

WORTHLESS CHECKS?
CLEMENCY, COMPASSIONATE RELEASE,
AND THE FINALITY OF LIFE
WITHOUT PAROLE

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ABSTRACT—Life without parole (LWOP) sentences are politically popular in the United States because, on their face, they claim to hold prisoners incarcerated until they die, with zero prospect of release via the regularized channel of parole. However, this view is procedurally shortsighted. After parole there is generally another remedial option for lessening or abrogating punishment: executive clemency via pardons and commutations. Increasingly, U.S. legal jurisdictions also provide for the possibility of compassionate release for lifers, usually granted by a parole board.

On paper, pardon, commutation, and compassionate release are thus direct challenges to the claim that an LWOP sentence will inevitably and invariably lead to the prisoner's death while incarcerated. Few previous studies, however, have examined the finality of LWOP empirically. In this Article, I present original empirical data on clemency covering the period 1990–2021 in order to investigate the relationship between LWOP sentences and the release mechanisms of executive clemency and compassionate release in both state and federal cases.

Ultimately, the results of this research reaffirm the finality of LWOP in the United States, despite the availability, on paper, of at least three potential release procedures. Only a handful of LWOP prisoners have received commutation or pardon from U.S. presidents, state governors, or pardons boards. Compassionate release has been granted almost as rarely. That said, some demographics tend to have benefited more than others. The findings presented within this Article are relevant not only to domestic clemency and end-of-life release policy but also to litigation dealing with a “right to hope” as a component of human dignity, and to the academic debate over LWOP as a global replacement for the death penalty and a form of “extreme” punishment of its own accord.

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“I don’t want to get buried in Angola [Louisiana State Penitentiary] graveