'probably not yet right' (Haines 1996: 207) he predicted abolitionists would 'hammer [pragmatic arguments] home with increasing frequency and forcefulness' (Haines 1996: 208).

5. Voicing victims' families' opposition to the death penalty

In the 1990s, it was conventional wisdom that victims' families supported the death

penalty because it alleviated their grief. Yet some organizations, such as Murder Victims Families for Reconciliation, revealed an alternative view: victims' relatives too could oppose the death penalty. Also, abolitionist groups were often criticised for giving too much importance to the voice of defendants at the expense of innocent victims' families. For instance, The Bay Area Death Penalty Action Team that organized a workshop attended by members of DPF and the ACLU-NC in 1997, stressed the importance of incorporating victims' perspectives. Indeed, the question 'but what about the victim?' was a 'frequent rejoinder to arguments against the death penalty' (Bay Area Death Penalty Action Team 1997). As a result, DPF sought to draw attention to these unconventional views, providing them with a more central platform and disseminating their perspectives on capital punishment. To this end, DPF launched the Families of Victims Project, which was intended to assist victims by disseminating information about California's law in support of victims of violent crimes and identifying organizations and resources to help with the trauma associated with such crimes. They also organized conferences and talks where victims' relatives could speak of their experiences.

In addition to giving these opposition voices a platform, DPF emphasized how the death penalty failed victims and their families. Because of endless appeals and review processes, they argued, capital punishment prolonged relatives' pain, preventing them from reaching 'closure' (DPF 1992a: 2). The effort to bring victims' voices to the forefront as part of the wider endeavour to educate the public, directed public attention to LWOP. For some, the punishment had the power to ease victims' pain sooner and to help families begin their process of healing. Dieter (1993: 22) for instance argued, '[a] life sentence (…) does offer a sense of finality, rendered relatively quickly, as well as an opportunity for some restitution or reconciliation in

the future'.

Polls in the 1990s marked a first step towards placing LWOP at the centre of the death penalty abolitionist educational effort. The punishment, abolitionists discovered, could help redress certain misconceptions about the death penalty. It could also provide the means to build ties with victims' families, thereby challenging the prevalent view that most people supported the death penalty. As such, LWOP was capable of shifting public opinion, and could even rally a majority to repeal the capital statute. At the same time, few national organizations, and the ACLU in particular, were willing to take a stance on LWOP. While appealing, LWOP was a dangerous tool to handle as it risked creating dissention amongst abolitionist groups. Moreover, given the punitive climate in 1990s, it was not an opportune moment to reach out to voters. The launch of the SAFE Campaign would only begin ten years later.

IV. CONVINCING VOTERS: THE 2012 SAFE CAMPAIGN

From the early 2000s until the launch of the SAFE Campaign, DPF and ACLU-NC continued their educational efforts. To this end, they expanded their networks, developed grass-root projects, and collaborated to create new groups. To correct misunderstandings about capital punishment and underscore the penalty's racial bias, the risk of executing the innocent, and the emotional toll the punishment had on victims' relatives, abolitionist groups increasingly channelled their attention to the costs of sentencing, housing and executing capital offenders. The 'cost argument' was pivotal to rallying members of the public who, twenty years earlier, were staunch supporters of 'tough-on-crime' penal policies. To highlight the fiscal benefits of repealing the death penalty, and gain the support of rather unlikely allies,

organizations progressively brought LWOP to the fore. From educating the people, the abolitionist strategy in California morphed into a campaign to convince a majority of the electorate. A number of factors internal and external factors to the penal field influenced and reoriented the abolitionist political strategy, including the 2008 financial crisis, the completion of comprehensive academic studies, new polling results, and the arrival of key players at the head of both organizations' new death penalty projects.

1. 'Howl with the wolves, if you wish to get along with them':[54] rallying the unlikely allies

Abolitionists would not only need to capitalize on shifts in public opinion, they would also have to 'build a relatively broad coalition' (Dilts 2015: 113). The decision to redirect abolitionist efforts from 'educating the people' to 'convincing specific voters' can be traced back to 2006. In its December newsletter, DPF reminded its readers that repealing the death penalty would require a voters' decision (Oliveira 2006: 1):

> In California, eradicating the death penalty will require two important steps: (1) obtaining enough voter signatures to put the issue up for state-wide referendum, and (2) convincing the majority of the electorate to vote to end it. Is this impossible? Absolutely not. All it takes is educating the public to raise awareness of the realities of the death penalty
>
> (…) It is important to note that in California, abolition of the death penalty must occur through a voters referendum; therefore, any strategy we employ should bring us closer to passing a ballot initiative.

[54] Margo Schulter used this expression during her interview to summarize LWOP abolitionist politics in California.

Due to polls showing that the public support for the death penalty was declining, and statistics indicating that death sentences and executions were waning, DPF announced it was time to consider launching a political campaign against the death penalty and, to this end, created a new 'San Francisco Chapter' (Oliveira 2006: 4, emphasis added):

> What's more, the number of annual death sentences, executions and the size of death row continue to decrease. The most recent polling numbers also tell us that more people now favor a sentence of life without parole as the punishment for first-degree murder over the death penalty, and that general public support for state killing is at nearly a thirty-year low. As a result of these many positive developments, *we believe it is important to begin envisioning new ways to move our campaign against the death penalty to the next level*.

To gather voters' support, DPF explained it would focus on expanding and diversifying its networks (Oliveira 2006: 4, emphasis added):

> In order to accomplish [the ballot initiative], future campaigns undertaken by DPF should continue to reduce public support for the death penalty and increase support for alternatives, *expand and diversify our organizing base*, and discourage the use of the death penalty at all governmental levels.

However, launching a political campaign and reverting to the initiative process was not singly decided by DPF alone. It was the result of on-going discussions between different coalitions and opponents of the death penalty, including the ACLU-NC (Oliveira 2006: 4):

> For the past six months, DPF has been actively engaged in discussions with coalition partners, lobbyists, political campaign advisors, activists and chapter members, pollsters, and policy leaders in order to gather input, discuss options and solicit advice on how to keep our campaign moving forward. We have also been collaborating with the ACLU of Northern California on an upcoming research project that will give us even more insight into how we can more effectively develop and disseminate our message and improve our public education work.

When Natasha Minsker—one of the key players in the SAFE Campaign—joined the ACLU-NC in 2005, the organization had recently launched a new 'Death Penalty Project'. The project was part of a 'nonstop campaign to educate lawmakers and policy shapers about the injustices of capital punishment' (The ACLU-NC 2005). Amidst the impending execution of Stanley 'Tookie' Williams, the new Project was

to pursue 'a multidisciplinary strategy' to shift public opinion, and to improve and refine messaging to communicate with voters 'more effectively' (Interview #4 Minsker 2014). To this end, the ACLU-NC channelled its attention to specific counties, namely Los Angeles, Riverside, Orange and Alameda, all high death-sentencing counties (The ACLU-NC 2008; Interview #4 Minsker 2014).

Through grassroots county-based activities both organizations sought to rally 'unlikely allies', namely victims' relatives, law enforcement community members, and key Republican figures. In its newsletter, DPF detailed the goals set out for its new San Francisco Chapter (Oliveira 2006: 4, emphasis added):

> Our campaign has been incredibly successful because it has allowed us to *develop partnerships with unlikely allies*.
>
> (…) ([The new San Francisco Chapter] will focus on bringing about change in key California counties through a variety of grassroots activities and broad-based community-organizing programs. These will include: a campaign which highlights the voices of individuals who have lost loved ones to murder and who oppose the death penalty - including the hiring of a full time coordinator for this effort; relationship building with members of the law enforcement community; an increased emphasis on promoting public safety through the reallocation of resources away from the death penalty into programs that actually serve the needs of our communities; expanded outreach to diverse religious communities; and continued relationship building with political leaders in order to bring about important policy change.

Obtaining the support of murder victims' families was 'absolutely crucial to the success of the movement' (Interview #3 Schulter 2015). Building on the ties they had started to develop in the 1990s, DPF, the ACLU-NC and Murder Victims' Families for Reconciliation together founded a victims' families-focused organization, CCV (The ACLU-NC 2007). This new coalition brought together murder victims' families and friends who opposed the death penalty, having had to endure the 'traumatizing death penalty process' (The ACLU-NC 2007).[55]

[55] DPF and the ACLU-NC also reached out to international groups, extending their public campaigning beyond the borders of California and the United States. The ACLU-NC also organized press conferences and gatherings in more than a dozen California cities for the 'World Cities Against the Death Penalty Day', working in close collaboration with different religious groups and civil rights organizations. The DPF also collaborated with the World Coalition Against the Death Penalty and

The ACLU-NC and DPF further channelled their efforts to win the vote of the undecided, and those who traditionally supported the death penalty but had recently realized it was unworkable in practice. The aim was to get the 'moderates and the conservatives' attention', former Attorney General of California, John Van de Kamp, explained (Interview #2 Van de Kamp 2014). The interest groups, one of my interviewees explained, in essence targeted a small margin of the electorate. The strategy was to add this narrow portion of voters that now opposed the death penalty on practical grounds to those who stood firmly against the punishment on principle (Interview #1 2014):

> People who want to abolish the death penalty because it's ineffective already believe in the ACLU and progressive defence lawyers and all that. We don't need to convince them; we need to convince a tiny little …
>
> You know most of the electorate is fixed in its position – it's this little group of 5 to 10% in the middle who are the only ones who are persuadable.

Abolitionists were encouraged by recent shifts amongst conservatives and traditional supporters of the death penalty. Both DPF and the ACLU-NC had noticed a number of opinion leaders were now opposed to capital punishment (DPF 2009c). For instance, former Riverside county District Attorney Paul Zellerbach, previously a staunch supporter of the death penalty, had concluded that the money saved from repealing the death penalty could be better spent on effective law enforcement and community safety programs (The ACLU-NC 2011b: 5). Similarly, leading conservative pundit Richard Viguerie spoke against the death penalty in the late 2000s (DPF 2009c). The *Sacramento Bee* had also abandoned its 150 years old editorial board policy in favour of the death penalty (DPF 2013). Moreover, according to a 2011 poll, 58% of Republicans agreed to replace the death penalty with LWOP (David Binder Research 2011).

created an International Outreach & Communications Project in January 2009 (Zitrin 2009: 2) to ensure that Europeans and other international partners 'have a clear understanding of what interventions will be the most effective and timely for US activists' (DPF 2009a: 31).

The abolitionist organizations also narrowed their focus on law enforcement officials as their voice was 'essential' to persuade the unlikely allies: 'what's going to persuade them is a cop, a District Attorney, a Gil Garcetti, the former DA of Los Angeles who played a huge part of the campaign' (Interview #1 2014). The ACLU-NC helped the Senate introduce in 2004 the California Commission on the Fair Administration of Justice (CCFAJ), which recommended reforms to ensure that the state's criminal justice system was just, fair and accurate. The Commission was an independent and bipartisan panel of law enforcement officers, judges, defence attorneys, and citizens (The ACLU-NC 2005, 2007). In order to 'identify and empower' law enforcement officials who were against the death penalty and 'conduct outreach', DPF later launched the Law Enforcement Outreach Project in 2007 (DPF 2007). The Project was intended to lift the voices and increase the visibility of law enforcement officials who opposed capital punishment on practical bases. To maximize the Project's efficacy, the organization hired figures with whom law enforcement officials could relate including former Prosecutor Darryl Stallworth of Alameda county in 2008, and then later police officer Steve Fajardo. The organization also prepared and distributed a brochure, *What Law Enforcement Should Know About the Death Penalty* (DPF 2009a), and gathered different law enforcement representatives' signatures to a *Joint Statement* in which the signatories pledged their opposition to the death penalty (Law Enforcement Officials 2012).

In 2010, DPF appointed Jeanne Woodford, the former Warden of San Quentin and former Director of the California Department of Corrections as its main spokesperson to address law enforcement officials: 'Woodford was the official proponent of this campaign, she was the warden… Nobody wants to hear nobody who is not a natural ally of this' (Interview #1 2014). During her interview with me,

Woodford underscored that she approached abolition from a public safety perspective. Unlike other abolitionists who, according to Woodford, did not 'really believe in LWOP' because it was another form of death penalty, her public safety stance allowed for the promotion of and reliance on perpetual incarceration (Interview #5 Woodford 2014):

> When you talk about me and the advocates I think I come from a public safety perspective and there are very few advocates who think like I think. That leads [to] why LWOP was really never put on the table before because none of the advocates really believe in LWOP, they call it the "new death penalty".
>
> (…) I look at everything through the lens of public safety.
>
> [F]or me it's about public policy and when you're concerned about public policy you have to be concerned with what the public thinks and the public wants something cheaper and most effective.

By 2012 when Proposition 34 was submitted to voters, the organizations had successfully rallied a wide spectrum of what DPF had coined 'unlikely' allies. The measure was endorsed by 'more than 1400 community leaders and organizations' (DPF 2013). Some of the most vocal supporters included Judge McCartin, the 'hanging judge of Orange county', police officers, and prominent district attorneys. Former Los Angeles District Attorney Gil Garcetti and former Attorney General of California John Van de Kamp, both spoke in favour of the measure. The drafter of the 1978 statute himself, Don Heller, and the son of the 1978 Briggs Initiative, Ron Briggs, joined the ACLU-NC and DPF's abolitionists' efforts. Murder victim family members, as well as exonerees, also supported the Proposition.

How did the organizations succeed in convincing such a diverse set of voices to support the measure? What particular message did they circulate, what arguments did they make to rally such a wide spectrum of voters? In the following two sections, I focus on how LWOP was promoted during the SAFE Campaign as a tool that could provide '"justice for everyone"'. The particular framing of its severity was one of the key reasons for successfully rallying unlikely allies and marginalizing some of the

more traditional and principled abolitionists.

2. LWOP provides 'Justice That Works For Everyone'

The fiscal crisis may help explain why cost concerns became so prominent in the penal field in the late 2000s, especially in California (Gottschalk 2014; Aviram 2015). The state was, according to State senator Mark Leno, 'facing a "financial Armageddon"' (cited in Lindsey 2010). For DPF (2009c: 5), the economic context provided a unique opportunity to convince a particular strand of voters to repeal the death penalty:

> The nation's fiscal crisis has proved to be the driving force behind new allies emerging to oppose the death penalty, in conjunction with new studies demonstrating the enormous number of resources consumed by capital trials and appeals.
>
> In California the budget situation has provided significant traction to the state's county coalitions aimed at reducing the use of the death penalty at the county level, as well as shifting public opinion in strategically important regions of the state.

Newly appointed DPF Executive Director, Woodford, hoped reformers would find the 'courage' to debate capital punishment. She wrote, 'I do hope that with the California budget crises we will find the courage to open the discussion about the death penalty in this state' (Woodford 2009). Moreover, polls showed an unprecedented low level of public support for the death penalty (The ACLU-NC 2010).

While emphasising costs, the supporters of Proposition 34 nonetheless included some principled claims against capital punishment. Until the 2008, DPF and the ACLU-NC mentioned issues of race and innocence, drawing attention to the ties between the death penalty, space and race (The ACLU-NC 2005, 2006; Minsker 2008; DPF 2009b). The organizations exposed other forms of injustices, such as the risk of executing innocents (The ACLU-NC 2006, 2008, 2009; DPF 2009b). One of

the Campaign's commercials shared Franky Carrillo's experience, who had been wrongfully sentenced to two life terms at 16 years old and was eventually released after twenty years in prison. According to one of the interviewees involved in the Campaign, the publicity gained little traction mainly because those who cared about wrongful convictions were already in favour of removing the death penalty (Interview #6 2014): '[n]obody cared. (…) The people who are worried about convicting an innocent are already with us … but the vast majority of people didn't care about that'.

The 2012 SAFE Act preserved some moral claims, namely that repealing the death penalty would reduce the 'risk' of executing innocents and would relieve victims' families from having to endure long trials.[56] However, more than half of the suggested amendments in the Act were formulated as fiscal benefits. As one interviewee explained, 'in the end the arguments that won the days for the voters to vote in favour [of Prop. 34] was the financial argument' (Interview #6 2014). The argument that the death penalty was a costly institution and, as a consequence, a strain on taxpayers, was not new. However, the intensity and refinement of the claim, as well as the attention given to it, significantly increased from the 2000s throughout the SAFE Campaign. DPF and the ACLU-NC brought awareness to the cost of capital punishment by first disseminating academic findings (The ACLU-NC 2011b), highlighting that other states had repealed the death penalty on this basis (The ACLU-NC 2011b: 3; see also Yerkes 2007):

> Time and again, academic studies have demonstrated that California's death penalty is a staggering waste of taxpayer money, a legal fiction that gives voters

[56] SEC. 3. Purpose and Intent
(…)
4. To eliminate the risk of executing innocent people.
5. To require that persons convicted of murder with special circumstances remain behind bars for the rest of their lives, with mandatory work in a high-security prison, and that money earned be used to help victims through the victim's compensation fund.
6. To end the more than 25-year-long process of review in death penalty cases, with dozens of court dates and postponements that grieving families must bear in memory of loved ones. (The SAFE Act, Garcetti 2012:96).

> the impression they're being tough on crime even though condemned inmates typically expire of natural causes before making it to the death chamber.

The organizations drew attention to how voters, particularly law enforcement agents, were changing their views on capital punishment because of its fiscal repercussions. For instance, DPF and ACLU-NC both quoted Oakland police officers' concerns about job cuts and restraints on training and equipment because of the costs of the death penalty at county level:

> The death penalty is an irresponsible waste of the taxpayer's money at a time when we are laying off police officers, putting officers on furlough and cutting funds for crime labs, training and equipment. It makes no sense to pay an extra $125 million a year for a system that doesn't deter murder and is rarely carried out (Ray Samuels, former police Chief of Newark, cited in DPF 2009c: 5).
>
> While 11,357 murders occurred between 2005 and 2009, 107 people were sentenced to death in the same period. The costs of the trials alone in these cases likely exceeded $117 million, costs borne almost entirely by the counties. If California had chosen permanent imprisonment instead of the death penalty for these 107 offenders, the counties would have saved over $100 million, money that could have been funnelled into the very same law enforcement programs that are currently experiencing cuts, making it increasingly more difficult to solve murders. The state also would have saved millions by avoiding the extra costs of death row housing for these prisoners (Oakland Police Department 2008 report, cited in The ACLU-NC 2011b: 14).

DPF also included murdered victims relatives' opposition to the death penalty in light of its fiscal impact (Lorrain Taylor of CCV, cited in The ACLU-NC 2008):

> If the government really wanted to end the violence, it would take the millions of dollars it is wasting on the death penalty in California and use it for violence prevention for youth, and for rehabilitation and victim services.

The ACLU-NC further conducted its own research on the cost of the death penalty. Minsker produced a report on costs in 2008, *The Hidden Death Tax: The Secret Costs of Seeking Execution in California*, which concluded that California taxpayers paid $175,000 per inmate per year (Minsker 2008: 1). That year, the CCFAJ released its findings, citing the ACLU-NC's original research (CCFAJ 2008: 38). The Commission found that California had spent $137 million per year on the death penalty, placing an 'enormous financial burden' on the state of California (CCFAJ 2008: 10).

The different studies highlighted the expense of housing people on death row. In California, offenders sentenced to death are housed in individual cells and require expensive security measures (The ACLU-NC 2011b: 2). Because the capital system is dysfunctional, inmates are held in such facilities for decades. Critics also pointed out that the death penalty, with its bifurcated trials and multi-layered appeals, was also extremely costly from a procedural perspective (The ACLU-NC 2011b: 2):

> Death penalty trials cost up to 20 times more than trials for life imprisonment without the possibility of parole. In fact, death sentences are handed down after two trials, instead of one. Taxpayers are legally required to pay for numerous appeals in death penalty cases, unlike cases involving life without possibility of parole, where the prisoner gets only one taxpayer funded appeal. In California, the average time between conviction and execution is now more than 25 years.

By 2010, the ACLU-NC made it clear that repealing the death penalty was 'not just about values' but was also about money (The ACLU-NC 2010):

> Each prisoner sentenced to death costs ten times more than a prisoner sentenced to permanent imprisonment, a fact that has garnered salience during the budget crisis.
>
> The ACLU-NC and our partners, including Death Penalty Focus, have worked hard to drive this debate. We use advocacy, lobbying and public education efforts to underscore the inescapable fact that innocent people are wrongfully convicted, and to amplify the voices of family members of murder victims who want to solve unsolved crimes, instead of wasting precious funds on long, drawn out death penalty cases.

The cost argument resonated particularly well with victims' groups, law enforcement agencies and other unlikely allies because it would ultimately ensure public safety. In other words, the appeal was less a question of financial benefits than it was about security. Under the SAFE Act, savings would be reallocated to law enforcement agencies to hire more police officers and solve crimes and keep communities safe.[57]

[57] SEC. 2. Findings and Declaration
(…) Our limited law enforcement resources should be used to solve more crimes, to get more criminals off our streets, and to protect our families.
2. Police, sheriffs, and district attorneys now lack the funding they need to quickly process evidence in rape and murder cases, to use modern forensic science such as DNA testing, or even hire enough homicide and sex offence investigators. Law enforcement should have the resources needed for full enforcement of the law. By solving more rape and murder cases and bringing more criminals to justice, we keep our families and communities safer.
SEC. 3 Purpose and Intent

As Woodford explained in a video broadcasted during the SAFE Campaign, the money saved from removing the death penalty 'could be put to putting more police on the streets, and keeping our community safer' (SafeCalifornia 2012).

For Andrew Dilts (2015: 109), Proposition 34 was essentially a 'bargain of security through savings'. Removing the death penalty would ensure public safety through reallocating accumulated savings to law enforcement. This fiscal rhetoric not only infiltrated the abolitionist discourse, it also redefined the rationale for seeking abolition, with pragmatic justifications superseding moral concerns. Moreover, the entire abolitionist strategy was reframed into one that sought *replacement* rather than *elimination*. Rather than seeking to 'eliminate' the death penalty, the abolitionist groups offered to 'replace' it with LWOP. From this abolitionist standpoint, LWOP was offered as a trade-off. In her address to law enforcement officials, Woodford made it clear the goal was to replace the death penalty, not eliminate it (Woodford, cited in Albaek 2012: 4):

> Those of us in law enforcement know that the best way to prevent crime is to solve it. Replacing the death penalty with a punishment of life in prison without parole will free up funds for critical tools like DNA testing and more police officers on the street.

Why was it necessary to promote LWOP as a replacement penalty rather than focus on challenging the death penalty on its own fiscal terms? For Proposition 34 campaigners, underscoring LWOP as a trade-off corresponded to a certain 'political reality'. To begin with, the punishment was going to replace capital sentences regardless, as it was already in the statute. All they were doing was highlighting this reality for misinformed voters who were likely to worry that removing the death penalty would leave a void. As Minsker (Interview #4 2014) explained, emphasizing

3. To use some of the savings from replacing the death penalty to create the SAFE California Fund, to provide funding for local law enforcement, specifically police departments, sheriffs, and district attorney offices, to increase the rate at which homicide and rape cases are solved (The SAFE Act, Garcetti 2012: 95–96).

that LWOP would replace the death penalty was 'absolutely necessary' as it addressed people's concerns about what would happen if the death penalty were to be abolished:

> From a legal perspective we were deleting the punishment of death penalty from the penal code and LWOP would remain … the most persuasive way to explain that to the voters was to say that we were replacing the death penalty by LWOP as a maximum punishment for murder and it's that concept that we're replacing the death penalty with something else. That is the most effective way to explain it to the voters.
>
> They didn't know what would happen so you didn't want to leave that unanswered … if you use words like "abolish" and "repeal" the death penalty…all people hear is the loss, they're losing something that is important and left with all these questions about "what happens next?"
>
> So people have to immediately know what will happen is that they'll be sentenced to LWOP.
>
> You have to foreclose the wandering questioning from the beginning and that means you can't start the sentence with abolish and repeal, you have to say replace.

The President of DPF similarly explained it was essential to underscore what punishment would be left once the death penalty was removed (Interview #8 Farrell 2014):

> We know that the only way we'll get rid of the death penalty in California is to offer the public something that makes them feel safe and since in capital cases, the option is death or [LWOP], that's the logical fall-back.

Another reason for articulating the abolitionist strategy in such a way had to do with polls, which indicated that public support for the death penalty significantly declined when given LWOP as a substitute, especially when combined with restitution to victims' families. For supporters of the Campaign, polls indicated that the people approved of LWOP. Promoting the alternative punishment was thus 'just politics, that's what the polling showed', one interviewee explained (Interview #7 2014). Those who opposed the Campaign on the grounds it lent legitimacy to an extremely punitive sentence were described as denying political reality (Interview #7 2014). Finally, the cost argument against the death penalty gained more traction when

LWOP was offered as trade-off. Because LWOP was considered cheaper, it offered tangible support for the financial critique of the death penalty.

In addition to offering a trade-off for the death penalty, LWOP also provided 'Justice that Works For Everyone'. Put differently, the punishment was presented as being appealing in its own terms. In a YouTube video posted in 2012, *Yes on 34–Justice that Works for Everyone* (SafeCalifornia 2012), Woodford explained how LWOP would achieve justice for everyone. With police lights flashing, sirens wailing and piles of $100 bills floating in the background, 'justice' meant solving cold rape and murder cases (*Each year more than 1000 homicides go unsolved in California*). Justice would also entail arresting thousands of criminals, particularly rapists, who still roam the streets (*More than half of all rapists walk the streets…because police don't have enough money to go after criminals*). LWOP would save millions of dollars and provide '*justice that works for everyone*'. To further convince the strand of voters the Campaign targeted, supporters of Proposition 34 cautiously framed the severity of LWOP, striking a balance between promoting it as a morally acceptable, yet tough, punishment.

3. Framing LWOP's severity

For Farrell, the President of DPF during the Campaign, LWOP was a 'rational alternative' (Farrell 2008: 2). For others who were involved in the SAFE Campaign, the punishment was 'safe, swift and cost effective' (Sherrills 2010: 2), or the 'better choice' (Medina 2010: 4). This is not to say that supporters of Proposition 34 ignored that LWOP was a particularly severe sentence (Sandoval 2012). Don Heller referred to LWOP as poison, claiming that, 'to eliminate one poison, you're promoting the lesser poison' (Interview #9 Heller 2014). Many of the interviewees who were active

in the campaign against the death penalty described LWOP as a 'barbaric' and 'repulsive' form of punishment that was equivalent to the death penalty. A few recounted how some death row inmates had told them they would rather be executed than sentenced to LWOP. One campaigner confided that, should the punishment be assessed independently, it would certainly amount to cruel and unusual punishment (Interview #10 2015). At the same time, LWOP was perceived as preserving prisoners' lives, and as such allowed for wrongful convictions to be corrected. For this reason, it was deemed more 'humane' or rather 'less immoral' than the death penalty, '[w]hereas LWOP at least theoretically, locking someone to protect society, seems less immoral' (Interview #10 2015).

For those involved in the Campaign who privileged a public safety approach to removing the death penalty rather than a principled one, LWOP's degree of severity ensured they would not come across as being 'soft on crime':

> I came to believe that the death penalty should be replaced with life without the possibility of parole. I didn't reach that conclusion because I'm soft on crime (Woodford 2008, 2012).
>
> I have not gone soft on crime. I believe that public safety is one of the primary purposes of a government predicated on the rule of law (Heller 2011).

To appeal to more punitive voters, LWOP was presented as a type of sentence to death (the ACLU-NC undated). For instance, victims' relatives involved in the SAFE Campaign (e.g. Medina 2010), ensured prisoners sentenced to LWOP would die behind prison walls. Woodford similarly stressed they would die in prison:

> We are spending millions and billions of dollars on a handful of inmates, when we could give them a sentence of [LWOP], which would ensure that they would die in prison (Woodford, cited in SafeCalifornia 2012).
>
> In California, every person sentenced to life without parole has died in prison or will die in prison unless new evidence emerges to show that he or she is innocent (Medina 2010).

The predominant abolitionist discourse further distinguished the morally unacceptable nature of deaths through executions from the 'natural' deaths behind bars (the ACLU-

NC undated):

> The facts prove that life in prison without the possibility of parole (LWOP) is swift, severe, and certain punishment. The reality is that people sentenced to LWOP have been condemned to die in prison and that's what happens: They die in prison of natural causes, just like the majority of people sentenced to death. (…)
>
> No one sentenced to life without parole has ever been released on parole, in California or in any other state. Prisoners sentenced to LWOP actually remain in prison for the rest of their lives and die in prison.

In part, LWOP was deemed a morally preferable form of death because mistakes could be corrected: 'if we make a mistake by sentencing an innocent person to death, it can't be fixed (the ACLU-NC undated). In their online post, 'The Truth About Life Without Parole', the ACLU-NC (undated) also underscored that sentencing someone to die behind bars was preferable for it was cheaper in comparison to executions. In doing so, the costs and principled arguments become blurred (the ACLU undated): '[t']he differences: sentencing people to death by execution is three times more expensive than sentencing them to die in prison.'

The harshness of prison conditions was also brought to the fore in order to resonate with voters who believed the punishment was too lenient. The ACLU-NC (undated) for instance emphasized that prisoners sentenced to LWOP were held in overcrowded and violent prisons, and by consequence, the punishment ensured a 'horrible experience' (the ACLU undated).

> Spending even a small amount of time in California's overcrowded, dangerous prisons is not pleasant. Spending thirty years there, growing sick and old, and dying there, is a horrible experience. This is especially true given the unconstitutional failure to provide adequate health care to California's prisoners.

The SAFE Act provided that prisoners would be housed in 'high-security prisons' for the duration of their term (The SAFE Act, Garcetti 2012: 96), suggesting they would no longer be eligible to relocation to lower security facilities (see Chapter 7). In one of DPF's newsletters, Bill Richardson, former governor of New Mexico, explained why he had decided to support the replacement of the death penalty by LWOP in his

state. For Richardson, it was precisely *because* the prison conditions were so extreme that he took comfort in the substitution of the death penalty with LWOP (Richardson 2009: 3-4):

> I took comfort in the fact that New Mexico's repeal included adding the sentence of life without parole.
>
> There are some who will say that such a sentence does not afford the same deterrent power as death or who believe a life spent behind bars is too good of a life for our most dangerous criminals. Needing to reconcile these questions for myself and still struggling with my decision just hours before my deadline to take action on the bill, I decided to visit our state penitentiary and see first-hand what a sentence of life in prison really means. I looked into the eyes of our death row inmates and inside the small cells where they spend 23 hours out of every day. The visit made me realize that, in many ways, life in prison is a much harsher sentence than death.

Proponents of Proposition 34 further emphasized that prisoners sentenced to permanent incarceration would not be eligible for any of the 'many extra services' death row inmate were given (SafeCalifornia 2012). For instance, the ACLU-NC (undated) underscored that prisoners serving LWOP had access to fewer programs and housed in overcrowded group cells in comparison to those held on death row:

> Prisoners condemned to die in prison are not given any special treatment and, in fact, have less access to programs than other prisoners. They are housed in high security facilities with few privileges, far away from any relatives, and in crowded group cells. Ironically, people on death row are provided much more comfortable single cells and sometimes gain celebrity and attention just by being there.

As former warden of San Quentin Woodford recalled (SafeCalifornia 2012)

> When I sat on the classification committee of every newly arrived death row inmate and during that time, I had at least three inmates who had asked for the death penalty because they believed it was easier time, because you get a single cell, because you have a legal team. And that legal team tends to adopt you, they'll make sure you that you have mail, make sure that at Christmas time you get a Christmas card.

Both DPF and the ACLU-NC repeated throughout the Campaign that prisoners would not be afforded the procedural privileges available, in theory, to inmates on death row:

> Prisoners sentenced to permanent imprisonment don't have the same ability as death row inmates to appeal their case, so the final judgment in non-capital cases occurs much sooner (DPF 2009b).
>
> *Death penalty trials cost up to 20 times more than trials for life imprisonment*

> *without the possibility of parole*. In fact, death sentences are handed down after two trials, instead of one. Taxpayers are legally required to pay for numerous appeals in death penalty cases, *unlike cases involving life without possibility of parole, where the prisoner gets only one taxpayer funded appeal*. In California, the average time between conviction and execution is now more than 25 years (DPF 2009b, emphasis added).
>
> In contrast, murder cases in which the prosecution seeks life without possibility of parole have none of these special requirements. Instead, such trials are conducted like any other criminal trial and usually are completed in a matter of weeks. A prisoner sentenced to life imprisonment without possibility of parole is also entitled to only one tax-payer funded appeal, a process that is usually completed within 18 months after conviction (The ACLU-NC 2011b: 7)

The Campaign also stressed that prisoners would be forced, under the SAFE Act, to work for the duration of their sentence (The SAFE Act, Garcetti 2012: 96):

> Every person found guilty of murder and sentenced pursuant to this section shall be required to work within a high-security prison as many hours of faithful labor in each day and every day during his or her term of imprisonment.

Many of the supporters of Proposition 34 I interviewed in 2014 told me the abolitionist effort was not about abolishing the death penalty *for prisoners*. As such it was not based on human rights considerations and did not draw on prisoners' views and experiences. Human rights, and appealing to rights in general, would not work, many explained. The Campaign had to be about public safety and fiscal savings for law-abiding taxpayers. For instance, Don Heller said, 'I've already professed, I don't speak for anyone on the row, I speak for the people' (Interview #9 Heller 2014). Other campaigners shared they did not think much of prisoners, suggesting that their arguments and views were biased and unlikely to help the abolitionist effort:

> Q: lets go back to LWOP – how do you perceive the punishment, how it's experienced by prisoners? Do you ask yourself what it's like or do you prefer not to look into it?
>
> R: seriously I don't think about it, I don't think about it a lot. I know that there are some prisoners who and some people who purport to speak on their behalf and who refer to [LWOP] as the 'other death penalty' and when I think about it in that way, I think of juveniles (Interview #1 2014). (…) The caveat for me, I think that that prisoners' lobby is not as rigorously factual as professionals are. Of course they have a deep interest themselves (Interview #1 2014).
>
> I kind of got into an argument with one person and said you know it kind of doesn't matter to me what any particular inmate or even if you took a survey of death row inmate in California and get their opinion on the initiative on how it should be run, it kind of doesn't matter to me. Because you know they are a

> segment of the population affected by it no doubt but I don't know if they've got the best ideas on how to abolish the death penalty.
>
> And my goal is to abolish the DP (Interview #12 2014).

The particular framing of LWOP's extreme severity—horrific prison conditions, exclusion from programs and procedural privileges, and forced labor—was based on 'sophisticated measuring techniques' (Interview #10 2015). Minsker described how the choice of words had been extensively researched throughout the Campaign, tested in the field and further refined. The ACLU-NC hired a professional polling firm, David Binder Research. Polls and focus groups indicated that, by a small margin, a majority of voters believed LWOP said what it meant (DiCamillo and Field 2012: 5).[58] For this reason, many campaigners felt they had to give extra emphasis to the punishment's severity and the fact prisoners would never be released. A number believed they had no other choice but to prioritize a particular vision of LWOP, even if it did not match their understanding of the punishment, in order to resonate with key voters. In other words, the SAFE Campaign required uncomfortable compromises (Interview #10 2015):

> We're put in the worse form when your viewpoint is the minority view point you're always in the worst position to handle a ballot position because it's going to the public at large and your view point is the minority view point. And it does require compromises that are uncomfortable often.
>
> When you're engaged in politics, the messaging and approach is much more civical, it's not always optimal, (…) but to win would be such a huge thing so you have to do compromises to be able to engage in that kind of a form.

LWOP was thus not just a bargain in terms of savings; it was also a strategic compromise over its extreme severity. It is on the matter of punitiveness that some abolitionists disagreed and even opposed Proposition 34. To them, the Campaign and

[58] The question asked to voters was the following:

> What does the sentence of life in prison without parole mean?
>
> Guarantees the criminal will never get out of prison
>
> Doesn't guarantee that the prisoner won't be released some day
>
> No opinion.

In 2011, 46% believed it didn't always mean the prisoner would not be released, and 45% believing LWOP really meant that prisoners would never get out of prison. In November 2012, 47% believed LWOP entailed prisoners would never be released.

the Act was a compromise they could not make because it 'threw' both current death row inmates and LWOP prisoners 'under the bus' (Interview #16).

4. Opposing Proposition 34

Those who opposed Proposition 34 included the 'usual suspects', such as the CCPOA, California District Attorneys Association, Crime Victims United of California (CVUC) and Kent Scheidegger, the Director of the California Criminal Legal Foundation and a staunch supporter of the death penalty. Mark Klaas—Polly Klaas's father who had been a strong supporter of the Three Strikes Law in the 1990s (Page 2011)—and former Governor Wilson signed the 'Arguments Against Proposition 34', arguing the reform would be cruel and insulting to victims' families, and dangerous for families in general. Former governor Deukmejian also joined the opposition (Vote No on Prop 34 2012a). Unsurprisingly, they raised traditional arguments in favour of the death penalty, such as that it protects society by ensuring criminals would never offend again. To them, replacing the death penalty with LWOP meant 'killers get lifetime housing and healthcare benefits' (Vote No on Prop 34 2012b). For some, the alternative sentence was not what it really meant. For instance Harriet Salerno, the director of CVUC, explained that given what activists had done applied to LWOP applied to juveniles, individuals suggesting the punishment was permanent should not be trusted (Interview #13 Salerno 2014).

While successfully rallying a number of different supporters, the SAFE Campaign did not form a united 'bloc', to borrow Page's term (2011: 132). In fact, Proposition 34 raised a number of internal tensions and disagreement among abolitionists, in particular those who took a moral stance against the death penalty. For some religious campaigners, it was paramount to frame the Campaign in

accordance with voters' religious beliefs and traditions. The fiscal argument particularly appealed to the more 'secular' voters but before religious voters, it was paramount to emphasize that the death penalty violated the right to life as well as traditions of redemption (Interview #14 2014). From some of the religious interviewees' point of view, challenging the death penalty's immorality was sufficient; the campaign did not necessarily require instrumentalizing LWOP.

According to long-time abolitionist, Margo Schulter (Interview #3 Schulter 2015), the alternative, principled case against capital punishment was hard to voice and was at times frowned upon by some of leaders of the SAFE Campaign. In her interview, she recounted an event where she had been criticised for privileging such a moral stance (Interview #3 Schulter 2015):

> A small episode which very much concerned me involved an event, in the Bay Area as I recall, commemorating the 20th anniversary of the execution of Robert Harris, which was 21 April 2012. Participants and supporters of this event included my friend Michael Kroll, who had been a witness to the execution as Harris's friend and wrote a powerful description of the atrocity as it had unfolded before his eyes. For those of us who demonstrated against this execution, and watched as lower courts stopped the execution only ultimately to be overturned by SCOTUS, which actually issued an order preventing any lower federal court from granting a further stay of execution, this was a significant anniversary.
>
> Of course, 21 April would have been an important date for California abolitionists regardless of the status of the SAFE initiative or politics in general. And the event took place in the Bay Area, where, as during the years I had lived there (1976-1984), there was strong sentiment against the death penalty, so that the event reflected local community values.
>
> However, I learned from people involved with this event, there was evidently displeasure from some of those involved in the SAFE California campaign that an event was taking place that focused on an execution (where the guilt of the prisoner was not at issue), and made the death penalty a moral issue rather than merely a pragmatic one of having a more cost-effective criminal justice system. This distressed me, and seemed a very mistaken balancing of values.
>
> Later on in the campaign, I learned of another episode which was not so distressing, because it did not involve objections to a solemn commemoration of an execution put on by other abolitionists, but seemed to be to involve politically as well as ethically questionable judgment.
>
> During a debate with some death penalty supporters, an activist in the campaign was asked if they were personally opposed to the death penalty on moral grounds. This person refused to answer, in a way which seemed to me to suggest that the answer to the question was "Yes," but they somehow felt it would be unwise to give that answer. The argument was that the death penalty supporters

> should not be permitted to change the issue from the flaws of the death penalty system to the personal views of someone involved in the debate.
>
> Personally, I would much prefer to say, "Yes, I believe that the death penalty is immoral in principle", but there are many supporters of the SAFE Initiative who do not happen to share my view, but have concluded that the death penalty in California is arbitrary, unfair and fiscally wasteful. And there are family members of murder victims like Kathy Garcia who is not opposed to the death penalty in theory, but strongly opposes it in the real world because of the harm it does to victims like herself. There are other murder survivors like Bud Welch, who shares my view that the death penalty is itself immoral.
>
> That approach takes a few seconds to answer the question, but then turns immediately back to the issues at hand. I tend to believe that the worst thing for someone who opposes the death penalty in principle is to be reluctant to acknowledge this, because it makes a person's moral convictions a point of weakness rather than strength. Of course, this was a question of personal style: but when it had been carried, earlier, to the point of criticizing others for commemorating the execution of Robert Harris, I felt that things were getting out of hand.

For other long-time principled abolitionists, Proposition 34 was problematic for prisoners, whether held on death row or serving LWOP in the general population. The Campaign to End the Death Penalty (CEDP) took a firm stance against the measure. In previous years, the organization had supported bills that offered to substitute the death penalty with LWOP. The issue with the SAFE Act, however, was that it actively promoted LWOP, using a particularly 'conservative' language the organization refused to stand by and be associated with (CEDP 2012):

> While the Campaign to End the Death Penalty has taken the position that we do not support LWOP as a "just" alternative to the death penalty, in the past we have offered support to, yet were critical of, bills in other states that have abolished the death penalty and replaced it with LWOP. In California, we understand that it is the default sentence if the death penalty is abolished.
>
> However, many abolitionists and other criminal justice reform activists are uncomfortable with actively supporting this ballot initiative for reasons beyond its conservative language.

These abolitionists interpreted the political reality of abolition in California through a different lens: the death penalty would have to be repealed through a ballot initiative. However, anything replacing the death penalty would have to be reconsidered through a similar political process. The Campaign, in promoting LWOP, would essentially 'cement' the punishment and make it significantly harder to revise at a

later stage. It is because of the risk of normalizing the alternative punishment that the CEDP refused to endorse the SAFE Campaign (CEDP 2012 emphasis added):

> Because this is not a bill passed by a legislature, it cannot be modified or changed in new legislative sessions. Rather it is a ballot measure, so anything codified in it is much harder to revoke, requiring a new ballot measure voted on by Californians to change it.
>
> Therefore, it locks down a few things that are very objectionable.

For Christine Thomas, Pat Foley, Judith Tannenbaum and other prison activists I interviewed, penal reform and abolition were first and foremost about the men and women exposed to punishment. To them, campaigners and supporters of Proposition 34 not only disregarded prisoners' views and experiences, they essentially promoted and helped secure another form of inhumane punishment. Foley, Thomas and Tannenbaum, all had extensive first-hand experience with the carceral environment. Christine Thomas works at the Federal Public Defender's Office in Sacramento, and was married to a death row inmate, Correll Thomas. Pat Foley is a member of the CEDP, and Judith Tannenbaum was an Arts and writing teacher in San Quentin. For these activists, the CEDP, and others who preferred to remain anonymous, the Campaign misrepresented the experience of being on death row, and in prison more generally (Interview #16 2014):

> [SAFE Campaigners] went out and said things like "they have special housing now, they get single cells they get visits seven days a week, they are treated better than any other population, they get government paid attorneys, why should they be treated like that?"
>
> (…) People that mostly advocate for this solution [LWOP] view themselves as human rights advocates but do not touch people in prison. They are people who do not visit people in prison, who are not related to people in prison, who do not work for people in prison, they advocate this the most.

The SAFE Campaign approach was also at odds with prison activists' moral critique of long-term incarceration, in particular its racialized application, and deflected attention from deeper issues raised by imprisonment more generally (Interview #17 2014; Interview #24 2014). For the prison activists I interviewed, the Proposition

entrenched a binary choice between death sentences on the one hand and prison on the other, ignoring the thread that ran through both forms of punishment.

In rallying unlikely allies, some long-term abolitionists also felt uncomfortable working with individuals who had previously supported the death penalty. Specifically, the CEDP disapproved of the allocation of funds to law enforcement agents as it could reinforce the racially discriminatory policy and sentencing of African Americans and Latinos:

> Law enforcement and prosecutors are on the front lines of what Michelle Alexander calls the "New Jim Crow" which is responsible for locking up 2.3 million people behind bars, disproportionately African-Americans and Latinos. We want to end this injustice, not help strengthen it (CEDP 2012).
>
> And they brought to the front a warden and people like Gil Garcetti who put so many people on the row, and they have them mouthpieces and it was like "are you kidding?" I'm not going to be a part of that (Interview #14 2012).

Many also found it problematic that Jeanne Woodford was spearheading the Campaign, especially because as former warden at San Quentin she had approved and overseen Kevin Cooper's near-execution, an inmate on whose behalf the CEDP had been campaigning for years. In 2004, while Woodford worked at San Quentin, Cooper came within 3 hours and 42 minutes of being executed (Cooper 2012). He was already strapped onto a gurney when his execution was suspended (CEDP 2012):

> While SAFE author Jeanne Woodford, a former San Quentin warden who oversaw four executions, claims that locking people in prison for life is a way to make our communities safer, we know that is simply not true.

Principled abolitionists were left with a double bind between supporting Proposition 34 and legitimizing an equally inhumane form of punishment, or opposing it and risking being further removed from abolitionist politics. Some described voting for the Proposition while 'holding their noses' (Interview #17 2014). Professor Jonathan Simon of UC-Berkeley explained on his blog that while he opposed LWOP because it amounts to cruel and unusual punishment, he would vote for Proposition 34. For him, repealing the death penalty would allow a deeper conversation on the penal system in

California (Simon 2012c):

> I personally oppose LWOP as "cruel and unusual punishment". I will vote for Proposition 34 because it will at least take us to a more honest place, where we acknowledge what we are actually doing in California. After that we can begin to have a more realistic conversation about what punishment can achieve and how long that takes. We should reform our state courts so that they are not a rubber stamp of sometimes deeply flawed convictions, and we should reform parole so that prisoners who atone and seek to reform themselves in prison face a realistic chance of going home. Sadly, only one of those things is on the ballot this November.

Echoing these various qualms, a number of prisoners held on death row and others serving LWOP spoke against Proposition 34, drawing attention to the implications these measures would have for those exposed to either form of punishment. For offenders sentenced to death, the proposition meant no chance of having their sentence reviewed and their innocence proven. Cooper spoke against Proposition 34, arguing that replacing the death penalty with LWOP while promoting the latter signified a major step backwards rather than progress: '[w]e are in fact taking a step backward in our ability to challenge our convictions' (cited in Egelko 2014). The CEDP sent letters to over 220 death row inmates to ask their thoughts about the SAFE Act. Of the 50 responses the organization received, only four wrote to support the measure (CEDP 2012).

For Hartman (2012), the President of The Other Death Penalty Project, the Campaign was an opportunity to shed light on LWOP's extreme severity. In particular, he drew attention to how the ACLU-NC and other supporters had highlighted the barbarity of the punishment he was serving while at the same time promoting it. Like Cooper, Hartman (2012) believed the abolitionist effort was not progressive:

> The ACLU of Northern California openly advertises that life without parole is a horrible and painful sentence, that life inside this state's horrific prisons is a nightmare, that medical care is cruelly deficient, and men and women sentenced to death by imprisonment will be forced to endure endless suffering until they die a lonely death in a barren cell, somewhere. And they state all of this with a mocking glee to solicit support for the initiative. It's hard to reconcile their

> thuggish rhetoric with progressive thinking or with the promotion of anyone's civil liberties.

Tom, one of the participants in this study, shared his bewilderment towards those who supported Proposition 34. For him, this demonstrated a profound misunderstanding of LWOP's severity and was at risk of enhancing California's 'prison industry complex' (Tom, aged 29, served 10 years, Corcoran):

> I'm baffled that the guys on Death Row and their lawyers are pushing so hard to get the death penalty abolished in California. I can't understand why these inmates prefer to rot away in prison instead of just getting killed and avoiding the daily pain and suffering. Furthermore, I can't believe these guys want to spend the rest of their lives in California's level IV prison yards. By far, California has to be probably one of the worse places to be incarcerated in. When you're incarcerated in California, you're not treated like a human being, which is the worst part of it all. For one, lifers aren't allowed family visits and the regular visits we do receive are uncomfortable because the correctional officers are constantly harassing us for nonsense. Secondly, most level IV prison yards are constantly on lockdown. Moreover, California has segregation units where someone can end up in for decades just over allegations that a trial court has never found you guilty of. Lastly and the one that angers me a lot is that nine out of 10 of these correctional officers consider us animals that don't deserve anything.
>
> It seems to me that the guys on death row are so eager to get the death penalty abolished that they don't realize that by getting it abolish they are actually helping California's prison industrial complex.

Proposition 34 failed by a very small margin. In 2013, former Republican governors, Wilson, Deukmejian and Davis introduced a new death penalty initiative that would have moved in the opposite direction from the 2012 proposition (Pringle 2013). Their initiative offered to streamline the capital appeals process, reducing the costs of executing offenders (Dolan 2014). However, it failed to qualify for the November 2014 elections.

V. CONCLUSION: A TOOL FOR ABOLITIONIST POLITICS

In line with the 'way' that emerged in Congress in the 1930s (see Chapter 4), LWOP has been increasingly used to challenge the death penalty in the broader political sphere. To educate the public, abolitionist grassroots projects offered to redress

certain misconceptions about the death penalty using LWOP as a corrector. The punishment served to illustrate that the death penalty was an unnecessarily costly and inefficient institution. To evaluate the public support for the death penalty, polls included LWOP as a measure of comparison. When offered LWOP as a substitute, studies demonstrated that support for the death penalty declined. Gradually, abolitionists' pamphlets, workshops, flyers and advertisements, systematically mentioned LWOP in their discussions about the death penalty. This political instrumentalization further entrenched the understanding that LWOP was necessarily secondary to the death penalty, a political means to a greater end. In Congress, LWOP was created to remove capital punishment; in the broader political sphere it has been modelled as a means to replace it.

Central to their efforts to educate the public and later to convince the electorate to remove the death penalty, DPF and the ACLU-NC have produced and disseminated a certain vision of LWOP, or 'imaginary' to borrow Carlen's terminology. To convince a particular strand of voters—those who were less opposed to the death penalty on principle but more so for practical reasons—LWOP was promoted as a cheaper and manageable form of punishment. The fiscal gain brought by LWOP even eclipsed procedural qualms, such as the risk of wrongful and discriminatory convictions. LWOP would help substitute a broken piece—the death penalty—in the broader criminal justice engine. The punishment would even improve the machine by enhancing its speed and decreasing its costs.

The vision campaigners produced also comprised a particular understanding of the sentence's severity. DPF and the ACLU-NC underscored that LWOP was not a 'lenient' substitute for the death penalty. Their experience in overcrowded and violent prisons would be 'horrific'. The punishment ensured that prisoners would never be

released and would die behind bars. The SAFE Act of 2012 even offered to toughen the terms and conditions of confinement. The measure provided that prisoners would be housed in high security facilities for the duration of the punishment and forced to work. Campaigners included rather than set aside demands for permanent exclusion, namely requests for 'more police, more punishment and more prisoners' (Dilts 2015).

To lend legitimacy to the claim that LWOP was not a lenient trade-off, they relied on a specific form of knowledge, that of law enforcement agents and victims' families. The SAFE Campaign did not turn to penological expert knowledge as had been the case in Congress in the 1950s and 1960s. In order to resonate with a particular strand of voters, specific individuals were strategically asked to share the abolitionist vision of LWOP. Woodford, for instance, was one of its spearheads. As former warden at San Quentin, she was able to provide first-hand testimony and assurance that prisoners would not be afforded any of the 'special' services for which death row inmates were eligible to. In her addresses to law enforcement officials, she spoke with authority. Woodford's positioning in the Campaign was strategically designed to overcome the political objections and to build ties with more conservative voters.

Whereas in Congress, and in its early days, abolitionists rarely engaged with the punishment's severity, in the broader political sphere, campaigners have systematically presented LWOP as a less inhumane type of punishment in comparison to the death penalty. Polls indicated that voters were willing to exchange the death penalty for LWOP, from which it was inferred that LWOP was a lesser evil and that endorsing it was thus morally acceptable. While acknowledging the punishment's inhumanity, campaigners only rarely investigated or shed light on the lived experience of the punishment, what it entailed to serve life with no possibility of

review. Similar to what had previously happened in Congress, campaigners refrained from rethinking or conceptualising the meaning of life or death when serving perpetual incarceration. Campaigners largely chose to ignore prisoners' experiences and that of abolitionists with competing 'imaginaries' who felt uncomfortable promoting another extreme form of punishment.

In essence, the ACLU-NC and DPF succeeded in producing and sharing a vision of LWOP that brought together a host of policy concerns, harmonizing contradictory and heterogeneous views on criminals, crime and punishment. The vision they disseminated about LWOP's severity combined elements of progress and punitiveness. It was associated with the repeal of the death penalty and described as a less inhumane alternative. At the same time, the depiction of LWOPs' severity also resonated with ideas of penal punitiveness because it was grounded in public opinion research and sought to suit those who worried they would appear soft on crime. As proclaimed during the 2012 Campaign, LWOP worked for everyone.

The framing of LWOP's severity as one that combined extreme punitiveness and progress was routinely disseminated. From the late 1980s onwards, such a vision was repeatedly, regularly and widely shared within the wider political sphere. Other law enforcement officials, such as district attorneys or police officers, as well as victims' relatives' groups, embraced, and shared this vision. In a snowball effect, the depiction of LWOP as a progressive yet extremely punitive penalty gained significant traction. The quantity and intensity of such distribution increased in the lead-up to the SAFE Campaign. Through media outlets and online channels, during conferences and meetings, this vision of LWOP was circulated to a wide set of individuals and groups.

The production and dissemination of such a vision emerged as a part of changing abolitionist politics. Rather than seeking to eliminate the death penalty, DPF

and the ACLU-NC offered to replace it. LWOP had become pivotal to the abolitionist politics of replacement. This abolitionist shift was set in a particular Californian political reality, which required convincing a majority of voters to repeal the 1978 Briggs capital statute. Such political constraints required identifying the public demands and then tailoring appropriate responses to them. To this end, DPF and the ACLU-NC relied on polling and focus group studies, and developed their own set of moral imperatives: replacing the death penalty with LWOP was morally acceptable, benefited the public at large, improved the criminal justice system, and helped victims' families.

The shift not only expanded the pool of abolitionists to include Republicans, law enforcement officials and victims' families, it also increased the number of LWOP supporters, some of whom were traditionally opposed to extreme forms of punishment. The political abolitionist shift provoked surprising positioning: punitive reformers agreed to oppose the death penalty because LWOP, as a replacement, was practically workable but also sufficiently punitive. At the same time, those who conventionally encouraged progressive and principled reforms, became supporters and promoters of an inhumane form of penalty.

The political abolitionist shift also contributed to redefining who qualified as a victim. Traditionally, interest groups such as DPF and the ACLU-NC, were most concerned with those the criminal justice system unfairly discriminated against. The victims these organizations usually defended were the poor and ethnic minorities. The shift in abolitionist politics not only obscured those earlier concerns, it also modified and enlarged the notion of victims. During the SAFE Campaign, ethnic minority groups were no longer the predominant victims of the criminal justice system; taxpayers were. LWOP was thus promoted as a means to address the needs of a larger

span of ‘victims’.

It is not that both sides of the political spectrum have reverted to LWOP to serve their respective and opposing penal agendas. In this political setting, progressive reformers have used and represented LWOP to reach out to the more conservative and punitive reformers, and convince them to pursue a common goal of replacing the death penalty. As a tool for abolitionist politics, LWOP has served as a bridge to reconcile and align opposing political penal demands. In the broader political sphere, the normalization of the punishment is depicted by the wide-ranging embrace for LWOP. A number of supporters have agreed and compromised over an inhumane type of punishment as a means to remove the death penalty.

While this chapter focused on the ACLU-NC and DPF, we must remember that they were not the *only* abolitionist groups or individuals involved in the SAFE Campaign. A number of religious organizations and victims’ groups as well as prominent academics and defence attorneys, supported and participated in this abolitionist effort. Nonetheless, in comparison to other penal reform organizations and abolitionist groups and individuals, DPF and the ACLU-NC held prominent positions in the death penalty field: they collected more resources, attracted greater media attention, and even acquired a certain international visibility. In 2014, for instance, Elizabeth Zitrin of the World Coalition Against the Death Penalty and member of DPF along with Jeanne Woodford were invited by Wadham College, University of Oxford, to give a talk on the SAFE Campaign. Part of the reasons why these two organizations came to hold such a dominant position in the field was because they bolstered certain ideas about punishment and criminal justice, which fit well within the wider penal field. In an era of austerity (Loader 2016), the offer to revert to a cheaper and yet severe forms of punishment was quite appealing. Those

who held competing perspectives about LWOP, refusing to compromise over its severity and side with unlikely allies, were by contrast marginalized.

That said, neither the ACLU-NC nor DPF have acquired the power and influence of the CCPOA in penal politics. They disposed of significantly less capital and human resources, and their experience with handling the initiative process was relatively new. Also, DPF and the ACLU-NC did not use proxies to further their political goals, which is what the CCPOA did with CVUC. If anything, they tried to replicate the political model set by the CCPOA. They worked to change prevalent misguided assumptions about the death penalty, to create a bloc and develop bonds with unlikely allies. Central to playing the 'political game' was framing LWOP's severity in such a way to fit a wide range of views. Rather than offering rewards or endorsement like the CCPOA has done, these organizations tailored and disseminated an image of LWOP, which appealed to different, and even contradictory, penal demands.

***

As explained in Chapter 3, the penal field sits at the intersection between the political and legal fields. In the next chapter, I turn to a different setting in which some individuals who oppose the death penalty have relied on LWOP, one which is less political and more legally oriented. In courtrooms, before judges and jurors, defence lawyers will strive to avoid their client being sentenced to death. In this particular setting, I discuss how LWOP is represented and what purpose it serves, and in what ways its severity has been normalized.

CHAPTER 6—IN COURTROOMS: SETTLING AND PLEADING FOR LWOP

I. INTRODUCTION

Since its introduction in 1978, the number of LWOP sentences has dramatically increased in California (Nellis 2014), but for what crimes do offenders get sentenced to LWOP? Through which sentencing processes is the punishment handed down, and how much space is given to sentencers, prosecutors and defence lawyers to consider, discuss and debate the punishment's severity? How do those opposed to the death penalty represent LWOP? These are the questions this chapter answers. Under Californian criminal law, LWOP can be imposed both for capital crimes (i.e. essentially first-degree murders involving one of the twenty-two special circumstances) [59] and for noncapital crimes (e.g. first-degree murders where the killing involved a hate crime,[60] second-degree murders for killing a peace officer,[61] or for killings committed after having already served a prison term for murder in the first or second degree)[62]. An offender can also be eligible to LWOP for crimes that do not involve killings, such as aggravated sex crimes committed on a juvenile victim.[63] For some crimes, LWOP is the *only* punishment available for sentencers to impose once guilt and the elements of a given crime are evidenced. For instance, it is the only option for second-degree murders of peace officers.[64] It is also the only sentence

[59]CPC 190.2.
[60] Hate crime is defined as a crime motivated by hatred that is based on 'race, religion, ethnicity, sexual orientation or disability', CPC 190.03.
[61] CPC 190 (c).
[62] CPC190.05.
[63] CPC 667.61.
[64] CPC190 (c).

available for habitual felonies involving great bodily harm.[65] In the context of capital crimes, LWOP stands as the alternative sentence to a death sentence. Sentencers have the choice not to sentence the offender to death, but when they elect not to do so, LWOP becomes the minimum and sole punishment available.

In California, LWOP sentences are predominantly given for capital murders or first-degree murders involving special circumstances, as an alternative to death sentences (Nellis 2014). More specifically, and based on the data I have collected, a large portion of LWOP sentences are given for capital *felony* murders, which include those killings committed in the course of felonies such as burglaries, robberies or kidnappings. For this reason, this chapter mainly focuses on the legal provisions and sentencing mechanisms that lead to capital felony murder convictions, and for which a defendant could be sentenced to LWOP. I do not however purport to discuss each legal and sentencing aspect relevant to LWOP in the context of a capital felony murder case. Instead, I explore those issues deemed most significant by the men and women serving the punishment in California. The chapter is thus organized around the main themes that have emerged from their written testimonies. I have also drawn on interviews with prosecutors and defence lawyers, as well as on academic literature on Californian and American criminal and sentencing laws. To further illustrate how such sentencing mechanisms are implemented in practice, I have collected data from two district attorneys' offices in California, Alameda and Los Angeles (see Annex). The counties follow radically different sentencing practices with regards to capital punishment, with Alameda[66] rarely seeking the death penalty, and Los Angeles producing the greatest number of sentences (DPIC 2014, see also Chapter 1) and

[65] CPC 667.7.
[66] While the approach to capital punishment has changed in Alameda in recent years, the county still stands as the 9th county in the United States to hold the greatest number of death row inmates (DPIC 2013).

holding the largest death row population in the state and the overall nation (DPIC 2013). However, both counties appear to share comparable approaches in terms of LWOP sentencing.

In this chapter I argue that the combination of certain criminal legal provisions pertaining to capital felony murders and different sentencing mechanisms—prosecutorial charging and plea-bargaining discretion, mandatory sentencing, and appellate reviews—shrouds the punishment's exceptionally punitive nature. Little space or opportunity is given for prosecutors, defence lawyers and sentencers to fully address, discuss, evaluate, measure or review LWOP's degree of severity. I suggest that the sentence's punitive nature is minimised, in part, due to the failure to account for certain mitigating evidence. Unlike death sentences, individualising elements that would otherwise shed light on a punishment's extreme nature are not taken into account in LWOP sentencing decisions. As such, in the context of capital felony murders, the punishment is routinely imposed without a systematic inquiry into its qualitative punitive nature.

As the focus on the sentencing mechanisms that lead to LWOP stems from an interest in investigating the role played by death penalty abolitionists in normalizing the punishment, this chapter pays close attention to how defence lawyers represent and construe the sentence's severity before prosecutors, judges and jurors. What knowledge do they produce and share about LWOP in the courtroom? Foucault (1977) argued that social scientists, including criminologists, produced a particular type of knowledge on carceral disciplinary measures, which enabled judges to re-describe penalties as pursuing reformatory objectives and as such veiled their essentially punitive nature (see also Foucault 1980: 411; and cf Garland 1992). Given that litigants who oppose the death penalty have to negotiate particular sentencing

mechanisms, such as plea-bargaining and capital bifurcated trials, they often have no other choice but to frame LWOP in certain ways to avoid their client receiving a death sentence.

The first section of this chapter focuses on the pre-trial phase in capital felony murder cases. It draws attention to the different facets of prosecutorial discretion: the choice to charge a case as a capital crime, to seek LWOP or death for the given offence, to offer plea deals, or to initiate a trial. During these determinations, some defence lawyers will try to convince prosecutors not to seek the death penalty and ask for LWOP instead. When given the opportunity, they will also agree to settle for LWOP to avoid a possible death sentence at trial. The second section turns to the mandatory application of the sentence when the capital felony murder case is brought to trial rather than being settled. The prosecutor can either seek death ('Death Trials') or ask for LWOP from the outset ('LWOP Capital Trial'). In Death Trials in particular, defence lawyers will plead in favour of LWOP, at times emphasizing its extreme severity.

The third section explores the post-conviction proceedings and discusses how the proportionality test established by the United States Supreme Court for noncapital sentences such as LWOP fails to comprehensively measure the proportionality of the punishment in a given case. It fails to evaluate the severity of the punishment against the culpability of the offender and the gravity of the crime. Other avenues to review and reconsider LWOP are scarce, in part due to limits on legal representation. In the concluding remarks, I discuss the extent to which the criminal legal criminal provisions pertaining to capital felony murders combined with the different sentencing phases have helped normalize LWOP's severity, as well as the degree to which litigants who challenge the death penalty have facilitated such normalizing

processes.

II. PRE-TRIAL: CONVINCING PROSECUTORS NOT TO SEEK DEATH AND SETTLING FOR LWOP

> Accepting responsibility and accountability was difficult for me too because I am serving LWOP because of California's felony murder rule. In a nutshell this means because I had the knowledge of the crimes and committed actual robbery during these crimes and I was 'present' twice. I've never held a gun in my life much less shot one (Claudia, aged 42, white, served 23 years, Central California Women's Facility).

Claudia, like a number of other participants, wrote that she had been sentenced to LWOP under the 'felony murder rule'. Under California law, killings committed in the context of a felony can be charged as first-degree murder and are generally punishable by a sentence of 25 years to life.[67] However, these crimes can also be elevated and qualify as capital murders, thereby becoming eligible to LWOP or even death, if the crime was committed in the course of one of the 22 special circumstances listed in the penal code.[68] The list of special circumstances includes killings committed in the course of felonies such as robbery, burglary, arson, or carjacking. A felony such as robbery can thus count twice in the penal grading and be used 'redundantly' (Zimring and Johnson 2012: 740), a phenomenon Frank Zimring and David Johnson (2012: 741) describe as the 'hyperextension' of the American criminal law. The felony counts once to qualify the crime for first-degree murder and a second time to increase it to capital murder. When a felony can count multiple times in the grading of murders, the line between sentences of 25 years to life, and LWOP or even death, arguably becomes rather blurred (see also Oppel 2011; Zimring and Johnson 2012).

[67] CPC 190 (a).
[68] CPC 190.2 (a).

Among the participants who had been charged with, and convicted of, capital felony murder, a number specified they had not killed the victim and nevertheless had been sentenced to LWOP. For instance, Julia explained that she had been sentenced for having conspired to commit a robbery during which her then-boyfriend killed a gas-station employee. They were both sentenced to LWOP (Julia, aged 38, served 12 years, CCWF):

> I had no history of any real violence, (…) I had never served any jail or prison time. (…) And I did not murder anyone. I was held responsible for the actions of someone else and received their same punishment.

This is also the case of Mary Stroder who in 1995 was sentenced to LWOP for the kidnapping and murder committed by her partner (Pishko 2015). These testimonies point to a particular legal doctrine applicable to killings committed in the course of a felony. In California, as is the case in virtually all the states in America (Binder 2012: 184), the felony murder rule allows prosecutors to seek to hold any and all participants in a felony equally accountable for the death resulting from it. The rule fails to account for the possibility that participants may have different levels of guilt or responsibility in the crime, raising a number of criticisms among legal scholars. As an exception to the traditional intentionality requirement for murder,[69] malice is not required for the felony murder rule to apply.[70] The felon's intent to commit the felony is transferred to the killing and transformed into the required intent for murder. As a result, if a defendant commits a felony killing but does so accidentally or negligently rather than intentionally, he or she could also be held liable for murder (*People v Coefield* 1951).

Moreover, under the felony murder rule, a defendant can be held liable for the homicide committed by his or her co-participant during the felony. The rule does not

[69] CPC 187, 188. If someone is killed without malice, the offender would generally be charged with involuntary manslaughter (CPC 192).
[70] Where malice is defined as the intent to kill, or a reckless disregard for human life.

require the defendant to have committed the killing or to be present when the act causing the death occurred in order to be charged with murder.[71] It must be evidenced that the offender aided, abetted, commanded, induced, solicited, requested, or assisted in the commission of the felony as a 'major participant' and with 'reckless indifference to human life'.[72]

The combination of the capital felony murder law and the felony murder rule means that offenders who neither killed nor *intended* to do so can be charged with capital murder and face the harshest forms of punishment. In California none of the executions carried out since 1978 involved a participant to a felony murder who had not killed.[73] By contrast, LWOP has been handed out in a number of cases where, like Claudia or Julia, the offender was not the killer. A case involving juveniles sentenced to LWOP while not having killed the victim drew significant media attention in the 1990s. Brandon Hein and Anthony Miliotti were sentenced in California to LWOP in 1995 for having been involved in a felony killing. Hein and Miliotti, as well as two other youths including the killer, were convicted of capital murder under the felony murder rule for a killing committed in the course of a burglary and attempted robbery of marijuana. The participants were held equally responsible for the death and sentenced to LWOP (Reed 1995; Rushing 2001; McKay 2003). Hein's sentence was commuted in 2008 to serve 29 years to life but Miliotti—who was 17 at the time of the crime and is now 38 years old—is still serving his sentence at the California's Men Colony state prison. In 2008, Human Rights Watch found that 45% of the juveniles surveyed had not committed the murder for which they were convicted (HRW 2008). The organization further reported that a significant number of cases

[71] Cal. Criminal Jury Instructions, rule 540B.
[72] CPC 190.2 (d).
[73] However other states, in particular Texas, have executed criminals who were involved in a felony killing but had not necessarily killed the victim (DPIC 2015).

involved situations of attempted crime having gone wrong, such as fatal botched robbery attempts, rather than premeditated murder. Given the remarkably wide net cast by felony murder laws and the numerous problems with these laws exhibit, the question of who has the authority to decide whether or not to charge a case with felony murder is of the utmost importance. It is the focus of the next section

III. PROSECUTORIAL DISCRETION: CHARGING CAPITAL FELONY CASES, SEEKING AND PLEA BARGAINING LWOP

The decision whether or not to charge a crime as a felony capital murder and to bring the case within the ambit of LWOP or death belongs to prosecutors (Misner 1996; Stuntz 2001; Barkow 2009b; Bowers 2012).[74] For Josh Bowers (2012: 26) they 'retain practically plenary power over the addition and subtraction of legally cognizable charges'. Barkow (2009b: 871) similarly suggests that '[prosecutors] are the final adjudicators in the vast majority of cases'. In *Bordenkircher v Hayes* (1978 at 364), the United States Supreme Court upheld prosecutors' broad charging discretion:

> So long as the prosecutor has probable cause to believe that the accused committed an offence defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.[75]

In Alameda and Los Angeles, felony special circumstances allegations outnumber the other 21 special circumstances for which a killing can qualify as a capital murder. Between 2011 and 2014, almost two thirds of the special circumstance cases involved

[74] Stuntz pushes the argument further by saying that prosecutors operate as lawmakers, '[a]s criminal expands, both law-making and adjudication pass into the hands of police and prosecutors' (Stuntz 2001: 509).

[75] See also *United States v Goodwin* (1978 at 368)',the prosecutor should remain free before trial to exercise his discretion' to select charges.

a felony killing in Alameda. Felony killings accounted for nearly half of the cases charged with a special circumstance in Los Angeles (see Annex). Where there is a factual basis to support a special circumstance felony allegation, Alameda and Los Angeles district attorney's offices will then convene a special circumstances committee to decide which penalty to seek, LWOP or death. Neither the offender nor his or her defence lawyer attends these meetings. Nonetheless, interviewees from the Alameda and Los Angeles District Attorney's offices explained that the committees dealing with special circumstances cases would strive to gather as much information as possible about the offender, her or his life story and background, before taking any decision.

In the vast majority of cases, the committees will also receive additional information from defence lawyers about the particular circumstances surrounding the offender and the crime. In Los Angeles, the special circumstances committee frequently receives letters from defence attorneys, urging the committee not to seek the death penalty. These letters are referred to as 'mitigation packets' because they typically contain information about the defendant that would extenuate the gravity of the crime. In Alameda, it is also customary for defence lawyers to send letters stressing why the prosecutor should not seek death, drawing attention to mitigating factors pertaining to the offender's background, upbringing and social environment as well as any psychological particularities.

As illustrated by one such letter, the aim of the litigant was essentially to dissuade the prosecutor from seeking the death penalty. The legal practitioner in this letter did not draw attention to the severity of LWOP. Rather, the sentence was described as an outcome that involves 'mercy and compassion' (Anonymous 2014, emphasis added):

> We hope that you will consider all of these factors in making your final decision as to whether or not to seek the death penalty in this case. By no means do we seek to justify […]'s actions in what he did in killing and [...] However, we do believe that based on the extensive mitigation related to [...] and all that he suffered through his childhood that *a death verdict is unlikely and that his history cries out for an outcome that involves mercy and compassion for him even in the face of these killings*.

Between 2011 and 2014, both counties' special circumstances committees sought LWOP in virtually all the felony capital murder cases. The committee in Alameda sought the punishment in each of the cases for which it had filed a felony special circumstance allegation, and in Los Angeles the committee pursued death in only a handful of cases (see Annex).

For some of the prosecutors I interviewed in California (including, but not limited to Alameda and Los Angeles), the great number of cases where LWOP was sought made it hard to distinguish one case from another, or one defendant from another. In former federal prosecutor Bennett Capers' experience (2012: 169), the sheer quantity of cases where LWOP was sought made it difficult to remember the offenders eligible to the punishment:

> 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.

For Capers (2012), these prosecutorial discretionary decisions privilege procedure over the individual on whom the punishment would be imposed. As he explained, 'the individual defendant mattered less than the process' (Capers 2012: 168). Capers (2012: 169) remembered that he 'barely gave these defendants a thought.'

Once a prosecutor has charged a case with capital felony murder and chosen the punishment, he or she can also elect to offer the offender a plea bargain (Ehrhard 2008; Ehrhard-Dietzel 2012).[76] In particular, LWOP can be offered as a way to avoid

[76] Prosecutors can offer a plea bargain at any time until the jury reaches a verdict but in practice most of the plea deals were offered prior to trial in Alameda and Los Angeles.

a capital sentence. Some participants explained they had been offered LWOP as a 'deal'. For example, Jeremy writes, 'I told my attorney to get me a deal. LWOP was what he came back with. I signed the deal and came to prison' (Jeremy, aged 33, White, served 12 years, Corcoran). If the legal requirements for a given crime will be difficult to evidence at trial, the threat of going to court is significantly lower. In such cases, defendants will be tempted to refuse the deals offered by the prosecutors and try their luck in court. By contrast, where the offence is relatively easy to prove, the risk of going to trial and being sentenced by a jury or judge becomes more substantial. Since felonies can count for double in the penal grading (see above), the danger of being convicted of capital murder is real. Prosecutors will thus be able to maximise their bargaining power, and offer LWOP as a deal to opt out of death. As a former district attorney described (Interview #2 van de Kamp 2014),

> LWOP is often times offered as an opportunity to the defendant to escape possible execution and so used a bit as a bargaining chip sometimes to get a plea out of a defendant.

A defence lawyer similarly explained (Interview #22 2014),

> I don't think it's uncommon for a prosecutor to charge a case as a capital case, as a death penalty case, with the idea that the client will settle for LWOP.
>
> (…) Prosecutors know this, so they charge these cases in the hopes of getting the client to plead and take a LWOP.

The use of plea bargaining in capital cases has raised a number of criticisms (see discussion in Ehrhard-Dietzel 2012), yet the Supreme Court has upheld prosecutors' use of such charging and sentencing leverage, saying that 'a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty' (*Brady v United States* 1970 at 397). As their scope to manoeuvre to avoid capital sentences is so limited, particularly when felony murder rules apply, defence lawyers will often feel compelled to accept such plea deals and settle for LWOP (Wright 1990; Ehrhard 2008; Ehrhard-Dietzel 2012; Nellis 2013). This interviewee explained how, to avoid

risking a death sentence, they had accepted plea deals and settled for LWOP (Interview #22 2014):

> The risks at trial of a jury giving a death sentence are enormous for a host of reasons we can discuss; you're trying to settle these cases. It's not that you want to see your client to spend the rest of his life in prison but it's that you know what unfortunately the odds are; that what the client's gonna end up with is a death sentence.
>
> (…) [B]ecause you know the client's gonna be convicted and you know that at least one of the special circumstances is going to be true which means at least one death eligible factor is going to be found true then why are you going to trial?
>
> (…) [A]ll you're doing is risking the chance which is high, that your client will get death.

In addition to accepting LWOP to avoid capital sentences at trial, the significant costs of bifurcated capital trials (Bohm 2003; Dieter 2005) are also conducive to accepting plea deals, even more so when public defence offices are understaffed and underfunded (Barkow 2009b; Ehrhard-Dietzel 2012). The defence lawyers I interviewed described the fiscal advantages to settling capital cases:

> There's definitely a tension between some of the advantages of settling a case early - however that's defined - and also the fact that these cases are tremendously time consuming and costly to investigate (Interview #22 2014).
>
> The cost of doing trial level case is unbelievable (Interview #6 2014).

Some explained that settling for LWOP may come as a 'relief' but it did not feel like a 'victory'. In part, this had to do with the fact that, when a defendant accepts a plea deal, she or he will be barred from appealing the sentence.[77] In the words of one of the litigants, '[i]f you settle a case, if you negotiate then there's no appeal. It doesn't feel good, it doesn't feel good at all' (Interview #22 2014). While the traditional death penalty has been successfully avoided, the outcome also creates a certain unease. This legal counsel described it was hard to come to terms with having agreed to locking-up their clients for the rest of their lives (Interview #22 2014):

> When you settle a case – you saved your client from the death penalty. But the idea you're involved in this decision making with the client where he's agreeing

[77] CPC 1237.5.

> to spend the rest of his life in prison which means the case is over – for the most part the case is over.
>
> (…) The idea that [LWOP] is the best you can do for them is just – it feels – you're going to do everything you can but it's very hard to come to terms with the idea that that's the best.

Notwithstanding such concerns, very few participants reported having been offered an option to accept LWOP in order to avoid a sentence to death, some specifying they had not been given such a deal. Whereas guilty pleas are frequently entered into in criminal cases, they are rarely relied upon in the context of homicides (Barkow 2009b: 871, 879), and even less so in capital murder cases (Ehrhard-Dietzel 2012). Some prosecutors simply refuse to negotiate death-eligible cases (Ehrhard-Dietzel 2012). Similarly in Alameda, one interviewee explained that the District Attorney's office 'did not negotiate death' (Interview #23 2014). In Los Angeles County, LWOP was offered as a deal in a third of the cases where the prosecutor had sought death (see Annex).

My findings suggest that LWOP is routinely used as a threat to plea bargain and settle for lengthy prison terms. In Alameda, a number of capital felony cases were settled prior to trial for life sentences (40%). In Los Angeles, a smaller percentage of cases were settled for lower prison terms (34%), suggesting that in counties that seek the death penalty, there are fewer opportunities to opt out of LWOP (see Annex). It seems that in capital cases LWOP is a powerful bargaining tool, even more so in counties that seldom use the death penalty. There, prosecutors appear to be willing to offer a broader panel of lengthy prison terms and move away from the two extreme sentences.

Where offenders fail to take the threat of LWOP seriously and refuse the lower lengthy prison terms, they are actually at risk of facing the punishment at trial. Indeed, if the deal to opt out of LWOP is rejected, the prosecutor can decide to take the case to trial, and this time ask for LWOP (Barkow 2009b: 878; Bowers 2012: 38;

Stuntz 2004). The Supreme Court has upheld such leverage power. In *Bordenkircher v Hayes* (1978), the Court affirmed the conviction where a defendant had first refused a five-year plea offer and was recharged as a habitual offender subject to a mandatory LWOP sentence. This is what happened to Arthur, one of the participants. He wished he had accepted the deal for a long prison term as he felt he would have probably avoided being sentenced to LWOP at trial, 'I would have been better off pleading this case out and receiving 25 to life' (Arthur, aged 40, African American, served 19 years, Centinela). More generally, there is a sense among the participants that their opinion mattered very little; sentencing decisions were essentially negotiated and discussed between the prosecutors and the defence attorneys, or with the judges. Joseph (aged 38, served 17 years, Sierra Conservation Center) described how he felt he had been turned into a 'statistic':

> After I was arrested, I lost all right to make any decisions, almost all were made by the courts, the district attorney and my attorney, nothing I would say will take any effect nowhere (…) I was just there as a subject. As an LWOP I have no opinion, I am just a statistic.

The breadth of prosecutors' discretion is vast. They decide whether to charge a case as a capital felony murder, they choose to seek LWOP or the death penalty, and may offer a plea bargain. Here, LWOP can either be proposed as a deal *out* of a death sentence, or as a threat *into* lengthy life sentences. In this context, defence lawyers will try to convince prosecutors not to seek death, providing elements of the cruelty of capital sentences and emphasising how the alternative, LWOP, can demonstrate mercy and compassion. Where the opportunity arises, these litigants will be inclined to accept plea deals and settle for LWOP. However, such occasions seldom arise as the majority of capital felony murder cases are taken to trial.

IV. AT TRIAL: PLEADING FOR LWOP

1. The mandatory application of LWOP

> In my case my jury did not sentence me to LWOP, nor to death. My judge said he had no choice except to sentence me to LWOP (Rachel, aged 63, White, served 16 years, CCWF).

An individual charged with capital felony murder can be sentenced to LWOP in two situations. If the prosecutor seeks LWOP the offender no longer faces a possible sentence to death. This type of trial, which I will refer to as 'LWOP Capital Trial', will often be a jury trial[78] and follow a non-bifurcated route. If in a given case the jurors find that the special felony murder circumstance and guilt are established, the only sentence available for the judge to impose is LWOP. In the second type of trial, the outcome of which could also be LWOP, the prosecutor has sought a death sentence. Here, the 'Death Trial' will be bifurcated and follow a two stage procedure. First, the jurors determine whether the felony murder circumstance and guilt are proven. They will then decide, in a second phase known as the 'sentencing' or 'penalty' phase, whether or not to sentence the defendant to death. If the jury elects not to sentence the defendant to death, the only available option becomes LWOP.[79] Jurors in a Death Trial do not 'choose' LWOP over death. Rather, they reject death and the judge must then impose the alternative sentence.[80] In both LWOP Capital Trials and Death Trials, when guilt and the elements of the capital crimes are established and a death sentence is rejected (either because the prosecutor has not sought the death penalty, or because jurors choose not to sentence the defendant to death), LWOP not only becomes the only and minimum available sentence, it is the

[78] The defendant may decide to waive his or her right to a jury trial (CPC 190.4 (a)). However in most cases in Alameda and Los Angeles, LWOP defendants were tried in front of a jury.
[79] CPC 190.3.
[80] The judge, albeit in rare cases, can override the finding that a special circumstance was true (CPC 190.4(e)).

required course. In other words, capital felony trials tried either as LWOP Capital Trials or as Death Trials can lead to LWOP sentences not so much because the sentencers chose the punishment but rather because they had to impose it.

Mandatory sentencing has been criticised by numerous legal scholars. For Cassia Spohn (2009), mandatory statutes turn judges into 'sentencing machines'. For William Stuntz (2001; see also Oppel 2011), it shifts the sentencing power from judges to prosecutors. Mandatory sentencing also excludes the consideration of mitigating evidence (Branham 2002: 167; Whitman 2003), which, for Eva Nilsen (2007: 114), amounts to treating defendants 'more like objects than individuals'. Stephen Schulhofer (1993) has argued that the exclusion of elements that would otherwise justify lowering a punishment in a given case leads to unfair results, in particular when co-participants to a crime have played different roles in the criminal act. An individual's distinctive history or personal involvement in the crime will have no bearing on the determination of the mandatory sentence. For Schulhofer (1993: 210), the mandatory application of a sentence amounts to 'excessive uniformity', which is particularly controversial where some parties have played a small role in a crime: '[p]arties who were pressured to provide minor assistance face the same sentence as the more violent and abusive leaders' (Schulhofer 1993: 211). 'Just punishment for lesser roles', Schulhofer (1993: 211) continues, 'is inevitably precluded'.

The mandatory application of LWOP has raised similar concerns. Bowers (2012: 32) argues that evaluating the circumstances of the crime and the individualized consideration of the offender's character are 'almost entirely irrelevant to the sentencing decision'. A sentence to LWOP is 'no product', Bowers continues (2012: 25), of a 'reasoned deliberation over equitable blameworthiness'. It also gives

extensive power to sentencing prosecutors (Bowers 2012: 35-38), while at the same time disempowers jurors (Bowers 2012: 34):

> In the modern era, the jury is bound to return a verdict of guilt once the prosecutor has introduced evidence establishing the structured legal elements of the offence, and thereafter the judge is required to impose a mandatory-minimum.

The conjunction of criminal and sentencing laws with mandatory procedures can be particularly damaging for certain types of offenders, in particular those who have been exposed to abuse, intimidation, influence or coercion. For instance, research has shown that a common characteristic of women sentenced to LWOP was their experience and history of abuse (Nellis et al. 2009; Pishko 2015). For Professor Heidi Rummel, the director of the Post-Conviction Justice Project at the University of Southern California Law, the women she represented that were sentenced to life and LWOP sentences had, in nearly all of the cases, suffered from physical or sexual abuse (cited in Pishko 2015). Under the felony murder legal provisions, women who were coerced, intimidated or manipulated into engaging in felonies during which a killing is committed, could be sentenced to LWOP, and even death (Kaser-Boyd 2015). The mandatory application of LWOP at trial is at risk of prolonging, if not exacerbating this phenomenon.

The application of the felony murder laws has also had a great impact on young offenders. While the United States Supreme Court has forbidden the mandatory application of LWOP for youth offenders, some are still serving their sentence. In California, where 12% of the juvenile LWOP population is held (Wood 2014), youth offenders still have to serve 25 years before being allowed to apply for a sentencing hearing (Yee 2012). Of those juveniles sentenced to LWOP who Human Rights Watch surveyed in 2008, over 75% had committed their crimes in groups (HRW 2008). Pressure and influence exercised by peers is significant during teen years, the

organization emphasizes. The report further highlights the high level of adults involved in the crimes for which juveniles had been sentenced to LWOP. In nearly 70% of the cases involving co-perpetrators, at least one of the co-defendants was an adult. Human Rights Watch argued 'the influence of adults over young people should be taken into account when assessing a youth's criminal responsibility' (HRW 2008). One of Human Rights Watch's interviewees, Bill, had been exposed to continuous sexual and physical abuse by his co-defendant, who was 12 years older than him. He pressured Bill into being the lookout for a robbery. When his co-defendant killed the robbery victim, Bill was sentenced to LWOP for his role in the felony (HRW 2008).

Scholars often give emphasis to the contentious mandatory application of LWOP for nonviolent offences, where the severity of the punishment is underscored and contrasted to the nature of the crime (Bowers 2012; Henry 2012; Nellis 2013). Less scholarly attention has been given to how the punishment's severity is evaluated, addressed and represented in the context of capital crimes, such a felony murders, where LWOP is also mandatory.

2. Representing the severity of LWOP

> When I was sentenced, the gravity of its meaning wasn't fully comprehensible (Daniel, aged 30, Asian American, served over 10 years, Pleasant Valley).

For a large number of participants, when they first received the sentence, the meaning of spending their lives in prison with no possibility of parole was rather confusing (see also Wright et al. 2016). Sometimes, the lack of clarity had to do with how the sentence was described to them in court. Indeed, a few of the written testimonies suggest that the judges in their trials provided obscure explanations of the length and nature of their sentence. Gregory writes (aged 59, White, served 26 years, Salinas): '[w]hen I first heard the judge say 'you should and shall be segregated from the

society for the rest of your life', I didn't really understand what that meant.'

In another case, the judge told Jim that he 'would spend [his] natural born life in prison', but again it wasn't clear to him what exactly that entailed (Jim, aged 38, White, Kern). Roman remembers how the judge instructed the jurors in his case not to consider the time he would spend in prison if found guilty, referring to 'life in prison' and making no distinction between life in prison 'without' parole and life in prison 'with' parole (Roman, aged 43, African American, Solano).

In Death Trials, some information about the punishment's punitive nature will be brought to sentencers' attention. For instance, juries and judges will at times be told that, compared to a death sentence, LWOP is a merciful outcome. Charlie (aged 56, African American, served 34 years, Wasco), one of the participants, reflected on his trial:

> I can still hear my attorney arguing for my life!: 'Mr. [X] is still a young man, he's just 21 years old he doesn't deserve the death penalty he still have time to rehabilitate himself.'

For different strategic reasons, the defence lawyer can also choose to emphasize the severity of an LWOP sentence (Gottschalk 2012: 262):

> Capital defence attorneys, in making their pitch for life over death, emphasize that the defendant will never be getting out of prison and that a life sentence that stretches out for decades is actually more punitive than condemning someone to death.

For instance, in the federal case involving Dzhokhar Tsarnaev, the 'Boston bomber', his defence lawyers sought to emphasize before the jurors how punitive his life in prison would be, in order to avoid their client receiving a sentence of death. In his opening statement, the defence counsel Mr. Bruck showed pictures of the federal super maximum security prison in Florence, Colorado where Tsarnaev would be held. He stressed that the prison, also known as the 'Alcatraz of the Rockies', housed the inmates deemed most dangerous, '[t]his is where the government keeps other terrorists who used to be famous but aren't anymore' (cited Gass 2015). He also

showed a photographic picture of a small barred window that gave access to a glimpse of the sky. The window, Bruck explained, would be Tsarnaev's only contact with the outside world. His communications would be limited and a camera would be placed in his cell, watching him 24 hours a day. Bruck (cited Gass 2015) pleaded:

> No matter what [Tsarnaev] does now, no matter what regrets he feels, no matter how he matures, no matter what amends he might want to make, his last choice came when he was 19, and he will never have the chance to make another choice again, Bruck pleaded.

In another famous case relating to the 9/11 attack on the World Trade Center, Zacarias Moussaoui's defense attorney, in making his pitch for life over death, emphasized the harshness of LWOP. He told the jurors that they should rest assured that LWOP prisoners 'rot' (Serrano 2006).

For some prisoners serving LWOP, there was nothing surprising about defence lawyers emphasizing and instrumentalizing LWOP's extreme severity (cited in Cockburn 2009, emphasis in text):

> [P]ro-LWOP rhetoric is all tied up with defense lawyer rhetoric at trial. Everyone tells the jury how great it would be to give the guy or woman 'a punishment worse than death' … because everyone at trial is terrified of the impending verdict. It's like an emergency room: all automatic pilot by the legal defense team—reflex tactical activity, no higher thought, pandering to the hatred and anger of the community. Smart lawyers believe these cases should NEVER go to trial—they should be pleaded out. If they do get to trial, it's all about trying to save a life, no matter what.

From the perspective of defence lawyers, some feel that when jurors elect not to sentence their client to death, they have saved their life. The lead defence lawyer in the Tsarnaev case, Judy Clarke, said, that '[v]ictory usually means a life sentence' (cited in Radden-Keefe 2015). In part, it feels like a victory over the prosecutor who did not offer to settle for LWOP and decided to charge the case with death. One defence lawyer explained (Interview #22 2014):

> Maybe it feels like a victory when you try a case and get that result because at least you feel like even if the [District Attorney] wouldn't settle, you couldn't get a deal, you battled it out and you got this result—it doesn't feel like a good victory but it feels like you saved your client.

In Alameda and Los Angeles counties, the majority of the capital felony murder cases were taken to court as opposed to being settled pre-trial, and virtually all the cases were tried as LWOP Capital Trials rather than through Death Trials. On very few occasions, defence lawyers pled for their client's lives and drew attention to the alternative sentence's degree of severity. However, in the largest portion of capital felony murder cases, LWOP was the only punishment available from the outset. In these trials, representations as to the sentence's severity and mitigating evidence pertaining to the offender had little bearing on the sentencing determination. In fact, the chances of being sentenced to LWOP in capital felony murder cases tried through LWOP Capital Trials are extremely high. Between 2011 and 2014, the punishment was imposed in every case that went to trial in Alameda. In Los Angeles, of the cases that went through LWOP Capital Trials, LWOP was imposed 75% of the time[81] (see Annex). By the time a sentence to serve life with no possibility of parole is handed down at trial, there still has been no consideration or evaluation of the punishment's extensive severity. Appeals and post-conviction avenues become the last opportunity for attention to be given to LWOP's particularly punitive nature.

V. APPEALING LWOP SENTENCES

1. Measuring severity

The Eighth Amendment prohibits the application of disproportionate sentences, where proportionality is measured by weighing the gravity of a crime against the severity of the sentence (*Harmelin v Michigan* 1991 at 1001; *Solem v Helm* 1983 at 290–291). To measure the proportionality of a sentence, appellate courts will

[81] LWOP was never imposed in Death Trials in Los Angeles County, other than when used as a plea bargain.

essentially balance three factors: the nature and seriousness of the offence; the culpability of the offender (together composing the 'gravity' element of the test); and the nature and harshness of the penalty (amounting to the 'severity' element of the proportionality evaluation) (Siegler and Sullivan 2011).

On the grounds that 'death-is-different'[82]—according to which the death penalty deserves particular attention and treatment due to its gravity and finality—the Supreme Court has developed a robust proportionality review[83] to rule out capital sentences for entire categories of offences[84] as well as for categories of offenders.[85]

In particular, to measure the gravity side of the proportionality equation, the Court requires lower courts to consider mitigating evidence pertaining to the level of culpability of an offender. The constitutional prohibition against cruel and unusual punishments has been interpreted as requiring that in capital cases 'the individual be given his due' (*Eddings v Oklahoma* 1982 at 112). As a result, any element pertaining to the offender should be taken into account and given due consideration, 'the character and record of the individual offender and the circumstances of the particular offence [are] a constitutionally indispensable part of the process of inflicting the

[82] The origins of the 'death-is-different' argument can be found in Justice Brennan's concurring opinion in *Furman v Georgia* (1972 at 286) '[d]eath is a unique punishment in the United States.'

[83] The categorical proportionality test applied to capital sentences includes an objective and subjective assessment. The Court first relies on 'objective' criteria, which essentially entails turning to the different states' legislations and jury decisions to examine whether capital sentences are available, and the degree to which it is in practice used. In so doing the Court seeks to determine whether there is a national consensus against the sentencing practice at stake (*Roper v Simmons* 2005 at 564). It will pay attention to the number of jurisdictions that have authorized death sentences for a particular category of offender or offence, and will also consider how often the sentencing practice is used with respect to that category (*Roper v Simmons* 2005 at 567) . The Court will then revert to a subjective appreciation (*Coker v Georgia* 1977 at 597), and refer to its controlling precedents and prior interpretations of the Eighth Amendment (*Kennedy v Louisiana* 2008 at 2650).

[84] *Coker v Georgia* (1977), prohibiting death sentences for rape; *Enmund v Florida* (1982), prohibiting capital punishment for acccomplices to felony murders who did not participate in, or intend, the killing; *Kennedy v Louisiana* (2008), prohibiting capital punishment for non homicide crimes), as well as for categories of offenders (*Atkins v Virginia* 2002, prohibiting death sentences for offenders with intellectual disability; *Roper v Simmons* 2005, prohibiting death sentences for juveniles).

[85] *Atkins v Virginia* (2002), prohibiting death sentences for offenders with intellectual disability; *Roper v Simmons* (2005), prohibiting death sentences for juveniles). The application of these categorical bans is controversial in practice, notably in the context of offenders suffering from mental illnesses (Hood and Hoyle 2015: 257–264).

penalty of death' (*Woodson v North Carolina* 1976 at 304). States are therefore forbidden to prevent sentencers in death penalty cases from considering *any type* of mitigating factors (Roth and Sundby 1985; Barkow 2009b). Juries and judges should be able to evaluate as mitigating evidence, 'any aspect of a defendant's character or record and any of the circumstances of the offence that the defendant proffers as a basis for a sentence less than death' (*Lockett v Ohio* 1978 at 604). Further, no limits can be imposed on the scope of the mitigating evidence to be considered (*Payne v Tennessee* 1991 at 822).

Because it would preclude the consideration of elements pertaining to the offender's individual guilt, the Supreme Court has banned the mandatory application of death sentences. In *Woodson v North Carolina* (1976 at 304, emphasis added), the Court held that mandatory death sentences are unconstitutional because they render defendants indistinguishable from one another and thereby amount to blindly imposing capital sentences:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. *It treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.*[86]

The individualization of a capital case further accounts for the possibility that some defendant may be more blameworthy than others. In *California v Brown* (1987 at 545) the United States Supreme Court held:

> [D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems […] may be less culpable than defendants who have no such excuse.

Following a similar line of reasoning, namely where mandatory sentencing problematically prevents the individualization of a case, the Supreme Court has

[86] See also *Roberts v Louisiana* (1976); *Sumner v Shuman* 1987).

declared unconstitutional the mandatory application of LWOP sentences for juveniles.[87] In *Miller v Alabama* (2012) the Court combined two lines of precedents. It drew on decisions that recognized juveniles' lesser culpability, including the recent ban of LWOP for juveniles convicted of nonhomicide offences (*Graham v Florida* 2010) . The Court also relied on a second strand of case law that requires sentencers to conduct a fact-specific analysis before sentencing a defendant to death (*Miller v Alabama* 2012 at 2467). On the basis of these two lines of precedent, the Supreme Court concluded that mandatory LWOP for juveniles violated the Eighth Amendment because it essentially prevented taking into account the crucial element of 'youth' (*Miller v Alabama* 2012 at 2468-2469).[88] Other than in cases involving the mandatory application of LWOP for youth offenders, the Supreme Court has generally rejected the individualization of cases when a defendant faces LWOP. The Court specifically ruled that mitigating evidence did not have to be considered before imposing LWOP (*Harmelin v Michigan* 1991).

In the precedent governing the proportionality review for noncapital sentences, including LWOP, *Harmelin v Michigan* (1991), the Court has interpreted the Eighth Amendment as forbidding sentences that are grossly disproportionate to the crime for which it was imposed. This test has been criticized by a number of scholars because it amounts to a hands-off approach towards noncapital—including the most disproportionate—sentences (Nilsen 2007; Barkow 2009a; Berry 2010; DeClue 2012; Taylor 2012; Torti 2013). For Nilsen (2007: 152), the Court has 'short-circuited the review of non-death cases.' Barkow (2009a: 1146) similarly argued, 'the Court has

[87] While juveniles can still face discretionary LWOP, including for felony capital murders, the California Supreme Court has recently emphasized the importance of taking into account elements pertaining to the offender's youth; namely, the immaturity of children and their underdeveloped sense of responsibility, the vulnerability of youth, and the recognition that a youth's character is not yet as formed as that of an adult's (*People v Gutierrez* 2014).
[88] *Montgomery v Louisiana* (2016), ensures that the decision applies retroactively.

done virtually nothing to ensure that the [noncapital] sentence is appropriate'. For Bowers (2012: 33), there is neither a 'front end equitable intervention in the form of contextualized sentencing' nor a 'back end equitable intervention in the form of case specific proportionality review.'

The Court has examined the proportionality of noncapital sentences in a handful of decisions,[89] and among those, it has upheld LWOP sentences including for nonviolent offences.[90] Further demonstrating its unwillingness to engage with the evaluation of the proportionality of noncapital sentences, the Supreme Court has repeatedly emphasized that challenges to such types of penalties under the Eighth Amendment would be exceptional (*Rummel v Estelle* 1980; *Harmelin v Michigan* 1991 at 997; *Solem v Helm* 1983 at 289-90; *Ewing v California* 2003 at 20, 30; *Hutto v Davis* 1982 at 383). Where such cases are reviewed, proportionality would have to be narrowly interpreted (*Harmelin v Michigan* 1991 at 1001). In *Harmelin v Michigan* (1991), Justice Kennedy's concurring opinion explained that 'only extreme sentences that are "grossly disproportionate" to the crime' would violate the Eighth Amendment (*Harmelin v Michigan* 1991 at 959). In *Harmelin*, for example, the Court upheld a mandatory LWOP sentence for a first time offender who had been convicted of possession of 672 grams of cocaine, rejecting the claim that the application of the punishment in this case was grossly disproportionate (*Harmelin v Michigan* 1991 at

[89] In chronological order, the Court has assessed whether a term-of-years sentence violates the Eighth Amendment in the following cases: (*Rummel v Estelle* 1980; *Hutto v Davis* 1982; *Solem v Helm* 1983; *Harmelin v Michigan* 1991; *Ewing v California* 2003; *Lockyer v Andrade* 2003). In an exceptional departure from the *Harmelin* test, the Court in *Graham v Florida* (2010) applied the categorical proportionality test generally limited to capital sentences to prohibit LWOP sentences for juveniles guilty of non-violent offences. While the case may appear encouraging, a number of scholars remain dubious as to whether it signals a step towards expanding the categorical proportionality test more broadly to LWOP sentences (Berry 2010; Gottschalk 2012; Henry 2012; Taylor 2012).

[90] In *Solem v Helm* (1983), the Court had adopted a different three-step test that compared the gravity of the offence against the harshness of the penalty, as well as an intra- and inter- jurisdictional comparison (*Solem v Helm* 1983). The Court held that a sentence to LWOP for six prior nonviolent felonies under the South Dakota recidivism statute breached the proportionality constitutionality threshold. It is the only case to date in which the Court held that a noncapital sentence violated the Constitution's prohibition against cruel and unusual punishment.

961, 994, 995). By contrast, a sentence to life without parole for overtime parking would be considered unconstitutional (*Harmelin v Michigan* 1991 at 963).[91] Some Supreme Court justices, such as Justice Scalia, Justice Rehnquist, and Justice Thomas have even argued that the Eighth Amendment does not contain a proportionality requirement for noncapital sentences (*Harmelin v Michigan* 1991 at 961-963; *Ewing v California* 2003 at 31–32).

Not only has the Supreme Court rarely addressed the proportionality of noncapital sentences, but also the standard it requires for a sentence to breach the prohibition against cruel and unusual punishment is very high. It is 'so high', Taylor writes (2012: 1815; see also Fong-Sheketoff 2010; DeClue 2012), 'that it allows extremely lengthy sentences for low-level offences to pass constitutional muster, making it prohibitively difficult for prisoners to prove that their sentences violate the Eighth Amendment, even when their claims demonstrate a strong indicator of gross disproportionality'. The test is regarded as 'meaningless' and for others is considered to be a dead letter (Castiglione 2010: 80; Bierschbach 2012: 1746).

More specifically, the severity side of the proportionality test has been criticised for providing little guidance as to which aspect of the punishment contributes to its harshness (Torti 2013). When evaluating the severity of a prison term, the Court has only referred, in abstract terms, to the relative length of the sentence. 'The entirety of the Court's discussion of the sentence length in *Ewing* is as follows: "To be sure, Ewing's sentence is a long one"' (Torti 2013: 1821). When the Court considers LWOP, it speaks of imprisonment for the 'rest of [the offender's] life' (*Rummel v Estelle* 1980 at 281), or that he 'will remain in prison for the rest of his days' *Naovarath v State* (1989). Yet, the Court does not measure the *actual* time an

[91] See also *Rummel v Estelle* 1980 at 274 n.11, '[t]his is not to say that a proportionality principle would not come into play in the extreme example [of] a legislature ma[king] overtime parking a felony punishable by life imprisonment.'

individual prisoner will spend in prison, as it does not take into account his or her age at the time of sentencing. It treats LWOP as a very superficial penal metric. The punishment is seemingly a blanket 'lifetime in prison', but in reality LWOP's severity is highly sensitive to the age of the individual being sentenced. A 19 year old defendant sentenced to serve LWOP will spend a longer time incarcerated than a 50 year old prisoner sentenced to the same punishment. In the words of Alice Ristroph (2010: 77), '[i]t is not enough to consult the calendar and count years'.

Moreover, under the applicable test, the Supreme Court fails to examine carceral conditions when measuring a punishment's proportionality. Instead, it persists in treating prison conditions separate from evaluating the severity of a punishment under the Eighth Amendment proportionality review (Nilsen 2007; Torti 2013). The Court subjects prison settings to a different test, which requires the prisoner to prove that prison officials intended the harm caused to the prisoner (*Farmer v Brennan* 1994 at 829, see also *Wilson v Seiter* 1991 at 300)[92]. In *Farmer v Brennan* (1994 at 854), the majority opinion held:

> Any pain and suffering endured by a prisoner that is not formally a part of his sentence—no matter how severe or unnecessary—will not be held violative of the [Eighth Amendment] unless the prisoner establishes that some prison official intended the harm.

For Nilsen (2007: 146), this approach to prison conditions has essentially given courts a free pass to ignore the realities of prison life. Nilsen added (2007: 175):[93]

> By failing to recognize the actual consequences of a prison sentence as punishment, and by creating constitutional tests that deflect and deter Eighth Amendment challenges, the Supreme Court has blindly and cruelly accepted form over substance, thus abdicating its responsibility as a guardian of the

[92]Noting that prison conditions do not breach the Eighth Amendment as they were not caused by the deliberate indifference of a prison official.

[93] Recently, the Court has considered the risk of harm that prisons may cause to *every* prisoners, rather than tying it to demonstrating prison officials' intent to cause harm against a particular inmate. In *Brown v Plata* (2011), the United States Supreme Court notably acknowledged the humanitarian crisis caused by overcrowding in California that exposed every prisoner to an unconstitutional level of risk of harm. As promising as this recent case may seem, the Court persists in excluding prison conditions from the evaluation of a sentence's proportionality (*Brown v Plata* 2011)

Eighth Amendment.

Yet, there is a significant scholarship indicating that the environment where prisoners are held, whether in solitary confinement, maximum security facilities, or overcrowded jails and prisons, influences the severity of the sentence and shapes inmates' individual experiences of the punishment, often provoking a range of psychological and physical ills (e.g. Haney 2006; Nilsen 2007; Gawande 2009; Shalev 2009, 2011; Simon 2014a). As I discuss in Chapter 7, the LWOP sentence is also distinctively qualitatively harsh because it exposes inmates to particular discriminatory treatments behind prison doors.

Although the test is not comprehensive, the Court has sought to highlight certain features of LWOP. In particular, it has distinguished the punishment from other life sentences, notably by measuring it against the death penalty. Thus, in *Harmelin v Michigan* (1991) the Supreme Court noted, 'a life sentence without parole is the second most severe penalty permitted by law' (*Harmelin v Michigan* 1991 at 1001). Similarly, the Court highlighted in *Graham v Florida* (2010) that such a sentence was 'the second-harshest sentence available under [the Court's] precedents for any crime, and the most severe sanction available for a nonhomicide offence' (*Graham v Florida* 2010 at 2038). In *Graham v Florida* (2010 at 2027, emphasis added), the Court went a step further and held that the LWOP shared some characteristics with death sentences:

> It is true that a death sentence is 'unique in its severity and irrevocability', *yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences.* The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.

The Court has also identified a distinctive feature of LWOP's severity, one that is not measured against capital sentences and involves the denial of hope (*Graham v*

Florida 2010 at 2027):

> [LWOP] means denial of hope; it means that good behaviour and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit [of the defendant], he will remain in prison for the rest of his days.

The Supreme Court has also failed to include a comprehensive and clear analysis of the individual defendant's culpability—to measure the gravity of the offence—to be weighed against the severity of the punishment. Yet, '[b]lameworthiness' Taylor (2012: 1847) writes, 'is an essential element of the constitutional proportionality test because it is central to measuring the gravity of the offence'. For Taylor (2012: 1817), the test does not adequately differentiate between those who 'deserve' to be sentenced to LWOP from those who do not. The proportionality test has essentially directed the attention away from individuals, privileging states' interests in deterring crime and protecting society (Taylor 2012: 1824). Instead, Taylor (2012: 1857) suggests, appellate courts should interpret the test more broadly and turn to a wider set of factors that intervene beyond the moment of the crime, including external factors relevant to an offenders' social and economic background, exposure to violence and abuse and family structure, as well as those social factors such as youth, intellectual disability or mental illness.

Following the Supreme Court's lead, lower appellate courts that have applied the proportionality review to noncapital sentences have failed to fully engage with the severity of noncapital sentences or account for the elements of the offender's culpability. Very few cases have been overturned on the grounds that they were grossly disproportionate,[94] and penalties such as LWOP have been upheld, including for nonviolent cases (DeClue 2012; Taylor 2012; Torti 2013).

[94] In California for instance, appellate courts have upheld sentences such as 25 years to life for the theft of two cassette players and three perfume bottles valued at $70 (*People v Rodriguez* 1996 or 25 years to life for the theft of a $149 MP3 player (*People v Pena* 2010).

2. Representing severity

The Supreme Court's proportionality test does not fully address the severity of LWOP. Additionally, its perception of the punishment's extreme nature may have been distorted by anti-death penalty pleadings and claims. The battles originally led before Congress were moved to the courtrooms in the late 1970s (see Chapter 4), where lawyers challenged capital punishment before the Supreme Court. Litigants, who strove to restrain the scope and use of death sentences, often heralded LWOP as the better more humane alternative and as such may have inadvertently limited the Court's understanding of the punishment's extreme punitive nature. For the Steikers (2008: 175), the punishment is perceived by the Supreme Court as a 'lesser evil' rather than as an evil in itself. According to them, anti-death penalty promotion and praise of LWOP have veiled the punishment's 'horror', since '[e]ven the lengthiest sentences lose their horror when they are so vividly sought and so victoriously celebrated by the (rarely) successful capital litigant' (Steiker and Steiker 2008: 190). Barkow (2009a: 1191, emphasis added) has similarly argued that anti-death penalty pleadings promoting LWOP have restricted the Supreme Court's understanding of the punishment's extreme severity:

> [The] near-universal endorsement [of LWOP] by death penalty abolitionists is troublesome because they seem to be approving it as a general matter in their arguments to the [Supreme Court], *which may, in turn, limit the Court's sense of how extreme a punishment it is.*

Moreover, when anti-death penalty litigants distort or fail to shed light on LWOP's extreme severity, they arguably reinforce the binary between life and death sentences, which has been the basis for the development of distinct proportionality tests. For Dubber (1995: 713–714) the 'death-is-different' campaign may have 'won capital defendants certain additional protections, but only at the considerable cost of lumping together other penalties under the rubric of 'non-capital' punishments, thereby

effectively shielding incarceration from constitutional scrutiny.' Along the same lines, Barkow (2009a: 1192) wrote:

> The problem is that, because litigants have the incentive—indeed, the obligation—to make these sorts of arguments, the death-is-different philosophy gets reinforced and the [Supreme] Court repeatedly hears arguments that effectively cast aside all other punishments as less important.

In sum, the pleadings may have distorted the Supreme Court's understanding of the punishment's severity, and may also have reinforced the test under which LWOP's punitive nature is not taken into account fully. Other than proportionality reviews, there are very few opportunities for offenders to have their case reviewed and their sentence evaluated.

3. Fighting their appeals alone

> Us, LWOPs, get pushed through the appeals system then forgotten (Mick, African American, aged 54, served 23 years, Mule Creek).

The federal judge Alex Kozinski of the Ninth Circuit Court of Appeals, once claimed that innocent offenders in California were better off with a death sentence because they were eligible to 'a whole panoply of rights of appeal and review that you don't get in other cases' (cited in Kozinski and Bright 1997; see also Harvard Law Review Association 2006; Henry 2012). In California, any person convicted of a felony is entitled to one direct appeal before the California Court of Appeals,[95] which is time barred to 60 days.[96] Typically, the duration of an LWOP appeal case can range anywhere from less than a year up to seven or eight years, according to Gary McCurdy (Interview #21 Alexander 2015) of the Central California Appellate Program. Offenders sentenced to death are entitled to an automatic appeal to the California Supreme Court,[97] whereas those sentenced to LWOP will only be able to

[95] CPC 1235.
[96] CRC 8.308.
[97] CRC 8600.

obtain a review of their case at the highest court's discretion.[98] More research would have to be undertaken but on the basis of some experts working in death penalty appeals cases, few cases are in fact reviewed beyond the initial Court of Appeal in California (Interview #21 McCurdy 2015; Interview #20 Alexander 2015).

Offenders sentenced to either death or LWOP can also file habeas corpus petitions before state or federal courts,[99] alleging any constitutional or federal issues.[100] These proceedings are valuable because the courts will be able to consider a number of aspects of the case relating to the underlying case such as the police investigation, incompetent legal representation, misconduct by a judge, juror or the prosecution, or newly discovered evidence, which generally do not come within the ambit of direct appeals. These appeals have enabled some prisoners sentenced to death to stall their executions (Uelmen 2009; Egelko 2014). Acquittal is also more likely to result from habeas corpus than in the earlier appeals (Egelko 2014).

In California, petitioners sentenced to LWOP are not entitled to state-appointed counsel as a matter of right for any post-conviction proceedings[101] (Steiker and Steiker 2008: 203; Uelmen 2009: 512).[102] Under these circumstances, participants describe feeling abandoned and forgotten. Alice writes, 'I who have a life without parole don't get an attorney assigned to me by law, nor do I go to board every so many years; so where do I fall? In between the cracks?' (Alice, Mexican American, aged 47, served 11 years, CCWF).

[98] CRC 8.500 (b).
[99] Despite the importance of such habeas appeals, federal petitions have been significantly narrowed since the mid-1990s. In particular, the U.S. Congress has limited the number of habeas petitions and time-barred the appeals to one-year from conviction (Steiker and Steiker 2008: 203; Nellis 2013: 449).
[100] They need to wait to have exhausted all the state remedies before starting a federal habeas proceeding (Uelmen 2009).
[101] While those on the row are entitled as a matter of right to state appointed lawyers for state habeas petitions, there is a significant number of inmates who are still without lawyers (Uelmen 2009; Interview #20 Alexander 2015; Interview #21 McCurdy 2015).
[102] Despite the importance of habeas appeals, federal petitions have been significantly narrowed since the mid-1990s. In particular, the U.S. Congress has limited the number of *habeas* petitions and time-barred the appeals to one-year from conviction (Steiker and Steiker 2008: 203; Nellis 2013: 449).

Had they been sentenced to death, some participants felt they would have been able to have their cases reviewed and their sentence overturned:

> I would be better off given the death penalty. At least I would have been given a lawyer to help with a habeas corpus petition. But instead I'm given the slow death penalty with no help on my appeal (Liam, aged 31, White, served approx. 10 years, Ironwood).
>
> Death row inmates are treated better than LWOP prisoners because they have all paid attorneys for their appeals while we have to pay ourselves or try and find someone to help with our legal work (Sue, aged 50, served 13 years, Filipino, CCWF).

As prisoners serving LWOP are not eligible, by constitutional right, to appointed counsel, other than for their first appeal, they must therefore litigate *pro se*, if they do at all. What this means is that offenders will often prepare and submit their petitions and filings without legal representation:

> When you LWOP you have no legal assistance and have to fight for yourself (Adriana, aged 29, Vietnamese American, served 13 years, Central California Women's Facility).
>
> LWOPs are left to fend for themselves in the courts with no or little legal expertise along with out-dated and inefficient legal libraries (Thomas, aged 56, White, served 19, Mule Creek State Facility).
>
> Those of us with an LWOP are left to struggle with the appeals process on our own (Jim, aged 35, African American, served 11 years, Corcoran).

As they are not legal experts and are not accustomed to the different procedures, it also means they will make errors, such as missing deadlines:

> I lost my appeal at the federal level, I filed my writ 54 days late was not my fault (Harry, aged 56 years old, RJ Donovan).
>
> I started too late studying the law and soon realised I had missed the first deadline to file on my own and that sealed my fate as an LWOP (Fred, aged 52, Filipino American, served 22 years, Pleasant Valley).

Some will turn to jailhouse lawyers who, according to Wally, 'feast on desperate inmates too poor to hire professional counsel' (Wally, aged 35, African American, Lancaster). In practice, few LWOP cases give rise to post-conviction litigation (Steiker and Steiker 2008: 203). According to certain studies, the reversal rate for noncapital cases in federal habeas proceedings is significantly lower than that of capital cases (cited in Henry 2012: 77).

Some inmates on death row opposed the 2012 California SAFE Campaign that would have repealed the death penalty and replaced it with LWOP (see Chapter 5). They did not oppose the Campaign because they wished to die. Rather, they challenged it because they wanted to preserve the possibility of maintaining Supreme Court automatic appeals, and state-appointed lawyers to pursue habeas proceedings and get a chance to prove their innocence. For Correll Thomas, who is on death row in San Quentin, the commutation of his death sentence to LWOP would have 'slammed the courthouse doors forever' (cited in Egelko 2014). Similarly, Kevin Cooper (2012) opposed the measure because it means prisoners on the row would lose access to their habeas appeal state-appointed lawyer:

> We who are on death row will also lose our legal habeas and habeas appeal process that we have and are currently entitled to under the law. So we are in fact taking a step backwards in our ability to challenge our convictions.

The alternative routes to review LWOP sentences are very limited. Executive pardons or commutation power have almost entirely disappeared (Whitman 2003; Mauer 2004; Bowers 2012; Gottschalk 2013). Furthermore, most organizations committed to challenge cases on grounds of innocence tend to focus on capital cases (Gottschalk 2013: 356) or on lower sentences (e.g. California Innocence Project; North Californian Innocence Project). There have been very few LWOP exonerees in California. Since 1989, only ten LWOP prisoners have been exonerated (University of Michigan Law School).

VI. CONCLUSION: CREATING 'LWOPS'

Throughout the different sentencing stages that lead to LWOP, prosecutors, defence lawyers and sentencers barely consider the punishment's extremely punitive nature. LWOP's severity is barely visible in the legal setting, that is, it is rarely discussed or

evaluated, and very little evidence is shared with sentencers. The crux of the negotiations, exchanges and decisions concentrates on the traditional death penalty. For instance, during the pre-trial sentencing determinations, the decisions taken by prosecutors essentially revolve around assessments about the severity of the traditional death penalty. They will determine whether or not to charge an offence as a capital crime, whether or not to seek death at trial, or instead offer a plea deal. They do not choose LWOP as their decisions are centred on the death penalty. In this context, litigants who strive to avoid a possible capital sentence at trial will try to convince prosecutors not to seek death. At times, when offered the opportunity, they will even settle for LWOP. The elements they will bring to the prosecutor's attention mainly stress the merciful outcome, should LWOP rather than the death penalty, be sought. At this early sentencing stage, it is not that defence lawyers or prosecutors ignore the severity of LWOP. The significant number of felony murder cases for which LWOP is used to plea-bargain lengthy prison terms, suggests that the particularly severe nature of the punishment is well recognized.

Where a capital murder case is taken to trial, it can either follow a bifurcated route or a non-bifurcated procedure. In Death Trials, once guilt and the special felony circumstance have been proven, the crux of the sentencing phase will be to discuss, debate and decide whether to sentence the offender to death. Here, defence lawyers will represent LWOP as a merciful, less severe form of punishment in comparison to capital sentences, while at the same time highlight its particular severity to try to reassure prosecutors, jurors and judges. As illustrated by the Tsarnaev case, some defence lawyers draw attention to the environment in which offenders will be held, the duration of the sentence, as well as to the treatment that will be imposed on LWOP inmates. As in political settings, the punishment's punitive nature is

systematically compared to the death penalty. LWOP is repeatedly presented as a lesser and preferable evil, rather than an evil in its own terms. In LWOP Capital Trials, which, account for the majority of the capital felony murder cases, the extreme nature of capital sentences overshadows appreciations of the severity of LWOP. When prosecutors elect not to seek the death penalty, the alternative sentence becomes the only available punishment. Its application will be mandatory and as such, its degree of severity will have little bearing on the decision to impose the punishment. In other words, the decision not to select death essentially determines later considerations for the alternative punishment's level of extremity.

On the grounds that 'death-is-different', there will be no further and thorough evaluation of the punishment's severity at the appellate stage. Not only will the proportionality of an LWOP sentence seldom be evaluated, the applicable test grants scarce attention to the real duration of the punishment, to the carceral environment and to the particular treatment offenders will be exposed as LWOP inmates. The sentence will be handed down in 'capital' cases—whether as the outcome of a LWOP Capital Trial or of a Death Trial—because the underlying felony crime is a 'capital' offence. Yet, the sentence's severity will not be exposed to the in-depth review developed for capital sentences. Put differently, LWOP may be available and imposed for *capital* offences but it does not warrant *capital* protections (e.g., post-conviction review). In the rare cases where the Supreme Court has considered LWOP, it has always been in comparison to death sentences rather than in its own terms.

Recently, the Court has hinted at some of the punishment's distinctive features, particularly the denial of 'hope'. However, the Supreme Court provides little indication as to what hope means and how to measure it. If hope were to be tied to the availability of review, offenders would be deemed, if not expected, to remain hopeful

as long as the law provides such mechanisms. Regardless of whether an offender is actually given the opportunity to have his or her case reviewed, he or she would be expected to be hopeful. As such, a punishment that provides 'hope' under the law would never be considered to be cruel and unusual because an offender would in theory never lose hope (or she or he would not be considered to have a legitimate reason to feel hopeless). The way the Supreme Court has construed hope further denies the possibility that this emotion may be shaped by the carceral environment and treatment to which prisoners are exposed.

When defence lawyers shed light on LWOP's punitive nature, like campaigners before voters and lobbyists in Congress, they produce and share a certain form of knowledge with those who have the power either to seek the sentence (prosecutors) or to hand it down (judges and jurors). In so doing, anti-death penalty abolitionists may have helped shape an understanding of the punishment's degree of severity and influenced those with sentencing power. In legal settings however, there are very few occasions where litigants plead for their client's lives and promote LWOP before prosecutors and sentencers. Most cases that result in LWOP sentences are indeed tried as LWOP Capital Trials. If anti-death penalty lawyers were to exert any form of influence, it would have to be during pre-trial determinations. Yet, against the breadth of prosecutorial discretion, defence attorneys' influence tends to be minimal.

Some scholars (Steiker and Steiker 2008; Barkow 2009b) have suggested that anti-death penalty litigants' pleadings may have clouded the Supreme Court's understanding of the punishment's severity, and reinforced the prevailing 'life v death' binary on which is grounded a number of procedural safeguards and bans. However, it is essential to underscore how stringent and restraining the rules of the game are in the legal setting. Lawyers who strive to avoid their client being given a

traditional death sentence have only a few cards to play and very few opportunities to offer contrasting views of LWOP. The laws and procedures that have been elaborated for the death penalty have cornered defence litigants, giving them no other choice but to rely on LWOP and to frame it in such a way to appeal to sentencers. The part anti-death penalty litigants play should further be mitigated as things may be changing. The Supreme Court has recently acknowledged that LWOP bore some similarities with death sentences, suggesting that 'death' may not be so different after all (see *Graham v Florida* 2010).

Further, it is the routinized application of the punishment (both in terms of quantity and regularity), rather than anti-death penalty defence lawyers, which has minimized legal actors' appreciation of LWOP's extremely punitive nature. The routinization is the result of the conjunction of capital felony murder laws with the different sentencing mechanisms. The penal grading of felonies in capital crimes has opened the door into the two most extreme punishments. More specifically, because death sentences are seldom sought even in counties such as Los Angeles, the criminal law for felony killings has eased the way to LWOP sentencing. Mandatory sentencing with the particular felony murder rule has also widened the net of offenders. Indeed, the failure to account for different levels of guilt or culpability means that more offenders, including those who have not killed, are eligible to the sentence. The figures further attest that LWOP is virtually imposed in almost all capital felony murder case taken to court. These sentences are unlikely to be overturned, perpetuating if not entrenching the routinized imposition of LWOP sentences.

Because LWOP has become habitual and ordinary, the extent to which it is punitive has been lost. The routinized application of the punishment further eclipses its severity by disconnecting the punishment from the offender on whom it will

eventually be imposed. At no point in the lead to LWOP in capital felony murder cases, does mitigating evidence serve to turn attention to, and shed light on, the punishment's degree of severity. It is typically when sentencers are asked to consider the specific and individualised characteristics of an offender that they begin to consider the qualitative nature of a punishment. Yet, in the context of capital felony murders such evidence will serve no such illuminating purpose for LWOP. During the pre-trial phase, the focus of the special circumstances committees as well as that of defence lawyers appears to be on the qualification of the crime, on whether or not there is sufficient factual evidence to charge a case with a felony special circumstance. Some mitigating elements may be considered to decide whether or not to seek a death sentence. However, they will not serve to draw attention to LWOP. In other words, mitigating evidence serves to decide whether or not to *consider* and *choose* death but it does not serve to *consider* and *choose* LWOP, for the punishment is only the fall back option.

When the case is taken to trial, LWOP is applied mandatorily. During LWOP Capital trials, the criminal legal provisions relating to felony murders exacerbate the detachment of the punishment from the offender, since the felony murder rule provides that every participant to a felony killing can be held equally responsible. As such, the rule fails to account for different levels of culpability, and mitigating evidence will not draw attention to the punishment's severity. In Death Trials, the Supreme Court case law requires sentencers to consider any mitigating evidence relating to the offender. As a result, death penalty litigants will provide elements pertaining to the offenders' personality, mental state, and personal background. While the case may be individualised, the elements brought forward at trial will only serve to consider the severity of death sentences not that of LWOP. In other words, the

mitigating evidence pertaining to the offender will only be capable of reducing the death sentence to life imprisonment with no possibility of release, but if the jury decides not to sentence the offender to death, the mitigating circumstances evidenced during the Capital Trial will have no bearing on the application of LWOP. As such, the individualisation of a capital case will only influence appreciations of capital sentences but not the alternative mandatory minimum, LWOP. The sentence, regardless of its severity, will be imposed on individuals whom defence lawyers, prosecutors and sentencers know, and have officially acknowledged, suffer from mental illnesses or have experienced abuse and violence.

At the post-conviction stage, the proportionality test that would be applied to LWOP sentences fails to provide a comprehensive appreciation of elements pertaining to the offender's culpability, prolonging the effects of mandatory sentencing and felony murder laws that preclude mitigating evidence from shedding light on the punishment's extreme punitive nature. The different procedural stages combined with the felony murder laws in place have curtailed any attempt or opportunity to consider or evaluate LWOP's severity.

The routinization of LWOP further shapes understandings of the punishment's severity by creating a class of prisoners known as 'LWOPs'. Traits that generally make offenders individually and distinctively human, such as race, age, gender, ethnicity, personal stories and social backgrounds, will have had very little bearing on LWOP sentencing determinations. Moreover, the sheer number of cases has rendered those who have been sentenced to LWOP, as Bennett Capers (2012) had suggested, not only indistinguishable but also forgettable. Post-conviction avenues that could otherwise, albeit rarely, help 'remember' these individuals are scarce. By the time the process is closed, those sentenced to LWOP have already largely been made invisible.

The failure to consider these differentiating and humanizing elements arguably reduces those serving LWOP to their sentence and nothing else. Their sentence becomes who they are. By the time the appeals have run out, the participants in this study have been turned into 'LWOPs'. This transformation opens a space for the creation of imaginaries about who these offenders are, what they did and whom they have become, how much pain and harm they endure, and allows for the elaboration of particular treatment behind bars.

Regardless of the minor role death penalty abolitionist play in activating normalizing processes in courtrooms, the system in place has led to an unfortunate alignment between those who seek the death penalty and those who oppose and fervently seek to avoid it at trial. LWOP has become a middle ground, an extreme form of punishment that satisfies both sides of the sentencing spectrum. When prosecutors offer LWOP as a plea deal, some defence lawyers experience it as a success, albeit as a lukewarm one: they have avoided the risk of a death sentence at trial. For prosecutors, LWOP is an alternative they often revert to, as suggested by the sheer number of capital felony murder cases tried as LWOP Capital Trials. Where the sentence is the result of a Death Trial, the punishment is an acceptable 'consolation prize' (Zimring and Johnson 2012: 745) whilst for defence lawyers it can feel like a victory over prosecutors. This convergence of interests echoes what has been highlighted in the political contexts (see Chapters 4 and 5). Regardless of, or despite, the sentence's particular severity, it has become sufficiently malleable to serve competing interests.

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At this stage of the inquiry, it remains unclear how punitive or severe LWOP is. When first introduced in Congress, claimsmakers who opposed the death penalty did not have the knowledge to imagine the punishment's severity; parole and life

sentences were entirely different then. By the time that anti-death penalty campaigners launched campaigns in broader political settings, LWOP had morphed into perpetual incarceration. While still used as a 'way' to remove the death penalty, the penalty's punitiveness has been repeatedly tailored to those specific voters activists have been trying to convince. These predominant imaginaries have eclipsed other competing views, particularly those of prisoners. To address this gap and to re-evaluate prevailing understandings of the punishment's severity, the following chapter turns to prisoners' views and experience of LWOP. It sheds light on how they construe death when serving life with no possibility of parole.

CHAPTER 7—BEHIND BARS: THE DIFFERENT MEANINGS OF DEATH

> We rarely pause to think through the significance of life without parole. We do not even recognize the irony that death behind bars is called life (Capers 2012; 175).

I. INTRODUCTION

In the early 1990s, a group of four young men and women were involved in a spree of robberies, kidnapping and multiple killings in California. The media quickly picked up on the events, depicting the fear these murders caused amongst the local community. Claudia was the youngest of the offenders, and the ringleader's girlfriend. She did not kill anyone but was involved in the felonies that led to the murders and was therefore tried for having participated in criminal activities that resulted in multiple killings. Under the California Penal Code (CPC) she was eligible to either the death penalty or life without possibility of parole. She was 19 when she was sentenced to LWOP. Claudia has now spent 23 years behind bars.[103] She is currently in the Central California Women's Facility (CCWF), the largest correctional facility for women in the United States, which also houses California's death row for women. Claudia, like almost all the 298 men and women who have shared their testimonies and are currently serving LWOP in California, describes her punishment as a death sentence. This contrasts with the predominant assumption that death, in the context of extreme forms of punishment, is generally—if not nearly exclusively—associated with the death penalty.

As a result, capital sentences and sentences to life imprisonment have been

[103] When she wrote her letter in 2014.

constructed differently, with traditional death sentences attracting most of the media and political attention (Dilts 2015; Lurie 2015). This categorisation not only fails to account for other forms of deaths, such as suicides, terminal illnesses or fatal violence behind bars,[104] it also fails to include those other meanings ascribed to death by the men and women who are actually serving the punishment. As such, the Manichean perception of what counts as a death sentence and what amounts to a punishment that preserves offenders' lives is incomplete and rather reductive. Moreover, in a context where prisoners on death row are more likely to die behind bars than to be executed (CDCR 2015), where the death penalty is waning and the use of LWOP is increasing and proliferating, [105] it is important, if not urgent, to attend to these other understandings of death in punishment.

A contrasting, and recent stance has emphasized that LWOP was a sentence to death (e.g. Hamilton 2015). Some scholars refer to the punishment as a as 'death-in-prison' sentence (e.g. Henry 2012: 67), whilst others speak of 'death by incarceration' (Appleton and Grøver 2007: 605). Alfred Villaume (2005: 267) has argued that a sentence to life incarceration is merely 'a semantically disguised sentence of death'. For Yvonne Jewkes (2005), the sentence is like a diagnosis of terminal illness. Shannon Sliva (2015) associates LWOP with a civil form of death, echoing Giorgio Agamben's (1998) notion of 'bare life'. For Sliva (2025:500), LWOP is a 'civil death for the prisoner, who is sentenced to live a shadow life within the walls of the prison and die hind bars'. For David Krajikcek (2015), when the state reverts to LWOP, it is proactively and physically condemning the individual to die within prison walls. Other commentators have begun to draw analogies with the death penalty (see

[104] The question as to whether such forms of death are the responsibility and direct doing of the state, namely whether it amounts to the state's exercise of its power to kill, is beyond the scope of this thesis but warrants further attention.

[105] In California–one of the states with the largest LWOP population–the number of sentences has been multiplied forty times between 1980 and 2012 (Nellis 2014).

chapters in Ogletree and Sarat 2012), coining the notion of LWOP as the 'new death penalty' (Henry 2012: 67) or the 'other death penalty' (Gottschalk 2013: 354).

While of great academic significance, none of these scholarly claims are empirically-based and informed. As such, they miss out on the other understandings of death. Also, by assessing LWOP in light of, and in comparison to, the death penalty, we limit our understanding of the punishment's severity, what it entails, and the extent to which it amounts to a death sentence. Therefore, this chapter explores LWOP in its own terms through the lens of those serving it.

This research does not employ a political conceptualization of death in the likes of Agamben's work. It is also to be distinguished from a more biological understanding of death, which in the context of extreme punishments is generally associated with methods of executions and their medicalization (Denno 2002, 2007, 2009; Groner 2002a-b). Instead, I have employed a sociological approach by drawing attention to the different meanings attributed to death by LWOP prisoners. This stance is situated in the broader scholarship on the pains of imprisonment (e.g. Sykes 1958), which has recently turned its attention to LWOP (e.g. Villaume 2005; Johnson and McGunigall-Smith 2008; Ristroph 2010; Abrahams 2011; Leigey and Ryder 2015).

More specifically, I rely on Ben Crewe's (2011) re-conceptualization of the traditional pains of imprisonment around notions of 'depth, weight and tightness'. Crewe (2011: 520) stresses the importance 'of finding descriptors which allow us to characterize the different components of the prison experience'. 'Depth' speaks to the relations between prison and the outside world. The term was first used by David Downes (1988) to characterize the degree to which the prison was oppressive and psychologically invasive. For Roy King and Kathleen McDermott (1995), the depth

of incarceration related to being held in high security prisons, under highly controlled conditions, and being ineligible for release for numerous years. The concept thus encompasses a sentence's length as well as the levels of security and control, both contributing to removing prisoners from the outside world. Crewe (2015) later stressed that prisoners could be placed under 'deep' conditions within 'shallow' establishments, such as when on remand or parole. According to him, depth in imprisonment thus requires 'paying particular attention to the points at which prisoners are submerged into or merged out of the system' (Crewe 2015: 55).

The 'weight' of incarceration encapsulates some of the qualities Downes categorised under the notion of 'depth', namely the psychological onerousness of imprisonment. The heaviness of punishment refers to the amount of rules, and control and surveillance measures, together capturing the degree of oppression and the omnipresence of penal power (King and McDermott 1995). Imprisonment weighs heavily on prisoners' shoulders. Nonetheless, light penal power can also be oppressive (Crewe 2015). Where power is under-used, prisoners may indeed experience the weight of chaos and feeling of insecurity. Whether the weight of incarceration is experienced positively or negatively also depends on the relations between the staff and prisoners (Crewe 2015).

Imprisonment has changed in many ways since the 1990s when Downes (1988) and King and McDermott (1995) published their works. Fewer demands and less visible controlling measuring are imposed on prisoners. While perhaps less stringent and coercive, penal power remains intrusive and highly demanding. It has morphed into a psychological and informational grip, one that is based on psychological risk assessment and computerized files. Power, Crewe (2015: 59) has argued, runs anonymously and perpetually. For this reason, he proposes a new concept to best

capture feelings of tension and anxiety generated by the uncertainty of the locus and direction of penal power. 'Tightness' represents the 'invasiveness of penal power, the breadth and reach of its demands and the degrees to which it is enveloping, all encompassing, navigate and negotiable' (Crewe 2015: 59). Whereas depth and weight are situated in the present and daily experiences of punishment, tightness bears more relevance to the imagined future (Crewe 2015: 59).

Death, as experienced and perceived by the 299 inmates serving LWOP in California who have participated in this study, runs deep, weighs on inmates' daily lives, while at the same time wrapping them tightly in states of confusion and lingering uncertainties. In giving emphasis to the different and nuanced meanings ascribed to death by those serving the punishment, this chapter moves away from the traditional conceptualization and categorization of life and death sentences. The different meanings of death articulated by the research participants are organized in three broad sections. The first points to the certainty of dying behind bars and impossibility of quantifying the time left to serve, which participants experience as 'living in limbo'. The second section offers a more embodied understanding of death, provoked by ageing and diseased bodies, as well as through the removal of parenthood and parenting. The third section considers how death is experienced as the destruction of former identities, where prisoners' capacity to change is disregarded. Instead, they are removed to the wings and reduced to spectators of others' lives. This thematic structure is not to suggest that each understanding is separate, as they often overlap and are self-reinforcing.

II. LIFE IN LIMBO

You simply have no tunnel or light you just exist in a separate dimension,

> floating it seems between life and death. One foot amongst the living and one foot in the grave. Forever floating, never setting, a nomad, a constant traveller to nowhere, taken over by the set stream of uncertainty… you literally exist simply to die (Rowan, aged 41, served 22 years, African American, Sacramento).

1. Uncertainty of death at first

Recent scholarship on time and imprisonment (O'Donnell 2014; Armstrong 2015) describes how the passing of time shapes prisoners' experience of their punishment and the meaning they ascribe to it. When the punishment is handed down, the meaning of the sentence is at first confusing. LWOP's very name refers to 'life' yet the denial of parole seems to imply death. For some who shared their accounts, there was a sense of initial relief when they escaped the traditional death penalty. At the same time, they recall being perplexed by the finality of the alternative sentence that had been handed down. They write: '[w]hen I was sentenced, the gravity of its meaning wasn't fully comprehensible' (Daniel, aged 30, Cambodian origins, Pleasant Valley); 'I didn't even know what LWOP meant back then' (Mitch, aged 38, served 20 years, Mexican American, Ironwood); '[w]hat does LWOP even mean? (…) It feels surreal' (Sharon, aged 41, served 15 years, Hispanic, CCWF). It is especially hard for those who were sentenced at a young age. At 18 or 19 years old, the sentence felt 'unreal' (Miguel, aged 40, Mexican American, Lancaster), as if it were a 'dream' (Ben, aged 37, Asian origins, served 16 years, Lancaster), or rather 'a nightmare' (Matthew, age 58, Native American Indian, served 33 years, Ironwood).

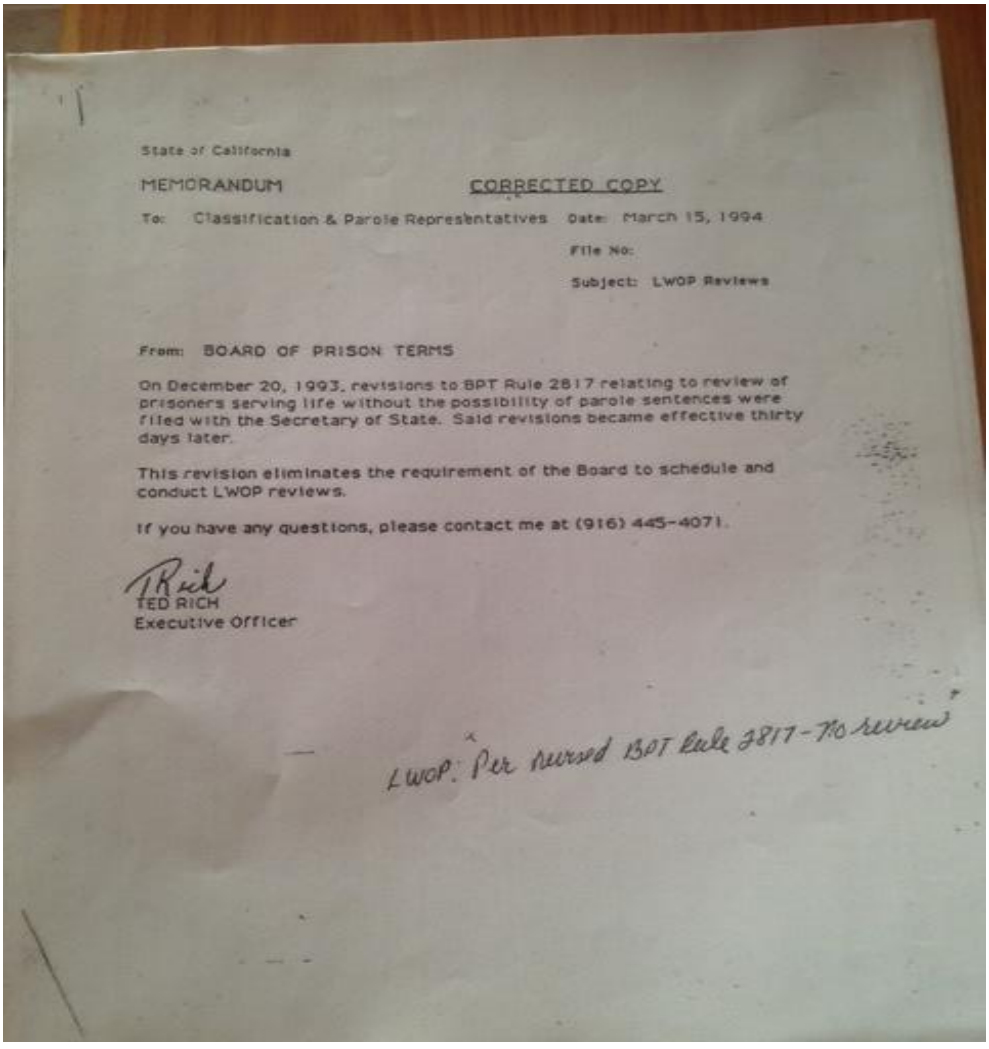
The confusion may have to do with how lawyers, prosecutors, judges and jurors describe the punishment within the courtroom (see Chapter 6). Also, the punishment sits beyond the reach of experience and imagination, making it impossible to make sense of the remote future (O'Donnell 2014: 203). Ascribing meaning to LWOP is made difficult because its duration is impossible to quantify, its end and length are

impossible to grasp or imagine: 'I did not comprehend the length of 'forever'' Jamie writes (Jamie, aged 60, mixed ethnicities, served 26 years, Lancaster); 'one cannot grasp the depth of "no parole"' (Alex, aged 56 years, served 36 years, African American, Lancaster). These accounts illustrate a form of 'temporal vertigo' (Wright et al. 2016: 8) where inmates sentenced to LWOP struggle to come to terms 'with the fact they would be imprisoned for more years than they had been alive' (Wright et al. 2016: 8).

It takes time to make sense of LWOP's duration. As long as appeals are available, participants describe remaining hopeful. The procedural milestones offer a comforting gauge of the time passing by, as well as a distraction from the frustrating and often vain attempts to define the length of their punishment. Appeals offer the means to deny the punishment's scope and reach, allowing prisoners to dispute and disbelieve the temporal parameters of LWOP and its consequences, namely death behind bars (Sliva 2015; Wright et al. 2016). Like corridors or activities behind bars as conceptualized by Sarah Armstrong (2015), appeals provide a means to escape the terminal and somewhat static feature of the punishment. For other participants, appeals allow the suppression rather than the denial of such reality. Rather than disputing the outcome of LWOP, they accept its terminal feature but postpone or suspend its acknowledgement for as long as appeals run. In all these ways, participants' accounts depict a state of disengagement between the self and the sentence, which is known to be more intense and to last longer for women (Jose-Kampfner 1990; Wright et al. 2016).

2. Certainty of death

Until 1993, inmates had a chance to have their sentence reviewed after serving 30 years (see Chapter 4). One participant submitted the document he received announcing the change to LWOP reviews.



State of California

MEMORANDUM CORRECTED COPY

To: Classification & Parole Representatives Date: March 15, 1994

File No:

Subject: LWOP Reviews

From: BOARD OF PRISON TERMS

On December 20, 1993, revisions to BPT Rule 2817 relating to review of prisoners serving life without the possibility of parole sentences were filed with the Secretary of State. Said revisions became effective thirty days later.

This revision eliminates the requirement of the Board to schedule and conduct LWOP reviews.

If you have any questions, please contact me at (916) 445-4071.

TED RICH
Executive Officer

LWOP: Per revised BOT Rule 2817 - No reviews

Participants describe how they were informed of the change and how it became clear to them that, unless one of their appeals was successful, they would stay in prison until their death. Charlie remembers (Charlie, aged 56, served 34 years, African American, Wasco):

> I went to my first hearing in September 1991, it didn't go as well as I thought. I was denied three years. My next scheduling was September 1994, which to this day the hearing never took place.
>
> When I was first denied the three years, changes were made with the [Board of

> Prison Term] now Board of Prison Hearing on December 23 1993 field with the secretary of state board to conduct only life with parole hearings. I was in shock. I remember clearly tears just fell from my eyes. I had given up then, all hope had left me.

Joe has a similar memory of the brutality and suddenness of the changes made to the law (Joe, aged 54, served 36 years, White, Sierra):

> On 26 May 1978 attended a classification committee and was told that I would be afforded a chance in twelve and a half years to appear before a deputy commissioner of Board of Prison Terms for a life without possibility of parole documentation review.
>
> When I did go before the board the first time I was denied and told that in 1993 three years later I would once again come before them, all four members concurred with that decision. Three years passed and I had not heard anything about my upcoming board appearance and I decided to go to my counsel to ask about the reason behind the delay.
>
> I was told that the law that had made it possible for me to go to board and possibly be released had been repealed and no longer would I be given the opportunity to appear before the board again until I completed thirty years of my sentence.
>
> Finally the time once again had come and I had completed a total of three decades in prison, and I once again went and saw my counsellor and informed him I had completed the thirty years and entitled to a parole hearing.
>
> I was informed that regulation had also been repealed and that the only way I had any chance of freedom would be if I field an application to the governor's office requesting that my sentence be commutated. I turned in the application on 26 October 2010. It's been 4 years and I have heard nothing.

Once their appeals had run out, participants described becoming certain that they would die behind bars. This realisation came as a 'shock' (see also Wright et al. 2016). When Jeff realised what his sentence entailed, he experienced a blow that hit him like the 'nuclear blast in Hiroshima' (Jeff, aged 30, served 13 years, Lancaster). The coming to terms with this new brutal reality speaks to the 'temporal parameters of pain' (O'Donnell 2014) or time-based anxieties (Wright et al. 2016). The time left to live conflates with the time left to serve.

When the certainty of death settles, participants rebrand their punishment. In so doing, they re-appropriate what was at first confusing; LWOP says life but really means death. They thus speak of 'death by incarceration' (Jane, aged 39, served 16 years, Hawaiian, CCWF), or the 'other death penalty' (Sarah, aged 53, served 11

years, White, CCWF), and sometimes use metaphors to depict the finality of their sentence, such as 'I will only leave this place in a pine box' (Carla, aged 40, served 18 years, CCWF) or in a 'body bag' (Gabriel, aged 41, Mexican origins, Kern). The way participants describe their cells also foregrounds their death. Matt asked me to imagine what his cell would look like if the small window was covered and the door cemented. It would be nothing less than a 'tomb', he writes (Matt, aged 52, served 30 years, Mexican American, Calipatria). Jed suggested I try to visualize 'a coffin made of concrete, living in a walk-in closet or a bathroom to be more exact, the same size, same smell just add a bed' (Jed, aged 33, served 6 years, White and Hispanic, Pleasant Valley).

Some scholars may see in this re-appropriation of meaning a 'coping mechanism' (Robert Johnson and Dobrzanska 2005; Leigey 2010; Abrahams 2011; Leigey and Ryder 2015). In rebranding their sentence participants seek to alleviate time-anxieties. It brings peace and reassurance to know and formulate what there is to expect. In reorienting the temporal horizons, they refocus their attention to the present and avoid obsessing about the future (O'Donnell 2016). They also re-acquire agency and self-government. Where rebranding is deemed to signal coping, it supposes that inmates have redefined their understanding of the punishment because certain objective circumstances have changed, namely, appeals have run out. On this basis, it assumes that inmates have essentially remained the same (see Wright et al. 2016). Yet, the very coping mechanisms through which they have renamed their punishment may have been deeply transformative. Inmates serving LWOP permanently change (see Haney 2003). The rebranding of the punishment could also reveal a form of deep and damaging destruction of the self.

3. Uncertainty of time of death

As they regained agency, participants also shared the frustration of not knowing *when* death will occur. This inestimable wait between the realization they have been sentenced to die and their actual physical death, which will mark the end of the sentence, is one of the hardest aspects of the punishment, 'I'm just waiting for the day I either die of natural causes with old age or by my own hands of suicide by calling it quits' (Myriam, aged 29, served 4 years, Hispanic, CCWF); 'I feel LWOP is just basically waiting to die in this place' (Sue, aged 50, served 13 years, Filipino, CCWF).

Perpetual incarceration creates a lingering form of death. To illustrate this wait, some participants compared LWOP to a terminal disease. For Kate, 'LWOP is a slow death, kind of like cancer just hanging on until the final breath' (Kate, aged 58, served 20 years, White, CCWF). For Danny, 'it's a slow death, a slow cancer that makes you rot from the inside' (Danny, 32 years, served 5 years, Mexican and White, High Desert). Others depict LWOP as a slow lethal injection. In the words of James, 'LWOP is like a very slow execution. A lethal injection of incarceration' (James, aged 37, served 17 years, African American, Pelican Bay). Yet, the time left before dying is unquantifiable, it is impossible to measure 'forever' (Davy, aged 45, served 24 years, African American, Corcoran). One inmate described how his nephew had become his measurer of time. As the child grows older, the prisoner measures the time passing by: '[h]e is three and he lets me know how long I have been down', (Liam, aged 31, served 8 years, White, Ironwood). While some participants considered the passing of time as an opportunity to reflect on and observe the changes undergone, how the offender they once were had become an entirely different person, such transformations are likely to go unnoticed and unacknowledged.

The certainty of death, in the context of LWOP, lacks solidity and predictability; it warps and drags. The punishment not only entails a slow physical death, it also provides the space and time to think, dread, fear and worry about the ultimate outcome that awaits them. It makes some feel as if they are trapped in a 'timeless bubble' (Ben, aged 37, Asian origins, served 16 years, Lancaster) or 'strange stasis' (Peter, Mule Creek). Ultimately, the punishment creates a bizarre limbo where inmates describe feeling they are both dead and alive at the same time. 'It's like being stuck in limbo', Frank writes, 'not quite fully alive, not completely dead' (Franck, Kern). Bernard explains that LWOP 'wedges you between death and life in prison' (Bernard, 58 years, served 36 years, African American, Solano).

In sum, death evokes the certainty of dying behind bars acquired once appeals have run out, and replaces an initial confusion caused by misleading terminology. It also points to the uncertainty of the time of death depicted by the process of dying behind bars and the unimaginable wait that will put an end to the punishment. These understandings of death can be situated within a broader scholarship that sheds light on the 'tyranny of the indeterminate sentence' (Mitford 1974: 92), where indefinite confinement and the uncertainty of the future provoke stress and anxiety (Rothman 1980; Mason 1990; see also Wright et al. 2016).

To fully understand how life in limbo is experienced, participants recommend delving into the carceral environment that surrounds them. Will suggests, 'first things first, it needs to be stipulated that serving time in prison is horrible (no matter how much time you're serving)' (Will, aged 34, served 13 years, African American, Sacramento). In the course of their life, inmates serving LWOP will be transferred to many different prisons. Men are first sent to San Quentin, the reception centre. Many then go through Pelican Bay, which is described as 'a war zone'. LWOP inmates are

then automatically locked up in the highest security prisons. Life while serving LWOP will vary depending on the prison they are sent to. Some environments harbour and fuel violence, where deadly stabbings occur and inmates 'live under the gun' (Mel, 45 years, served 26 years, Native American origins, Lancaster). Pelican Bay, Kern and Salinas prisons, for instance, are described as being particularly violent.

In these prisons, participants portray their confinement in exiguous cells where two grown adults can barely stand and walk at the same time. Gemma explains how female LWOP inmates used to be held in the Valley State Prison for Women (VSP), which was 'oriented towards rehabilitation' (Gemma, aged 42, served 19 years, White, CCWF). Due to overcrowding the state of California was ordered to reduce its prison population in 2011 (Simon 2014a, c). Within the first months of the realignment plan, the women's prison population dropped significantly. However, less than a year later, the women's facilities became overcrowded again in part because VSP had been converted into a men's facility. The two remaining female prisons, CCWF in Chowchilla and the California Institution for Women in Chino, were forced to absorb the VSP female population. CCWF in 2013 was operating over its capacity and was the second most overcrowded prison in California (Fleisher 2013). Women participants described being forced to live in dire prison conditions, sharing cells originally designed for four with seven other inmates. They are provided with a limited number of basic hygienic products and sleep on worn out mattresses, causing various different physiological pains:

> Our rooms here in this dismal place are old, dirty, moulded cinder block. Never have been painted (as they were at VSPW–the prison given to the men) these walls are stained, filthy and the flu come through from the rabbits and squirrels in the yard. It's terribly depressing and demeaning to look around at doors rusted, rotted, dented without ever being painted (Anita, aged 67, served 26 years, Indian, Cherokee Origins, CCWF).

Life in limbo is also interminably repetitive. Participants describe becoming automated and senseless subjects. Most of their days are spent keeping alert and responsive to the whistles' grim orchestra: one to wake up, another to go to eat in the 'chow' hall, then another one indicating they must go back to their cell and wait until the lights are switched off. And the same pattern starts over the next day. Jim explains, '[t]he food is the same, comes at the same time, yard, showers, lights on or off, counts, etc. Are all always at the same times except in some type of emergency' (Jim, aged 29, served 9 years, Mexican origins, Pelican Bay).

In addition to being repetitive, life in limbo is determined by prison rules that fall beyond prisoners' power: 'you're told when to shower, when to eat, when you can walk outside' (Andy, aged 27 years, served 6 years, Kern). Some feel they have become animals, living their sentence at a rhythm according to when they are fed. Life in prison is 'akin to being a pet living in an aquarium. You can only watch the world from the inside but you are never able to truly be part of it; you're always being watched and fed according to a schedule' (Bobby, aged 36, served 16 years, White, Tehachapi).

The routine also involves repeated undignified treatment:

> You are crammed into inhumane living conditions; randomly stripped naked in public areas, and ordered to show under your balls, or to bend at the waist and spread your butt cheeks open: you're locked in standing room only cages for hours on end (not cells, cages—like dog kennels)—sometimes naked, or in nothing but your underwear, outside, completely exposed to the elements. And you routinely have the few items of personal property you are allowed to have, damaged, destroyed, or stolen from you by overzealous cops in positions of power, during what they call "security searches". These are daily experiences, and should not be mistaken as a few outstanding occurrences (Will, aged 34, served 13 years, African American, Sacramento).

Life in limbo is rife with sensory disruptions to taste and sight. In the improbably named 'Pleasant Valley' prison, food is 'bland' and 'not fit for animal consumption' (Harold, aged 38, served 16, White, Pleasant Valley), 'chicken patties' are 'probably

produced with pink slime and often are filled with grizzle and bone chips' (Harold). Worse still is the texture of the food inmates are given, 'most food was cooked a week earlier, quick chilled and reheated later. Sometimes producing strange by-products. As in the case of creamed beef where the flour and grease combine to make gross little dough balls' (Harold). Keiran misses 'the taste of green seedless grapes' (Keiran, Mule Creek). Locked inside his cell with no view, Eric can almost 'taste the grey colour of concrete walls and metal doors' (Eric, aged 29, Hispanic, served 4 years, Lancaster). Richard describes the bland colour of his cell (Richard, aged 40, served 17 years, Centinela):

> I live in a cell with no paint on the walls just the bare colour of cement. I have a small window on the ceiling that's right under a skylight so I can see a bit of the sun in the day time I also have a window on the door but it faces the wall so it's not much to see out the door either.

Barry describes the yard in Pelican Bay as being the size of a 'dog walk size kennel' with a partial covering that prevents him from seeing sunlight rays, stars or the moon (Barry, aged 50, served 29 years, Pelican Bay). He adds that there is 'no sight of grass, trees or flowers with their natural scent'. As for many others, human contact has been limited. Barry has not 'touched hands', been 'hugged' or 'kissed with love for decades'.

By contrast, noise and smell are exacerbated behind prison walls. Body odour is prevalent 'because many inmates cannot afford deodorant or toothpaste, and neither state soap nor toothpowder has any kind of fragrance' (Harold, aged 38, served 16, White, Pleasant Valley). In addition, many medications prisoners take 'give them bad breath' (Harold). Some prisons are impregnated with the scent of cow manure, of sewage and human faeces. A number of women describe sleeping on thin, old mattresses that smell of dust, mould and sweat. Noise is a combination of 'loud, screeching incoherent announcements' and the result of placing a large number of

people in an enclosed environment. Inmates 'generally start speaking low' but soon 'start talking louder to hear or speak louder than the next guy' (Harold). Soon it is too loud to bear' (Harold). When I read Rowan's letter I could hear the sound of the keys attached to the officers' waists that clatter as they walk up and down the prison alleys (Rowan, aged 41, served 22 years, African American, Sacramento).

III. DYING BODIES

'It is always the body that is at issue' Foucault (1977: 25) once claimed when describing the shift from public executions to prison; the tortured, the incarcerated, the warehoused or the executed body has always been the inexorable locus of punishment (Spierenburg 1984; Garland 2011; Simon 2012a). For the men and women serving LWOP, death is similarly tied to how the punishment affects their bodies.

1. Ageing and diseased bodies

Like other thousands of other inmates in overcrowded prisons in California, participants receive dire medical and health care (Simon 2014a, c). For instance, when inmates experience dental problems, the medical staff do not attempt to cure but rather automatically resort to extracting the infected tooth. Thirty-seven years old Michael describes how he now only has 'half' of his teeth (Steven, aged 53, served 22 years, African American, Lancaster). A report released by medical experts in December 2013 found that the CCWF offered particularly poor medical care and exposed inmates to medical neglect (Goldenson et al. 2013):

> We find that the Central California Women's Facility is not providing adequate medical care, and that there are systemic issues resulting in preventable

> morbidity and mortality and that present an on-going serious risk of harm to patients.
>
> We believe that the majority of problems are attributable to overcrowding, insufficient health-care staffing, and inadequate bed space.

Myriam is thus 'careful to take good care of [herself] because the medical care here is a joke for those of us who aren't going home soon' (Myriam, aged 29, served 4 years, Hispanic, CCWF). While long-term incarceration affects prisoners' bodies, whether they are men or women, research shows that women experience specific medical issues, such as poor gynaecological health, to which institutions often fail to attend (Carlen and Worrall 2004; Currie 2012). Likewise, Alice explains she is not granted mammograms or pap smears (Alice, aged 47, served 11 years, Hispanic):

> I'm a 47-year-old woman who can't get a mammogram nor get a pap smear unless I have (show) "symptoms". That is not the care a woman my age would get outside this prison.

A number of participants worry the length of 'life without' will exacerbate the effects of medical neglect:

> I'm sentenced to live with poor medical care or no care at all for the rest of my life. I am entitled to get the right medical care under the US constitution, instead life without parole receives inhumane medical treatment forever (Alice, aged 47, served 11 years, Hispanic, CCWF).
>
> They give us medicine that don't fix our problem or completely ignore our problem without give in us anything to help us (Myriam, aged 29, served 4 years, Hispanic, CCWF).

For those who shared their experiences, officials who work within prison walls do not care whether they live or die. As they will not be considered for release, the punishment disengages prison and medical staff from the individuals they survey, manage and treat:

> What happens with me, they don't care nor matters to them. (…) They looked at me blankly and brush it aside as if they didn't care (Myriam, aged 29, served 4 years, Hispanic, CCWF).
>
> The staff here would rather you O.D. or commit suicide before intervening in our lives (Lucy, aged 30, served 9 years, American Indian/Hawaiian, CCWF).
>
> The consensus is an LWOP is never going home. So why bother? (Tracy, aged 59, served 18 years, White, CCWF).

Perhaps exacerbating this form of disengagement, California law provides that LWOP

inmates are ineligible for medical compassionate release even if they have less than six months to live,[106] or for early parole if they become medically incapacitated.[107] This is the case for Harry, whose letter arrived two months after he was diagnosed with terminal cancer (Harry, aged 56, RJ Donovan). He attached medical reports to his letter indicating he had less than six month left to live. Susan Atkins, one of the followers of Charles Manson, who was transferred to CCWF in 2008 with a diagnosis of terminal brain cancer, died at the prison on 24 September 2009 as she could not be released for medical compassionate reasons (Woo 2009).

Participants describe how they become passive witnesses of their bodies ageing over the years, incapable of slowing down or easing the process. They describe feeling they are 'just rotting away' (Myriam, aged 29, served 4 years, Hispanic, CCWF). Elly portrays her 50-year-old body as one that has prematurely turned 80 (Elly, aged 56, served 17 years, Mexican origins, CCWF). The process whereby participants observe their bodies becoming diseased and dysfunctional emphasizes their helplessness and powerlessness to change or slow down the ultimate outcome. Jim writes, '[y]ou have no control on your life. I can't control my diet, my health care… the things that will affect the state and the longevity of my life for the rest of my life' (Jim, aged 29, served 9 years, Mexican origins, Pelican Bay). The loss of autonomy over their body has less to do with an increase of material constraints, regulations and strictness. Rather it has to do with the neglect and indifference as well as the lack of intervention over inmates' bodies. It is the staff's disengagement which provokes feelings of anxiety and powerlessness (see Crewe 2011).

[106] CPC 1170 (e)(2)(C); (see also CCR 3076(b)).
[107] CPC 3550(a) & (b); (see also CCR 3359 (1) (a) (3)).

2. Violence and suicide

Death in prison can result from violent altercations. Participants described how some are stabbed or beaten severely. Diseased and ageing bodies may also expose inmates to further violence. Many worry that as they grow older they will be incrementally exposed to bullying: 'I see inmates that are elderly and infirm and I know that one day that will be me—old and feeble, unable to defend myself' (Billy, aged 40, served 9 years, African American, Calipatria). As Mark explains, 'in prison "weak" is the last thing one wants to be (…) if a lifer reaches old age, he becomes too fragile and open for victimization' (Mark, aged 30, served 6 years, Mexican origins, Corcoran).

Thoughts of death come and go. Many of those who wrote to me had considered suicide. Some described elsewhere having attempted to end their lives (e.g. Owens 2013: 3-7). For Anna, suicide was something she had never thought of before but that eventually became a recurrent, lingering thought (Anna, aged 46, served 16 years, White, CCWF). Participants described measuring the costs and benefits of taking the life offered by LWOP. Ending their lives is depicted as a way of reaching the end of their sentence more rapidly. When prison 'becomes your life without any end, then you begin to welcome death: you just want it over with' (Ricky, aged 35, served 11 years, African American, Corcoran). For Anton, the traditional death penalty seemed to be 'the better option', wishing he had received a 'swift' death rather than having to 'sit there till I wither away' (Anton, aged 35 years, served 12 years, White, Salinas). In their mind, the death offered by capital punishment is something that would put them 'out of [their] misery' (Andy, aged 27 years, served 6 years, Kern). For Will (Will, aged 34, served 13 years, African American, Sacramento):

> Death is a theme that plays on a loop in my head. It is prominent. For me, death no longer holds any connotation with anything negative. In my mind's eye, death has become synonymous with "freedom", "release", and "relief"'.

However, as illustrated by one of the chapters in the anthology compiled by The Other Death Penalty Project (see Ledbetter 2013: 15–22), suicide in high-security facilities is difficult (see also Shalev 2009) '[i]t's not the first time I tried to kill myself and, once again, someone came in the nick of time. I am alive, and I don't really want to be' (Ledbetter 2013: 17). Others decided not to take their lives because they felt responsible towards their families who have already been exposed to 'too much suffering' (Quentin, aged 30, served 10 years, White, Pleasant Valley). Julia shares that her children are the reason 'to go on and not give up' (Julia, aged 38, served 12 years, CCWF). Yet, the punishment also affects men and women's capacity to become and be parents.

3. Parenthood and parenting

Scholars have discussed the pains of losing control over fertility that women in prison face (Worrall and Walker 2000: 28). Others have shed light on how imprisonment impairs family relations (Condry 2007), such as parenting children and serving a maternal role (O'Brien 2001) or preserving legal parental rights (Bernstein 2007). It is essential to depart from, and not reinforce, a gendered and normative reading of participants' testimonies, whereby womanhood in particular is conditional on becoming a mother. That said, LWOP prevents men and women from choosing whether or not to have children. It takes away their agency to *consider* parenthood. Many participants were sentenced when they were young. They may not have had children or may not have thought about it.

For some, not having children is a relief, even more so when observing how those who are mothers suffer from being separated from their children. Claudia for example believes it is incrementally harder to serve LWOP for those who have

children on the outside: ‘the most difficult part about this sentence is coming to terms with it… I can’t imagine what the ones with kids go through’ (Claudia, aged 42, served 23 years, White, CCWF). Anna similarly explains, ‘I have no children and am very grateful for that. My heart goes to those men and women serving LWOP sentences with kids out there’ (Anna, aged 46, served 16 years, White, CCWF). For others however, the idea that they will never be able to become mothers supersedes any other pain or suffering caused by the punishment. It leads, at times, to a form of grieving, ‘I grieve the fact that I will never be a mother’ (Roxana, aged 33, White, CCWF); ‘I will never have children nor give mom grandchildren—it’s devastating to me’ (Myriam, aged 29, served 4 years, Hispanic, CCWF).

For the men and women who already have children, LWOP exacerbates the frustrations of not being able to be the fathers and mothers they wish they could be. Since the mid-1990s, inmates serving the sentence are no longer eligible for overnight family visits.[108] Fathers and mothers meet their children in common visiting rooms, where dozens of families reunite for a few hours on set days. The space and place make it hard to build and maintain parental bonds. Anita’s son was six years old when she was sentenced to LWOP. The personal overnight family visits used to help her ‘maintain the bond’ and ‘nurture’ her only child. When the laws changed, Anita describes how sitting in a ‘crowded visiting room’ has made it hard to ‘try to create a safe and ‘normal’ atmosphere’ when her son visits (Anita, aged 67, served 26 years, Indian, Cherokee Origins, CCWF). Anita also writes how arduous it has been to hear her son repeatedly ask her when she was coming home, to which she generally answers ‘Mommy doesn’t have a date yet’.

Compounding matters, the facilities where the participants serving LWOP are

[108] CCR 3177(a)(2).

held are often situated in rural and remote locations, making family visits both costly and time consuming, and therefore challenging to organize and sustain. When those who take care of the children live at a distance, sometimes in different states, the number of visits slowly withers away:

> My children at that time lived with my mother and stepfather in Arkansas, so to make a trip here to California to visit me was very expensive, they just couldn't afford to make the trip here for a visit which was only a few hours for 2 days in a visiting room. I haven't seen my son or youngest daughter since 1996, and it ultimately affected my relationship with my middle daughter (Alicia, aged 55, served 23 years, mixed ethnicities, CCWF).

Similarly, Rachel describes how the ties with her children have progressively waned: 'I have my oldest daughter who writes me about six times a year. I've seen her once in the last twelve years along with her daughter. I also have three sons in law who I also have never met' (Rachel, aged 63, served 16 years, White, CCWF). Many also share a sense of guilt at not being able to be the mothers they wish they could be. Some, like Janet, worry their children will be resentful and grow to hate them (Janet, aged 38, served 2 years, White):

> What I find the most difficult part of my sentence is being away from my children. I have four children that are growing up without me, I think about them calling someone else mom, about them hating me.

Alia is Kenneth Hartman's only child. In a powerful essay, the 19 year-old remembers how she spent most of her childhood weekends in prison to visit her father (Hartman 2015):

> My life started where most go to end, on the grounds of a maximum-security unit in the middle of nowhere California. (…) On Sundays, mom and I would drive down Avenue J. My smile would grow as the watchtowers came into view, the barbed wire of the fences shining in the desert's hot morning sun.

Prison never really felt like prison. Instead, Alia associated it with a strange form of home, a playing field where her father, in his chambray shirt and jeans, would build LEGO and read her stories impersonating each character. Alia now studies in San Francisco, making regular visits more difficult to maintain. However, she still travels

as often as she can back to Los Angeles to visit her father (Hartman 2015):

> The prison has never been a prison for me. It's a strange type of home, a place that lives inside of me, and the guiding presence of my father's calm voice in my head.
>
> (…) When I think of my dad, I have to go back to the beginning. He was the most excited father; constantly ready for any and all of the games I wanted to play, a master LEGO builder, who excelled at putting on as many voices as each book he read to me required. My dad, in his chambray shirt and blue jeans, with his old and fading tattoos suggesting something more sinister, the things the television teaches you make a person harder to love.

As an embodied experience, death is described as a form of distant and passive observation of bodies ageing and becoming ill, where inmates are incapable of slowing down or easing the process. Feelings of neglect and disinterest exacerbate such experience of powerlessness. Death is also associated with not being able to become and be mothers and fathers, where parenthood in particular is not only perceived as a way of quite literally 'giving' life but also as a means to give sense to their own lives. As time passes by, the punishment progressively destroys who these men and women once were. Death here is conceived as the scarcity of attention and acknowledgment afforded to these men and women's efforts to present themselves as individuals capable of living and dying, and more generally, of changing. They are reduced to spectators of others' lives and deaths.

IV. THE LIVING DEAD

In *Asylums*, Erving Goffman (1961) details the processes through which patients hospitalized in a psychiatric unit were coerced into redefining their identities. The 'mortification of the self' is described as the dramatic and forcible removal of patients' understanding of who they once were. Prior to entering the hospital, these individuals had constructed their personal identities and sense of place in society within the social contexts to which they belonged. As hospitalized patients, Goffman

evidences how they are stripped and dispossessed of these usual identities. The former constructions and understandings of who they were are removed and negated, they are 'mortified'. Mortification supposes different acts of degradations and humiliations. The process is also illustrated by the elimination of family, educational and occupational ties. Stanley Cohen and Laurie Taylor (1972) similarly found that inmates serving long-term sentences suffered from identity destruction anxieties.

In both studies, staff members (whether prison or hospital) played a central role in the mortification process. Through their exercise of authority, discipline and control, they actively participated in the stripping of patients' sense of selves (Goffman 1961: 149). The part played by 'others' in the definition and removal of the self is in fact central to Goffman's work. In his earlier seminal work, the *Presentation of the Self in Everyday Life* (Goffman 1959), he highlighted the significance of human interactions in the definition of personal identities. Interactions were analogized to theatrical performances, where individuals, like actors, present, define and adjust their appearances and sense of selves to varying audiences.

Behind prison walls, LWOP prisoners like inmates more generally are also forced to redefine who they once were. Their former selves and the places they held in society are similarly mortified (see George 2010; see also testimonies in Hartman 2013). For instance, Rowan was incarcerated when he was 18, he has 'never use[d] the Internet', never 'been on a date', 'held a job', never 'had a drink in a club or a bar', and 'never been to a family reunion as an adult' (Rowan, aged 41, served 22 years, African American, Sacramento). Life in prison until they die becomes their entire life. One participant wrote, 'the sentence is the entirety of your life for as long as you shall continue to breathe' (Josh, aged 53, White, Lancaster).

Prisoners, like theatrical performers, adjust their presentation to their audience,

whether it is medical or prison staff, parole board members, wardens, other inmates or visitors. Yet, participants describe having neither a stage on which to perform and define themselves as individuals capable of changing, nor an audience capable of witnessing such changes. The punishment simultaneously forces them to change, mortifying their former identities, and at the same time fails to recognize such metamorphosis. For these reasons, participants describe themselves as the 'living dead'. The process involves different forms of discrimination and exclusion, scarce attention and recognition to inmates' capacity to change, and ultimately being removed to the wings and reduced to spectators of others' lives and deaths.

1. Exclusion and discrimination

> In California, Life Without is used, quite often, as a means of further punishment above and beyond what everyone else receives. These are just a few examples: until recently, you could progress to a lower level custody and housing based on your good behaviour. That is everyone except those serving Life Without. You, based on your behaviour, are allowed overnight visits with your family. That is everyone except those serving Life Without. You can go to a Board to see if you are suitable for parole. That is everyone except those serving Life Without. You can go to self-help classes and work in a Prison Industry Authority and make a liveable wage. That is everyone except those serving Life Without. For most rule change that Sacramento makes concerning prisoners, it is quite often that they include that clause, *'Everyone except those serving Life Without'* (Hubert, aged 63, served 32 years, White, Lancaster, emphasis added).

The lives of the men and women in this study are rife with different forms of discrimination and exclusions. In addition to feeling exposed to worse prison conditions than the men serving the same sentence (see above), the female participants also described being treated differently in comparison to women serving traditional death sentences. Chowchilla holds both women on death row and those serving LWOP, yet the two groups of inmates are kept separately and under different conditions. Perceptions vary as to which is worse. Women serving LWOP are held in the general population and housed in cells with other women while those condemned

to death are held in single cells and do not mingle with the general population. For some, being held in the wider prison population is worse as they are exposed to violence and noise, by contrast '[death row inmates] don't have to deal with other roommates or all the fighting' (Sue, aged 50, served 13 years, Filipino, CCWF).

They also stress that not having privacy or space entails that LWOP prisoners cannot really 'settle' in or make the place feel 'homey' (Marie, aged 36, served 16 years, CCWF). For Bonnie however, LWOP inmates are held in better conditions than those on death row because they are less restrained (Bonnie, aged 59, White, CCWF):

> It is vastly different from the segregated, lock-down existence of death row inmates. We are free to roam the entire institution within reasonable boundaries, are never handcuffed or treated roughly unless we instigate trouble. Death row inmates are escorted everywhere fully cuffed and chained and accompanied by no less than two guards' arms with batons, pepper spray and other restraining devices.

Participants described being frustrated by the fact that prisoners convicted to death enjoyed greater legal representation, in particular accommodating post-conviction litigation (see Chapter 6). Almost all shared, sometimes at length and with great detail, the programs they wish they could apply to, and the repeated rejections or discrimination they had experienced. Because of their sentence, they are excluded from a number of vocational and educational programs:

> The most difficult part of my sentence and the hardest part of my sentence is the discrimination. I am not entitled to the same programs that are offered or even available to lifers. We are not allowed to take any of the classes that are offered to lifers (Gemma, aged 42, served 19 years, White, CCWF).

For instance, the California Department of Corrections introduced the 'Long-Term Offender Pilot Program' (CDCR 2014). It provides treatment such as for substance abuse, criminal thinking, anger management, family relationships and victim impact to inmates who are serving long-term sentences. The program, however, requires that prisoners have already come before the Board of Parole Hearings for an 'Initial Parole

Consideration Hearing', thereby explicitly excluding those serving LWOP. Lancaster State prison, where Kenneth Hartman is held, provides a Progressive Programming Facility, also known as the Honor Yard, a space forged by Hartman and approved by the CDCR, which is free of violence, racial tensions, gang activity and illegal drug and alcohol use (Hartman 2009). This program is the only one of its kind in the United States. The HBO documentary, *Toe Tag Parole: To Live and Die on Yard A* (Raymond and Raymond 2015), focuses on the men living at The Honor Yard, who seek self-improvement and spiritual growth through education, art and music therapy, religious services and participation in peer-group sessions. The documentary features interviews with inmates who describe growing up and old behind prison walls. The interviewees explain that they will only be released when they die, the equivalent to being given a 'toe tag parole'. Participants who have been or are currently held in Lancaster praise the program. Kevin, for instance, was able to attend certain self-taught classes, '[t]hrough peer-taught classes allowed in the Honor Program I was able to learn to write professionally under the tutelage of Hartman' (Kevin, aged 47, African American, Lancaster).

Prisoners serving LWOP are eligible for a limited number of paid jobs. This is in part due to a highly stringent 'visibility' requirement, which applies to those serving the most severe sentences. The rationale being that they present a heightened risk of violence and escape, and should therefore be supervised and visible at all time. Offenders sentenced to LWOP are thus held in Close A custody for a minimum of three years and then moved to Close B custody for seven years.[109] Close A custody allows inmates to participate in programs and activities scheduled between 6am and 6pm as long as 'visibility is not compromised in areas located within the facility

[109] CCR 3377.2(b)(1)(A).

security perimeter'.[110] In Close B custody, inmates are allowed to participate in program assignments and activities later in the day but only 'in areas located within the facility security perimeter'.[111] In Close A and B custodial facilities the number of jobs that meet the visibility requirement are few. As Todd explains, they cannot get 'kitchen positions' which requires a 'gate-pass to go through to work' (Todd, aged 55, served 33, Centinela).

In addition, LWOP inmates are *a priori* ineligible to work under the Prison Industry Activity schemes, unless the institution uses its discretion to decide otherwise. The California Code of Regulations (CRC) provides that only those 'institutions/facilities with a population resulting in inmate worker unavailability may utilize inmates with LWOP sentences with the approval of the Warden at the institution/facility of a case-by-case basis'.[112] When LWOP prisoners do have access to paid jobs or programs, they are often the last to be picked as priority is given to those with a hearing or parole date:

> When it comes to jobs in the prison we are put at the bottom of the lists (Tracy, aged 59, served 18 years, White, CCWF).
>
> As far as the programming goes, LWOPs are pretty much deprived of 'good' jobs. The last for pretty much everything (Miranda, aged 31, served 7 years, CCWF).
>
> Serving my LWOP at Calipatria State Prison I wasn't able to participate in certain activities. I wasn't able to partake in work-exchange program, which we learn basic trades, such as learning how to fix small engines, to learn how to repair upholstery, learn mechanics, or silk-screening. We also couldn't participate in over-night family visiting program and are last to be assigned a job or education. It took me about 6 years to finally get assigned to a job (Ronny, aged 42, served 18 years, Mexican origins, Ironwood, CCWF).

This discrimination is more stark in lower level facilities. Since July 2013, and due to the overcrowding of California prisons, LWOP prisoners with no 'write-ups' (i.e.

[110] CCR 3377.1. (a) (2) (B).
[111] CCR 3377.1. (a) (4) (B).
[112] CCR 8004 (b)(1)(d)(4).

prison records), are eligible to Level III prisons.[113] While level III facilities are generally less violent and offer a greater array of programs and activities, priority is given to those with a release date or parole hearing.

Not being able to work affects prisoners' capacity to compensate the victims' family, to financially support their own families and even to buy basic hygiene items. As such, there are strains on the ties with those capable of acknowledging their existence. This form of exclusion also makes the passing of time seem endless, exacerbating the feeling of being trapped in limbo. For Myriam, the exclusion is in part responsible for making her life seem meaningless, with no purpose, 'I feel so powerless, stagnant, and so helpless like there's nothing for me to live for' (Myriam, aged 29, served 4 years, Hispanic, CCWF). For Clyde, the right to be a 'productive member of society' has been permanently removed (Clyde, aged 52 years, served 34 years, Pleasant Valley). Moreover, it is experienced as a reminder that those serving LWOP are neither considered nor treated as 'real' lifers: 'I'm not treated as a lifer' (Gemma, aged 42, served 19 years, White, CCWF).

These discriminatory treatments help to erase participants' former identities, their social role behind and beyond bars. The chances of regaining a sense of self are further compromised due to the lack of post-conviction legal representation (see Chapter 6). In all these ways, their sense of self is 'mortified', in Goffman's sense. This mortification extends beyond exclusions, as it is also the result of having neither the platform nor the audience to witness their capacity to change.

[113] CCR 3375.2 (a) (6).

2. Recognition of capacity to change

Rehabilitation, understood as a penal rationale on the basis of which punishment can be justified, has different forms. At times, it has been analogized to spiritual expiation or soul transformation (Foucault 1977), and at others has been illustrated by efforts to turn prisoners into skilled workers (Simon 1993) or by the introduction of treatments deemed to cure criminals (Cullen and Jonson 2010). Central to each conceptualization of rehabilitation is the idea that offenders are capable of changing. It further presumes that others—prison staff, medical experts or parole board members—pay attention to and recognize such changes.

According to the mission statements of the facilities where the participants were held, rehabilitation was paramount. Rehabilitating offenders was to be achieved through discipline (California Department of Corrections and Rehabiltiation, CCWF Mission Statement), work assignments (California Department of Corrections and Rehabilitation, Calipatria Mission Statement) or acquiring 'life improvement skills' (California Department of Corrections and Rehabilitation, Ironwood Mission Statement). It is not apparent from these statements why the CDCR would want to rehabilitate LWOP prisoners as they are the least likely to reintegrate society. Implicitly, however, rehabilitation purports to prevent prisoners, in particular those left with no hope of release, from disrupting the running of the facility. It is imagined as a means to preserve prisoners' own peace of mind and, more obviously, their relationships with each other and with guards, namely for the safe and peaceful running of the prison. Earlier studies had similarly worried LWOP would produce 'a new breed of super-inmates, prone to violence and uncontrollable' (Stewart and Lieberman 1982: 16). Recent research has nonetheless demonstrated that long-term inmates such as those serving LWOP are amongst the best behaved (Cunningham et

al. 2005) and the least likely to engage in disruptive behaviour, at times even helping prison staff maintain order and discipline.

Like earlier conceptualizations of rehabilitations, these mission statements suggest that offenders can and will change, and presume that such developments will be closely monitored. However, participants' testimonies shed a different light on what LWOP does to ideas of punishment as entailing rehabilitation and recognizing offender's human capacity to change. The testimonies of women serving LWOP illustrate that change, and perhaps most importantly the recognition and acknowledgment of change, is essential to their construction of self, to their sense of feeling alive or dead:

> I work hard day, night, weeks, months, years, to show that I'm a rehabilitated woman, when these other women who are running in and out of here don't care if they get rehabilitated or not. LWOPs care about their rehabilitation (Susan, aged 55, served 19 years, African American, CCWF).

Yet, no matter what those serving LWOP do to change, it will have little bearing on their prison experience: '[a]ny improvements, growth, maturity will go unnoticed for the rest of my life' Oliver pointed out (Oliver, aged 33, served 8 years, Kern). The punishment even disregards inmates' capacity to become terminally ill (see above). Instead, the sentence freezes their identity the day they are found guilty of the crime. A man who was sentenced to LWOP at 19 years old writes that the hardest part of the punishment is realising that society had given up on him when he was young (Mitch, aged 38, served 20 years, Mexican American, Ironwood). In Jonathan Simon's words (2012b: 2082), 'LWOP is a punishment that offers no promise of let-up, regardless of how much the prisoner repents or is rehabilitated'. The sentence is 'unmediated by any further consideration of the prisoner as a distinct human being' (Simon 2012a: 282).

Not only will such changes be regarded as irrelevant, the punishment also

provides few means to help achieve them. Inmates serving LWOP are given neither platform to demonstrate any such efforts to rehabilitate (such as through access to parole board hearings) nor an audience to observe, measure and witness such changes. It is less that the exclusion from jobs and programs impacts inmates' capacity for change, as a number of participants detail how they have developed other means to evolve, progress and adjust. Rather, the discriminations discussed above means that the men and women serving LWOP have fewer opportunities to demonstrate and share to others their changes and development. The limited access to legal representatives further hampers the acknowledgment of their capacity to change.

Many reach the conclusion that rehabilitation is 'useless' (Henry, aged 34, served 7 years, White, Pleasant Valley) or 'fruitless' (Gabriel, aged 41, Mexican origins, Kern). Ross speaks of the 'irony' of not being given the death penalty because jurors believed he could be 'rehabilitated' (Ross, aged 47, served 17 years, Kern). By disregarding offenders' capacity for change, the criminal justice system treats offenders as if they were already dead. The unconcerned state, Herbert writes, 'is just waiting for me to die' (Herbert, aged 38, served 22 years, Mexican origins, Ironwood). The punishment not only freezes their identity the day they have been found guilty of the crime, it also forces prisoners to become, drawing on Goffman (1959), 'spectators' of other people's lives and deaths.

3. Spectators of other people's lives and deaths

> Where death row inmates acquire fans, advocates, and supporters to their plight over the years. Even if they don't reach that unenviable day when they are put to death. With every person who leaves their life there are others willing to step in. For LWOP prisoners there is no fanfare. We have no glorified story to tell in a book deal. No media request to tell our story or do a movie about our lives. When our wives and girlfriends leave us there is no social gathering of women awaiting our availability. When friends move on there are no support groups or prisoners' advocacy groups there to pick us up and help us to move on. And

> when we run out of money and our attorneys step down; we become law students without the professors and law scholars to instruct us. You realize that the inevitable fate you face is loneliness, financial despair, and incarceration until you die (Roman, aged 43, served 20 years, Black, Solano).

As their punishment unfolds, participants described how becoming alienated from other people's lives, whether of other inmates, prison and medical staff, or of their own families and friends. While they are held in the general population, participants witness those who are eligible to parole and release dates come in and out of prison. Many become frustrated, realizing that they will never get to plead their case, be allocated a review date or be considered for release. Again, these are reminders of their differentiated status and unacknowledged existence:

> Being an LWOP is hard when you see everyone running in and out of prisons (Susan, aged 55, served 19 years, African American, CCWF).
>
> I sit everyday watching women with "short time" come back and forth, and it creates anger, and resentment towards those who do not appreciate their freedom (Lucy, aged 30, served 9 years, American Indian/Hawaiian, CCWF).

Visits from family members become avenues to experience life through the accounts of others. When such ties wither away, the participants continue to imagine others' lives. Because they are unable to attend the funerals of their loved ones, prisoners serving LWOP also become distant observers of the passing of family members and friends. This in turn shapes how they perceive their own death. The death of their loved ones often means they will die alone, reinforcing the idea that their death will go unrecognized. Ania writes, '[w]hen I die, how long will they allow someone in my family if living come pick up my body?' (Ania, aged 35, served 16, African American, CCWF). Dominic worries, 'I don't fear death, what I fear is a cage, growing old and dying in it one day. There will be no one there to come and claim my body so I can have a proper burial' (Dominic, aged 40, served 21 years, Corcoran).

Because of the discrimination and the disavowal of their capacity to change, and as spectators of others' lives and deaths, participants consider the punishment to have turned them into the 'living dead'. They feel they are perceived and treated as being

barely human: ‘I’m no longer being seen as a person, let alone someone’s child, grandchild, big sister, for the CCWF only sees me as state property and a CDC#’ (Myriam, aged 29, served 4 years, Hispanic, CCWF). Some prefer analogies to objects to illustrate such de-humanization, comparing themselves to ‘trash’ (Tracy, aged 59, served 18 years, White, CCWF), ‘dirty rag’ (Alice, aged 47, served 11 years, Hispanic, CCWF) or ‘pincushion’ (Myriam, aged 29, served 4 years, Hispanic, CCWF).

V. CONCLUSION: THE TIGHTNESS, WEIGHT AND DEPTH OF DEATH UNDER LWOP

When serving LWOP, death bears different meanings. While less coercive and visibly invasive than executions, the inevitability of their death in custody holds a ‘tight’ grasp on prisoners’ existence. Once the certainty of dying behind bars settles, death becomes omnipresent, hovering over inmates’ heads and permeating many aspects of their existence. It is illustrated by the ongoing difficulty to quantify the duration of the time left to serve, which becomes, as years go by, conflated with the time left to live. Death also penetrates the men and women’s bodies. Participants describe how they lack the necessary means and medical attention to slow down the ageing process or to address illnesses. Prisoners’ autonomy is less constrained or controlled, than it is unacknowledged, or unaccounted for. The punishment further precludes them from giving life in becoming or being parents. Death also takes the shape of those repeated exclusions and forms of discrimination, all reminders that changes to their personalities and health will go unrecognized and unnoticed. Death is rampant and progressive. It flows continuously, occupying the body and the mind, and shaping multiple aspects of these inmates’ behaviours, cognition and identity. Its breadth and

reach, and the degrees to which it is enveloping, all-encompassing, and non-negotiable illustrate the invasiveness of death when sentenced to LWOP.

At the same time, the prospect of death is experienced as something that is 'heavy' in the way it inexorably affects these men and women's bodies, that is, ageing, diseased and dying bodies. Death also weighs heavily in the way it is static: the very locus of where these inmates exist becomes the place of their impending death. Their cells become their tombs. Moreover, the punishment refuses to recognize prisoners' capacity to transform, instead freezing their personalities and identities from the moment they are found guilty and sentenced; they are trapped. At the same time, weight as conceived by Crewe (2011) also speaks to a certain lightness, in particular when penal power is under-used or less visible. The form of death that emerges from LWOP is not the outcome of discernible institutional oppression. Rather, it results from a deficient and neglectful use of such power. Penal power, in the context of LWOP, is unconcerned with the prisoners' capacity to live, to become ill, and to ultimately to die.

Death runs 'deep', where depth points to the distance created between inmates and the outside world. The length of the sentence and its locations removes prisoners from the rest of society. Their ties with their families and friends gradually wither away, exacerbating the distance between prisoners and the free society. The depth of death is further illustrated by the multiple exclusions from activities, jobs and programs. Instead, prisoners serving LWOP are forced to become first-hand witnesses of people coming in and out of prison. Compounding matters, the punishment excludes them from being considered as terminally ill bodies, justifying earlier release, and further disengaging medical and prison staff from these inmates' lives and impending deaths.

These different understandings of death shed new light on what amounts to death in the context of extreme forms of punishment. These testimonies provide a new and important lens to appreciate the exercise of state power in deciding who must die and who deserves to live. Most importantly, in light of such findings, reforms that propose replacing the death penalty with LWOP should be carefully reconsidered.

CHAPTER 8—CONCLUSION: IN THE SHADOW OF DEATH

When we stand very close to a painting, it is often surprising how little we actually see. Some splashes of colour, darker shades may appear at the corner of the eye but the overall picture remains quite murky. At the start of this research, the story about LWOP was equally confusing and puzzling. On the one hand some prisoners, including inmates who were sentenced to the death penalty, described it as hellish. On the other, the punishment had been largely embraced, including by those who challenge inhumane treatments and defending fundamental rights. Despite its apparent cruelty, the punishment was expanding and proliferating across the nation, particularly in California. Close up, the story of LWOP did not make much sense.

A small step back from the painting, shapes and movements will start to take form. With perspective, a story begins to unfold before us. From a similar standpoint, and with the help of multiple types of data, what gradually emerged from this research is that LWOP had been normalized through processes of routinization, restrained visibility and denial. What further became noticeable is that above the mechanics of normalization a dark shadow hovered, that of the traditional death penalty. While withering, capital punishment continues to drive and orient penal policies and actions in the penal field. Where does that leave those who are committed to challenging the death penalty? Where do they stand in the picture?

As we take a step further back and appreciate the painting in the larger gallery room, we may notice similarities and differences with the artist's other works. We may begin to situate the piece in time within a particular artistic movement. Where does LWOP stand in the greater penal landscape? What does it express as a penal phenomenon?

Those with more expert creative minds may try to imagine the painting differently. How would a particular artist have represented a similar scene? What technique would she or he use? How much emphasis would be given to this or that part of the picture? Looking ahead, we may wonder what the future holds for LWOP. In one imaginary and futuristic world, the death penalty would be removed; in the other it would be lingering on. What conversations could we then imagine about LWOP?

I. WHAT HAS HAPPENED?

1. The Normalization of LWOP

The normalization of LWOP's severity has been made possible through different processes. Harking back to the three guiding concepts this thesis has relied on—routinization, visibility, and denial—LWOP's severity has been made to seem normal in the following ways. Where routinization is illustrated by the scale of a phenomenon, this thesis has shown that, since being introduced for capital murder in the late 1970s, LWOP has been used in great quantities, and has been disproportionally applied to African American and Latino men. While the punishment has been handed down disparately across the state, California has been churning out LWOP sentences. Over the last 30 years, its use has multiplied 40-fold.

The representation that has come to predominate in the penal field is that LWOP is less inhumane than the death penalty, as well as more efficient and cheaper. This understanding has also been broadly disseminated, in Congress, then into the broader political sphere, and concomitantly in legal settings. This particular framing has been shared by large and diverse groups of newly called death penalty

'abolitionists', which include conservatives, victims' families, district attorneys and law enforcement officials. These new abolitionists now side with those who traditionally opposed the death penalty, such as religious and human rights organizations, left-leaning academics or defence lawyers. In sum, many have championed the idea that LWOP is a 'better' extreme punishment in comparison to the death penalty. Public polls, which best illustrate quantity and scale, have been central to legitimizing and sanctifying this claim, and to reconciling seemingly incompatible penal interests. As a one-size-fits-all punishment, LWOP has had the extraordinary capacity to provide 'Justice for Everyone' (Chapter 5).

Scale is but one aspect of habituation patterns, it offers a snapshot in time that underscores quantity as opposed to regularity and durability (Chapter 2). Routinization is also illustrated by how we can grow accustomed to conditions to which we are regularly and routinely exposed. We know that, according to statistics and official figures, since the late 1970s, sentencers have routinely handed down LWOP. In political settings, LWOP has also been regularly discussed as a means to remove or sustain the death penalty. While works on routinization describe how conditions become habitual overtime, no such habituation process seems to have occurred with regards to LWOP. From its inception, LWOP has—with few exceptions such as LWOP for juveniles—only rarely been cast as a shocking sentence. Rather than *becoming* normal, LWOP has somehow always *been* normal. If anything, it is the intensity of its normalization that has developed and increased over time.

Routinization through scale and habituation has helped to blunt LWOP's extreme severity. The regular and repeated use of the sentence, as well as the widespread dissemination of a particular representation of it, has helped to reinforce

the idea that LWOP is a lesser and better evil than the death penalty. In this sense, the routinization of LWOP has helped define the degree of its severity. However, prisoners experience the punishment very differently and smaller, less prominent activists and interest groups who oppose the death penalty have not grown habituated to LWOP's extreme punitiveness (Chapter 7). This points to the fact that routinization through scale and habitation may not necessarily define a punishment's severity (Chapter 2). Through numbers, durability and regularity, various forms of penalties can become normalized regardless of their degree of severity. Uncovering routinization mechanisms, however, illuminates the processes through which even the harshest forms of modes of repression (as experienced by less prominent actors) such as LWOP can be made to seem normal. It becomes all the more important to attend to prisoners' and less dominant actors' views of the punishment's severity.

In terms of visibility, LWOP's severity has drawn very limited attention and reaction in both legal and political settings. The punishment has persistently failed to be treated as a 'social problem' (Chapter 2); it has rarely been placed at the forefront of political and legal debates (Chapter 4, 5, 6). There has been no social uproar against it, and legislators have not sought to narrow its use other than for juveniles. The recent calls to reduce the prison population in California post *Brown v Plata* (2011) have largely sidelined LWOP. Reforming LWOP is also rarely a priority amongst interest groups who tend to focus on either removing the death penalty or curtailing solitary confinement. Only very few and often less dominant interest groups have spoken against it. In legal settings, the Supreme Court of the United States has sporadically considered or called into question LWOP's severity. At a more micro level, in courtrooms, sentencers, prosecutors and public defenders barely discuss the punishment's severity or appropriateness in a given case (Chapter 6). It is

only during the pre-trial phase or during exceptional Death Penalty trials that the topic tends to come up.

Recalling the works on 'invisible' crimes (Chapter 2), it is not that LWOP is 'invisible'—it exists, and activists, policymakers, academics, the media and the wider public probably know it does. However, there is little detailed information about the punishment (Chapter 3). When I began this study, very little official data were available; I had to rely on the help of analysts working at the California Congress or with longstanding experience working with the CDCR such as Ashley Nellis from *The Sentencing Project*. To obtain specific details about the numbers and types of crime for which LWOP was handed down, I had to turn to separate district attorney offices. There were not only few official public figures on LWOP, there also had been few attempts to collect and disseminate such type of information. In 2013, someone at the Bureau of Justice Statistics explained they were in the process of collecting data on LWOP for the first time. The task proved to be particularly difficult, the analyst explained, because a number of states, including California, had failed to keep separate records relevant on the punishment. At the time of finalizing this doctoral dissertation, very few academic studies, and even less empirical research, had been completed on LWOP.

Part of the reason why LWOP has received limited visibility may be that both proponents and opponents of the death penalty have vested interests in preserving LWOP as it is (Chapters 4 and 5). It is a political tool to keep or remove the death penalty. It is also instrumental to avoid death sentences in court, or to settle cases quickly. Another explanation for how little attention has been given to LWOP's severity may have to do with the distance created in legal and political settings from those sentenced to the punishment. The sentencing process turns offenders into

indistinguishable 'LWOPs' (Chapter 6). They are then removed in remote high-security facilities, making it difficult to retain any sense of proximity with those serving the sentence. When sidelined from campaigns and reforms, LWOPs are further treated as 'out of sight, out of mind' (cited in Krajicek 2015). The thousands of men and women serving LWOP are not only spatially separate, they also represent a very specific group of people, namely African Americans and Latinos, possibly exacerbating feelings of 'distanciation' (Bauman 1989; Eriksson 2015).

Like normalization through routinization, the limited visibility afforded to LWOP in legal and political settings has directly shaped understandings of its severity. LWOP, in these settings, has systematically been treated as a peripheral and secondary form of punishment in comparison to the death penalty. Where individuals or groups with a certain influence and power in the penal field concede that a particular sanction is not sufficiently problematic to merit their immediate attention and reaction, this concurrence further normalizes the punishment's severity. Whereas normalization as routinization shapes severity through over exposure, here it is under exposure which has helped mould LWOP's punitiveness. Again, there may be no causal tie between a condition's visibility and the shaping of its severity (Chapter 2). The fact that little is known, said or done about LWOP does not say much about its intensity. Prisoners' testimonies are important reminders that LWOP is an extremely severe and cruel punishment. It is the scarcity of research, statistics, campaigning and reforms that have contributed to making LWOP, regardless of its severity, seem normal.

The ways in which the punishment's punitiveness has been framed is also crucial to understand how it has become normalized. In legal and political settings, actors rarely engage, discuss or debate LWOP's severity. In the few Death Penalty

Trials, some attempts are made to shed light on the prison conditions and the type of treatment offenders will be exposed to. However, the knowledge that has dominated the penal field is that LWOP ensures offenders will die behind bars. This type of death is, in comparison to execution, less inhumane. Rarely do actors explore and conceptualize the meaning and experience of 'life' or 'death' in the context of permanent incarceration.

In political settings, those with penological knowledge about crime and punishment originally proposed that LWOP would be permanent and efficient, without seriously engaging with the qualitative nature of the punishment (Chapter 4). This contrasts with the type of knowledge the CCPOA made central in the penal field, that of 'true' knowledge about the carceral world, or 'real life expertise' (Page 2011: 97). Yet—like the trend set by the CCPOA—as LWOP became pivotal to death penalty abolitionist politics in the 2000s, law enforcement experts such as Woodford, with first-hand experience of the prison environment disseminated their expert knowledge according to inmates sentenced to LWOP would be held in terrible conditions, exposed to dire medical, excluded from a number of programs, forced to work, and ineligible to procedural 'privileges'. In both legal and political settings, the punishment' practical features of has been repeatedly underscored; it is cheaper and more efficient, will protect society, and qualm victims' families' suffering.

It is less that the punishment's severity has been 'literally' denied (Cohen 2001). Rather, a particular and partial representation of LWOP has come to dominate the penal field. The framing, according to which LWOP is punitive yet less inhumane and spares taxpayer money, has become hegemonic. It has become dominant and eclipsed other 'imaginaries', to borrow Carlen's (2008) term, namely that of prisoners and less powerful activists. Some of LWOP's punitive features have also been

neutralized through claims that the punishment is justified. The claim is that: prolonged mistreatment is warranted because offenders sentenced to LWOP are deemed to be the most dangerous and cruellest, and thus deserving of particularly severe punishment. Both proponents and opponents of the death penalty in legal and political settings have concurred that the punishment is highly punitive yet mandated for some crimes and offenders. Through forms of implicatory denial, inmates' experience of pain and suffering have thus been overshadowed. Further, as offenders become undistinguishable 'LWOPs', they are at risk of losing their capacity to be seen as victims of ill- and inhumane treatment. Put differently, the denial of their victim status has helped to 'neutralize' the extent of the punishment's severity (Chapter 2).

2. The shadow of the traditional death penalty

Processes of routinization, restrained visibility and denial together help explain how LWOP's severity has been normalized. These normalizing mechanisms have instilled and helped to sustain a particular representation of the punishment's severity: LWOP is severe but, in comparison to the death penalty, is less inhumane; LWOP is severe but, in comparison to the death penalty, serves taxpayers' interests because it is less expensive; LWOP is severe but, in comparison to the death penalty, offers victims' families safety and faster closure. What becomes apparent is that, at the heart of each normalizing mechanism—routinization through scale and habituation, limited visibility and rhetorical neutralization—lies the traditional death penalty. The 'dark at the top of the stairs', as Zimring and Johnson (2012) put it, the drive behind these mechanisms, has always been capital punishment. In the penal field, the regular and widespread use of LWOP, the limited visibility afforded to its severity in legal and

political settings, and partial representations of its extreme punitiveness have systematically being determined in light of, or in comparison to, the death penalty. LWOP's normalization, at the risk of stating the obvious, has to do with its deep-rooted ties to the death penalty. The punishment has emerged, developed and proliferated in the shadow of the traditional death penalty.

From its inception, and now for over 30 years, in both legal and political spheres, LWOP has been portrayed and used as a death penalty tool. At times, it has even been instrumental to preserving capital punishment. Most often, however, LWOP has been used as a means to challenge the traditional death penalty. Moreover, through the Initiative Process (Chapter 4), its fate has been consistently tied to the death penalty in California. Any change to the latter will affect the former. Any reform to LWOP is made secondary and conditional on first attending to capital punishment. Additionally, LWOP has become pivotal to a form of abolitionism, which proposes to *replace* rather than *remove* capital punishment.

In the penal field, the death penalty holds an exceptional place. It is considered, by its critics, as uniquely heinous and morally unacceptable. The punishment triggers unequalled fascination and passions. Capital punishment is deeply embedded in American culture (Garland 2012). If you speak of the death penalty at any form of social event, it is likely everyone has an opinion about it. It often crosses our minds and is food for thought. The death penalty is omnipresent. Within the penal field, there is a subfield devoted to the death penalty (Page 2011: 12, on the imprisonment subfield). There, the rules of the political and legal games differ, and priority is systematically given to the death penalty.

Conceived as a tool to remove the death penalty, introduced as way to secure it and then used to avoid death sentences and lengthy Death Trials, LWOP has been

removed from the imprisonment subfield and cemented into the death penalty one. As a consequence, as the death penalty's subordinate, LWOP's severity has been repeatedly and regularly measured in comparison to, and in light of, traditional death sentences. This constant comparative appreciation means that LWOP's severity has persistently been trumped by understandings about the death penalty's punitiveness. Furthermore, as a 'death penalty matter', LWOP is withdrawn from the prison reformers' critical lens and placed outside the ambit of challenges to mass incarceration emerging within the prison subfield. Whereas overcrowding and prison conditions are increasingly called into question (Simon 2014b,c), LWOP has been largely sidelined from prison reform agendas.

The attachment of LWOP to the death penalty, and its removal from the imprisonment subfield, may also have to do with how scholars have researched it, namely the perspective and methods they have privileged. There is a tendency in the literature on the death penalty to privilege a legal approach, to concentrate on the applicable criminal and sentencing laws, and relevant case law. This perhaps has to do with the fact that some of the most successful attacks launched against capital punishment have been led in court by lawyers (Haines 1996). The primacy of legal perspectives and methodologies may also have to do with the fact that most of the academics writing about the death penalty, in particular in the United States, are trained as legal scholars.

The emerging writings on LWOP (e.g. Ogletree and Sarat 2012) are following similar analytical routes. Because these writings, like those on capital punishment, take a legal approach, understandings of the punishment's severity remain under-researched and under-exposed. It would thus be desirable to engage in more sociological explorations, which focus on the lived experience of serving perpetual

incarceration, distancing LWOP research from that of the death penalty and bringing LWOP closer to the prison subfield.

3. Challenging death: good intentions, unfortunate consequences

> The way in which the death penalty is done away with is at least as important as the doing-away. The roots are deep. And many things will depend on how they are cleared out (Foucault 1981: 459).

How are we to assess those who challenge the death penalty, and support and favour LWOP? How are we to understand their motivations and the consequences thereof? Normalizing mechanisms do not happen in a vacuum. They are the result of choices. Put differently, the normalization of LWOP's severity has come through particular actors' agency in the penal field. The original research question this thesis set out to answer was whether, if at all, and in what ways, those who have strived to challenge the death penalty, in legal and political settings, have facilitated, animated or even activated such normalizing processes.

Have they in any way curtailed the attention and reaction given to the punishment in legal and political settings? Earlier activists, penologists and legislators have offered a new 'way' to remove the death penalty. LWOP was introduced as a means to a very specific end: its *raison d'être* was to remove the death penalty. From its inception, LWOP was imagined as a secondary and instrumental form of punishment, one that would not need attention and reform as long as the death penalty was in place. From then on, death penalty opponents would rely on this strategy in political settings; it would become routine and regular.

The statistical data and utilitarian framing of LWOP abolitionist lobbyist shared with congressmen may also have inadvertently and unintentionally inspired more punitive policymakers in the 1930s and 1940s (Chapter 4). However, certain punitive

populist demands arising from highly mediatized crimes arguably overshadowed anti-death penalty campaigners' utilitarian representations of LWOP. When emphasis was later given in the 1950s and 1960s to the punishment's capacity to preserve offenders' lives and enable their rehabilitation, such conceptualizations were again eclipsed by incapacitative endeavours fuelled by early forms of penal populism and a widespread fear of crime. By using LWOP to preserve the death penalty and reverting to the Initiative Process to achieve this, proponents rather than opponents to the death penalty have tied the former's fate to that of the death penalty.

Because LWOP emerged as a tool to remove the death penalty, but was eventually instrumental in sustaining it, the punishment has gained little political 'visibility'. It has only been a topic of discussion when the death penalty was debated. Abolitionists only raise LWOP to challenge the death penalty and or when proponents of capital punishment threaten to expand the death penalty (Chapter 4). A similar observation has been made with regards to legal settings (Chapter 6). Defence lawyers only draw attention to LWOP's severity during the pre-trial phase when prosecutors consider whether to seek death, or later in one of the exceptional Death Penalty Trials when jurors need to choose between LWOP and death.

Have death penalty abolitionists facilitated the denial of certain features of the punishment? In the broader political sphere, death penalty opponents have promoted a particular understanding of the punishment's severity, one that was intended to echo and address the concerns of a particular strand of voters. This particular imaginary did not engage with prisoners' lived experience and instead emphasized the following two main aspects: the fact the punishment was cheaper and less inhumane than the death penalty. To lend legitimacy to the claim that LWOP was not a lenient trade-off, these campaigners strategically underscored law enforcement and victims' families'

imaginaries of the punishment's severity. In giving emphasis to their perception, and eclipsing prisoners' views, interest groups like DPF and the ACLU-NC have helped reinforce this particular understanding of punishment, one that fitted well within the penal field at a particular point in time. The dominance of such understanding may have been exacerbated by the fact it was disseminated by groups of actors who usually criticize cruel punishment and defend fundamental rights. When individuals or groups who are usually committed to preserve human rights, defend minorities, share and promote such an understanding or imaginary of LWOP's severity, it casts an additional degree of acceptability on the sanction. In courtrooms, litigants who seek to avoid a death sentence for their clients, will underscore LWOP's punitive features, arguing it is a well-deserved punishment.

Have opponents to capital punishment facilitated the routinized application of the punishment? In the early 1930s, Vollmer and Sullivan's understanding of LWOP as an efficient sentence entailed sending greater numbers of offenders to prison. Later, the 1978 Briggs Bill's analyst predicted the punishment would lead to a significant increase of the prison population. Those who, in Congress and in the broader political field, campaigned and lobbied for LWOP knew they might be encouraging the proliferation and use of the punishment. Also, in legal settings, defence lawyers who regularly settle and plead in favour of LWOP are aware of the likelihood the punishment will be handed down by sentencers.

It is, however, essential to differentiate and nuance abolitionists' influence when it comes to the routinization, restrained visibility and denial of LWOP's severity. In the 1930s, it was not unreasonable to support LWOP. Experts such as Vollmer and Sullivan did not intend for LWOP to be far reaching. The punishment was to be limited to very few serious crimes. Also, the very institutions on which LWOP was

grounded—life imprisonment and parole—were very different to what they would later become. They could not have foreseen that LWOP would become an irreversible and widespread punishment.

In the 1950s and 1960s, in the context of the Chessman case and when rehabilitation still dominated the penal field, death penalty abolitionists were cautious not to propose something that would, like the death penalty, be permanent and final. Some ensured the sentence preserved prisoners' right to life and amounted to a constitutionally valid form of 'civil death'. Also, many of those who testified in Congress were actually confused as to what the punishment really entailed (Chapter 4). If anything, experts from the carceral world, such as prison wardens and prison officials, were concerned the punishment would create uncontrollable offenders. It was still not obvious in the 1980s that LWOP meant dying behind bars. By the mid-2000s, when LWOP became pivotal to a new abolitionist strategy of replacement, many of those I interviewed knew LWOP was routinely applied and that prisoners were likely to die behind bars. At the same time, they often said they wished they knew more about the punishment, what it entailed for prisoners.

While the centrality of LWOP in death penalty abolitionist politics arose in a relatively bounded social space, it also happened in relation to external determinants. These included phases of high levels of crime, tough-on crime policies, and austerity (Loader 2016). These external factors have oriented the death penalty subfield and influenced abolitionist actors' practices and actions. In particular, they have penetrated the field and shaped representations of punishment, first as a necessary and efficient form of punishment to tackle crime, and then as a cheaper and less inhumane type of sentence. Whereas horrific crimes in the 1940s and 1970s were the main drivers behind the political instrumentalization of LWOP, from substituting the death

penalty to helping secure it, in the 2000s, the economic context and the arrival of key law enforcement players at the head of leading abolitionists organizations encouraged the politicization of LWOP.

Furthermore, the rules imposed in the legal and political settings have significantly restrained those who challenge the death penalty, leaving them with very little choice but to rely on LWOP. The political reality in California constrains reformers to attack the state's capital statute through legislation. Unless a proposition specifically allows for amendments through the legislature,[114] which is not the case with the 1978 Briggs Initiative, only another ballot measure approved by voters can correct or remove the legislation. Therefore, claimsmakers have sought to convince voters to remove the death penalty by drawing attention to a possible substitute which is already in place.

In legal settings, the rules are equally stringent. Under the applicable criminal and sentencing laws, defence lawyers are pressed to settle or plead in favour of LWOP. They have neither room nor opportunity to challenge the punishment's severity and resist its normalization. They are restrained because the criminal justice system does not allow defence lawyers to *avoid* LWOP; those who challenge capital punishment have very limited space to manoeuvre around LWOP. The same cannot be said of prosecutors, who have extensive space to charge crimes as capital offences and leverage to decide the ensuing procedural route.

Unlike the emerging doctrine that lumps abolitionists together, not all activists and interest groups committed to destabilizing the death penalty have supported LWOP. Some like Thomas, Foley or Tannenbaum, and groups such as the CEDP and The ODPP have repeatedly shared their concerns about the punishment. While

[114] California is the only state that prohibits the legislature from amending initiatives without the proponent's permission (CGS 2008: 10).

Vollmer, Sullivan and later the ACLU-NC and DPF, have campaigned for and promoted LWOP, they were not the only ones doing it. Other anti-death penalty groups and activists, with sufficient agency to decide otherwise, championed such an approach. In 2012, a number of religious organizations and victims' groups, as well as prominent academics and defence attorneys, supported and participated in the abolitionist effort. Moreover, whatever the more liberal actors have facilitated, it does not absolve conservative forces from also participating in different normalizing processes.

Regardless of whether they have played any part in normalizing processes, some abolitionists have acted in good faith, with good intentions at heart. Some of those I interviewed genuinely believed LWOP was a better and more humane sentence compared to the death penalty. Supporting LWOP to remove the death penalty has become somewhat of a tradition, many interviewees explained. Like other forms of habits, this strategy has become engrained and transmitted over time. Others perceived it as a means to an end, and suggested they would shift their focus to LWOP once the death penalty had been removed. Many said that they felt helpless: what more could they do in light of the political reality and legal rules in place? While recognizing the punishment's inhumanity, many saw no other way to abolish the death penalty. Also, a number of the interviewees, particularly those working in legal settings, shared their discomfort with having to plead in favour of LWOP. Further, while Minsker and Woodford were key figures during the Campaign, both have left their positions. Woodford no longer works for DPF and Minsker is no longer responsible for the ACLU-NC's Capital Punishment Project. If DPF launched a new ballot initiative for the November 2016 elections, the ACLU-NC has decided not to take part in this abolitionist effort. Perhaps in not joining the 2016 campaign is a sign

that privately, some regret having promoted LWOP?

It would nonetheless be a mistake to evaluate a punishment's severity, or its normalization, in light of death penalty abolitionists' good intentions. LWOP is not less brutal if promoted and delivered with professed good intentions. Some say that death penalty abolitionists were essentially faced with a dilemma and chose the option that, unfortunately, helped to legitimize an inhumane punishment. The first option was to challenge the death penalty using LWOP as trade-off. This strategy carried the risk of becoming part of a system that permanently incarcerates large groups of individuals who in the main part belong to ethnic minorities.

The second option would have privileged a longer-term campaign, which challenged the death penalty in its own terms and did not require further normalizing LWOP. Such a campaign could have been human-rights based. It could also have concentrated on the more practical side of the death penalty and targeted those companies that provide California with the lethal poison. This is, for instance, the focus of London-based organization Reprieve.

This campaign could also have been led before federal courts, that is, by challenging the death penalty's constitutionality. To a certain extent, this alternative is being explored. In July 2014, federal judge Cormac Carney of the US District Court found that California's death penalty system was unconstitutional on the grounds it was arbitrary and delayed, emphasizing that, since 2006, no executions have been conducted in California (*Jones v Chappell* 2014). The death penalty had become, Carney claimed, a 'life in prison, with the remote possibility of death'; the system in place thus breached the Eighth Amendment. While in November 2015 a panel of the US Ninth Circuit Court of Appeals overturned the district court's ruling, the reversal was not based on merits (*Jones v Davis* 2015). Rather, the judges ruled that the matter

was novel and thereby barred under the non-retroactivity doctrine.

Abolitionists in California have chosen to pursue the first option. They have privileged a short-term rather than a long-term strategy, mostly because the timing felt right to launch such an attack. The early 2000s was a time of austerity; it is unsurprising that the promotion of a 'cheaper' form of punishment resonated well with certain unlikely allies (Chapter 5). Also, when human rights and dignity driven campaigns have been increasingly brought to the fore (Simon 2014c), it made sense to represent LWOP as a less inhumane type of sentence. Some critics argue that, in so doing they have lost their way (e.g Dow 2012). Others suggest that, had they waited and pursued a long-term principled approach rather than opting for a fiscal-oriented short-term strategy, they would have succeeded without having to instrumentalize LWOP.

Rather than casting any sort of blame or responsibility on these abolitionists, an alternative perspective holds that actors who lobby, plead and settle, or campaign for LWOP, have become, if not intentionally, unfortunately, part of normalization processes. In legal settings, those who oppose the death penalty have become an unfortunate *part of* a system that routinely hands out LWOP sentences. In political settings they have helped to disseminate a partial representation of the punishment's severity. They have maintained the relative silence surrounding LWOP. In so doing, they have aligned with those they have opposed for decades; an unfortunate alignment that has helped to legitimize another inhumane sanction.

While they have not steered or created such mechanisms, they have helped to maintain them, to reinforce and enhance them. Alongside others, they have helped to turn LWOP into a mainstream punishment. Put differently, their contribution to the normalization of LWOP's severity is that they have taken part in something that was

already going in that direction. Caught up in this are lawyers, interest groups, academics, law enforcement officials and victims' families. Again, they are not responsible or to blame for creating the normalizing system, but have become a part of it. What legacy will this strategy leave if some decide to later challenge LWOP? What credibility will they have if, in a few years, they decide to reform LWOP? Have those who oppose the death penalty and promote LWOP not become an unfortunate extension of the carceral state?

While the difficulties in doing away with the death penalty are fully acknowledged, the LWOP replacement is a type of death sentence. Investigating 'how' LWOP's severity had been moulded has uncovered certain features of LWOP's extreme punitiveness. Prisoners' lived experience was the very starting point of this study. It was their testimonies that made us stop and pause, and reflect on how, despite its brutality and harshness, the punishment they were serving had been normalized. Following a traditional sociological exploration of the pains triggered by LWOP, this thesis has revealed the punishment is experienced as different forms of death (Chapter 7). Another way of interpreting such testimonies is to recognize that there are essentially two logics when it comes to punishment: the first acknowledges human beings' capacity to change, and the other privileges elimination. Like the traditional death penalty, LWOP follows a logic of elimination. As many participants explained, the punishment is a modern, 2.0 version, of capital punishment. The outcome is the same (prisoners are sentenced to die behind bars) but LWOP is a quieter, less visible and more discreet form of state imposed death. As the death penalty is withering, LWOP seems to have become the 21st century new method of elimination.

Furthermore, LWOP is not just *any* death sentence, it involves the death of very

particular groups of individuals. At this stage of the project, it should be re-emphasized that LWOP is applied, in the vast majority of cases, to African American and Latino young men. The assurance that prisoners will die behind bars permanently removes thousands of Black and Hispanic men and women from society. When such large groups are excluded from society and sentenced to die behind bars, it will surely have ripple effects in minority communities beyond the prison gates. The unfortunate consequence is that those who lobby and campaign for LWOP have unwillingly become a part of a system that pursues such a logic of elimination.

II. WHAT DOES LWOP EXPRESS? NORMALIZATION, MODERATION AND PUNITIVENESS

Where does LWOP stand in the greater penal landscape? What does LWOP express as a penal phenomenon? Does it signal moderation or punitiveness? In penal politics, penal populism or penal punitiveness[115] has predominated the penal field and become the orthodoxy. In the late 1970s, and throughout the 1980s and 1990s, politicians relied on 'tough on crime' rhetoric to gain legitimacy, promising voters severe penal sanctions. The effects of these policies have carried on well into the 2000s. The rise of penal populism has been matched by a decline of penal expert knowledge in favour of putative public opinion. The fears and emotional reactions of the public to crime have often justified the implementation of such coercive measures. Taking crime 'seriously' has been equated with ensuring public safety and offering retribution to victims of a crime. Policymakers have introduced ways to lock-up entire categories of offenders, whether violent or not, for extended periods of time (Zimring and Hawkins 1991; Feeley and Simon 1992; Bottoms 1995; Zimring et al. 2001; Alexander 2010).

[115] For the purpose of this chapter, I use penal punitiveness and penal populism interchangeably.

The causal ties between populist demands and penal politics are not one-directional; politicians have also fuelled and instrumentalized public anxieties to serve political ends, and the centrality of public opinion has been challenged (Beckett 1997; Brown 2006; Matthews 2005).

The literature on penal punitiveness is rich and diverse, often identifying new forms of punishment or re-emerging ones, such as boot camps (Simon 1995), at times focusing on the cultural roots of populist demands (see contra Garland 2001; Brown 2006), or paying attention to more macro factors such as neo-liberalism (Pratt 2007; Wacquant 2009). It is hard to find academic studies that discuss the expansion and proliferation of prison sentences or the death penalty without a reference or comparison to the 'tough on crime' era. Arguments about punitiveness, its ties to populist demands and public opinion, as well as its manifestation through the exponential use of severe penalties, have become hegemonic.

Against this backdrop, however, punitiveness seems to be in decline. Mass incarceration has recently been called into question by a wide variety of actors from the political right, including law enforcement and correctional officials (The Brennan Center for Justice 2015), victims' groups and Republicans, all traditionally associated with the punitive turns. Republican Presidential candidates Ted Cruz and Jeb Bush (Dickinson 2015; Keller 2015) along with religious conservatives Pat Nolan of the Prison Fellowship and The Family Research Council (Dagan and Teles 2012), have criticized the dramatic increase of the prison population, expressing concerns about overcrowding on both humanitarian and fiscal grounds (Gottschalk 2012; Hamilton 2015; Aviram 2015). For instance, Republicans Newt Gingrich and Pat Nolan announced in 2011 the formation of 'Right on Crime', a new justice reform group committed to addressing mass incarceration. They wrote, '[t]here is an urgent need to

address the astronomical growth in the prison population with its huge costs in dollars and lost human potential' (Gingrich and Nolan 2011). The US Attorney General Eric Holder recognized that many sentences introduced during the punitive era were now unnecessary and unacceptably draconian (cited in NYU Law 2014):

> For far too long under well-intentioned policies designed to be "tough" on criminals, our system has perpetuated a destructive cycle of poverty, criminality, and incarceration that has trapped countless people and weakened entire communities—particularly communities of color.

On 27 January 2016, California Governor Jerry Brown proposed a voters' initiative that would reintroduce parole hearings and early releases for non-violent felons. Offered as a cost-saving measure, the new legislation is intended to address California's overcrowding situation (Myers 2016). As such, an assortment of conservatives and liberals agree that things need to change. Right and left suggest reducing lengthy prison sentences for non-violent offenders, releasing older inmates and introducing new opportunities for review and release (Coalition for Public Safety 2015). Similarly, the death penalty, the expansion of which was tied to punitive populist endeavours, has now being severely criticised on both the left and right (Chapter 5).

There is evidence of reductions in penal severity, through initiatives and legislative measures. Since 2009, the national prison population has steadily started to decline (Simon 2014a). In California, 69% of voters in 2012 passed Proposition 36 (*Los Angeles Times* 2012), narrowing the scope of the state's three-strikes law and making the changes retrospective. The American Law Institute has proposed revised sentencing provisions in its Model Penal Code: Sentencing, whereby prisoners would be entitled to a 'second look' after serving 15 years, regardless of their crime and sentence, with such right recurring at 10 year intervals of continued imprisonment (The American Law Institute 2014 paras 305.6.1, 305.6.2). For Simon (2014b: 489),

'US penal policy is shifting'. Things are changing and may be heading towards what Ian Loader (2010) has called 'penal moderation', an era of restraint, parsimony and dignity (see, on dignity, Simon 2014a).

LWOP seems to sit at the crossroads of these two contradictory movements. It emerged during the punitive term, epitomizing the embrace of total incapacitation, and the rise of the victims' rights movement and its infiltration into penal politics. At the same time, LWOP—conceived and used as a means to remove the death penalty—also illustrates the move away from penal punitiveness, befitting the moderation model. In some ways, the punishment depicts elements of restraint, parsimony and dignity. Restraint, Loader explains (2010: 353), evokes the 'moral ambivalence' many citizens feel towards punishment, namely a desire to inflict harm on wrongdoers mixed with feelings of regrets and mercy. From its inception, LWOP has been proposed as a measure that would be efficiently applied and protect society. At the same time, it has been repeatedly portrayed as a merciful and compassionate form of mode of repression (Chapter 4).

It is perhaps less evident how LWOP exemplifies parsimony. Since the 1980s, the number of sentences has dramatically increased, in California in particular. The use of LWOP has even extended beyond the scope of capital crimes. We are told that parsimony should best be understood as proposing a 'minimum necessary', and in this sense is presented with a '[t]reasury mindset' (Loader 2010: 354). The claim is that prisons are expensive and should be used sparingly. From this perspective, LWOP can appear parsimonious. In legal settings, it is handed down as a mandatory minimum, the residue punishment for capital crimes (Chapter 6). In political settings, it has been promoted as a cheaper and more efficient sentence compared to the death penalty (Chapters 4, 5). In this sense, LWOP spares lives, saves money and is an

efficient, minimum necessary to ensure public safety. Penal moderation finally rests on the dignified treatment of offenders. It emphasizes the importance of 'harm reduction' (Loader 2010: 355). LWOP, as Simon (2012) underscores, stands at odds with ideas of dignity and human rights. However, in legal and political settings, it has been systematically portrayed as less inhumane than capital punishment.

What this thesis illustrates is that certain modes of repression can appear 'moderate' and progressive while being extremely punitive and inhumane. Exploring normalizing mechanisms does not purport to propose a new measurement of severity. Rather, it offers a lens through which to explore how a punishment's severity has been shaped to fit either a punitive or moderate model. The particular normalization of LWOP illustrates how penal punitiveness can subsist in the guise of penal moderation. Put differently, evidence of normalization puts a lie to the idea what we may be on this progressive march away from punitive politics. This will be a new challenge for penal moderates.

III. WHAT LIES AHEAD?

There are two imaginable scenarios. In the first, the death penalty is not removed. As long as it is in place, it is difficult to imagine any form of serious conversation about LWOP. It is unlikely the punishment will get any significant attention from the media, policymakers or courts. It is foreseeable the death penalty would continue to fascinate and to trigger unequalled passion and wide-ranging emotions. Even in abolitionist countries, the death penalty continues to attract significant attention, debate and discussion. For instance, in the wake of the recent terrorist attacks in long-time abolitionist France, a number of politicians and members of society have suggested reintroducing death sentences, despite the fact that life imprisonment is

available. In the shadow of the traditional death penalty, LWOP will continue to be anchored in the death penalty subfield. It will be conceived as a secondary means to a greater end.

In the second scenario, the death penalty has been repealed and we are left with LWOP. This would open a space to consider and discuss LWOP. For Simon (2014b: 499), a dignity-enhanced prohibition on cruel and unusual punishment could eliminate LWOP through one of two judicial routes: either by declaring it unconstitutional for certain categories of crimes and offenders, or by removing it in one go following the 'more fully human dignity approach' of the European Court of Human Rights. In European abolitionist countries, there seems to be a growing an interest in life imprisonment. The European Court on Human Rights has taken interest in the matter (Chapter 1) and academic research concentrating on life imprisonment is proliferating (e.g. Hamilton 2015; Hulley et al. 2016). In 2015, van Zyl Smit and Appleton launched an unprecedented worldwide project that focuses on different forms of life imprisonment, including LWOP (van Zyl Smit and Appleton 2016, forthcoming). As van Zyl Smit (2002) once suggested, without the traditional death penalty, life imprisonment would finally be taken seriously.

Whereas the death penalty has successfully encouraged and magnified emotionally charged rhetoric (Garland 2012), it is difficult to imagine how LWOP could 'heat up' the penal climate and provoke similar reactions. Looking at what some American abolitionist states have done with their LWOP statutes is quite alarming. Some, including those deemed to be the most progressive, have actually worsened the features of the punishment. In Pennsylvania, prisoners who avoid a traditional death penalty are held in Supermax prisons and locked into their cells for 23 hours a day. In Connecticut, LWOP is automatically served in Supermax

conditions. This kind of LWOP is taking the punishment to a different level of punitiveness. It is not only mandating a certain death behind bars, it is also aggravating the conditions of confinement under which thousands of men and women are going to serve their sentence until they die.

That said, in a world without the death penalty, some penal reformers may decide to seriously engage with LWOP. They may, for instance, be tempted to improve prison conditions, artificially creating an ideal carceral environment. Yet, an improved Scandinavian-style prison model, where prisoners sentenced to LWOP would be given free access to internet, sport facilities and hotel-like cells, would not detract from the fact that, from the moment the sentence is handed down, any further attempts to change will go unnoticed and not matter. It does not remove the fact that, even in a golden cage, prisoners are sentenced to die in that cage.

This is not to suggest that prison conditions should *not* be improved. Attending to the inhumane conditions in which thousands of prisoners are held is of the utmost importance. However, in the debate about LWOP, focusing on improving the prison conditions misses the fact that the punishment is permanent, irreducible and irreversible. This approach overlooks the key point that the punishment follows a logic of elimination, where prisoners' capacity to change is denied. In some ways, discussing improving prison conditions for LWOP prisoners is similar to improving execution methods. Trying to minimize the pain of killing someone, or rather the visibility thereof, does not change the fact that human beings are being killed at the hands of the state in the name of its citizens. Adding plasma televisions to LWOP prisoners' cells does not remove the fact that they will die locked in prison. Such reforms would be at risk of covering up the punishment's severity, the fact it amounts to death behind bars. Improving methods of executions and improving prison

conditions are distractors from much graver realities. The improvement of LWOP is thus a slippery slope.

A third proposition would be to build on the emotions triggered by the death penalty, and to rely on the momentum created by a move in favour of dignity (Simon 2014a) to challenge LWOP and the death penalty together. If we are to take seriously the task of addressing and removing penal policies that are founded on a logic of elimination from the current American penal system altogether, why not remove them both? This proposal would not exclude the possibility that some offenders would have to remain locked-up in prison until they die for reasons founded on dangerousness. The question of how and who is best equipped to measure it is beyond the scope of this thesis. This alternative route would, however, reject any form of penalty that from the outset assumes prisoners cannot change. In essence it would be committed to giving offenders another chance. The timing seems ripe, perhaps in California particularly, to challenge them together. For one, the death penalty has become a significant 'prison problem' as inmates on death row are more likely to die behind bars, while waiting to be executed, for similar reasons as those serving LWOP sentences. Also, the campaign against mass incarceration has been significant in California, in part because of the order the Supreme Court imposed on the state to reduce its prison population (*Brown v Plata* 2011). For these very reasons, it would be particularly opportune to link the goals of death penalty abolitionism with strategies pertaining to prison reforms.

This leads to two final observations. Some academics have discussed LWOP alongside other lengthy prison terms that stretch beyond the duration of human lives (e.g. Villaume 2005; Henry 2012). While this dissertation focused on LWOP, it is important to draw attention to the broader problem of life imprisonment and to

rethink the categorisation of 'life' and 'death' sentences. In a context where the death penalty is withering and the use of life sentences is dramatically increasing, the particular severity of lengthy prisons terms needs to also be addressed. It is indeed crucial to engage with the meaning of life sentences more broadly that result in 'death behind bars', and to recognize the conceptual limits of construing them as penalties that preserve offenders' lives. Attending to those other forms of extreme punishment would provide an opportunity to discuss a matter that has seemingly become quite taboo, that academics, state officials and interest groups alike have grown averse to: how should we punish the cruellest and worst criminals?

This thesis proposes a conceptual frame that can be used to explore the normalization of LWOP in other states, in particular those that have removed their capital statutes. Have similar processes occurred? Has the abolition of their death penalty statute accelerated, exacerbated or diminished such mechanisms? Focusing on other progressive reformers such as prison reformers would also be interesting. Have they tried to challenge and bring LWOP back within the prison field? If not, for what reasons? What part have they played in the normalization of such punishments? The model could be also used to explore the normalization of other forms of extreme prison sentences. Future researchers may also be interested to examine how normalization and generations interplay. Some questions that could structure future research include: 'Is LWOP the legacy of baby-boomers?' and 'How does the younger generation perceive and understand the sentence's particular severity?'

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This thesis' main argument is the following: at first glance, the story of LWOP is puzzling. It is largely embraced, widely used, and yet some voices suggest it is horrifically brutal. Like the death penalty, the punishment's exceptional severity is grounded in a logic of elimination; it is a form of death sentence. Yet, in the shadow

of the traditional death penalty, LWOP has been modelled to appear progressive and moderate. How has this happened? Through normalizing mechanisms (routinization, restrained visibility and denial), LWOP's extreme severity has been lost and made to seem normal. Evidence of normalization therefore puts a lie to the idea what we may be on this progressive march away from punitive politics. Caught up in this are opponents to the death penalty, academics, defence lawyers, activists. While those who promote, campaign, plead and settle for LWOP are not to blame for activating these processes, they have unfortunately become part of the normalization phenomenon. This thesis proposes that now, more than ever, and even more so in California, it is key to link the goals of death penalty abolitionism with strategies relating to prison reform. LWOP provides an exceptional opportunity for prison reformers and death penalty abolitionists to join and reconcile their reformist efforts.

ANNEX

Alameda County D.A.

Adult Murders Charged with Sp. Circumstances

Year Charged	Felony murders as sp. Circ.	Other sp. Circ.	Total Sp Circ.
2011	4	5	9
2012	12	1	13
2013	4	6	10
2014	7	3	10
Total	**27**	**15**	**42**

Penalty sought in capital felony murder cases

LWOP	Death	Pending decisions	Total
4	0	0	4
12	0	0	12
4	0	0	4
7	0	0	7
27	**0**	**0**	**27**

Charges, Guilty Pleas and Sentences in Felony murder cases

LWOP Capital Trials					Death Trials				
Sentence at trial		Guilty Pleas			Sentence and Guilty Pleas				
LWOP sentences	Acquittals or Mistrial	PG / Other sentences	Pending	Total	LWOP GP	Acquittals	LWOP Sentences	Death Sentences	Total
3	0	1	0	4	0	0	0	0	0
6	0	6	0	12	0	0	0	0	0
3	0	1	0	4	0	0	0	0	0
0	0	0	7	7	0	0	0	0	0
12	**0**	**8**	**7**	**27**	**0**	**0**	**0**	**0**	**0**

Los Angeles County D.A

Adult Murders Charged with Sp. Circumstances

Year Charged	Felony murders as sp. Circ.	Other sp. Circ.	Total Sp Circ.
2011	43	65	108
2012	67	73	140
2013	40	73	113
2014	55	46	101
Total	**205**	**257**	**462**

Penalty sought in capital felony murder cases

LWOP	Death	Pending Decision	Total
28	2	13	43
51	3	13	67
25	0	15	40
18	1	36	55
122	**6**	**77**	**205**

Charges, Guilty Pleas and Sentences in Felony murder cases

LWOP Capital Trials					Death Trials				
Sentence at trial		Guilty Pleas			Sentence and Guilty Pleas				
LWOP sentences	Acquittal/Dismissal /Mistrial/Not Guilty other sentence	PG-other sentences	Pending	Total	LWOP GP	Acquittals	LWOP Sentences	Death Sentences	Total
9	2	7	10	28	0	0	0	2	2
15	6	4	26	51	1	0	0	2	3
2	0	2	21	25	0	0	0	0	0
5	2	1	10	18	1	0	0	0	1
31	**10**	**14**	**67**	**122**	**2**	**0**	**0**	**4**	**6**

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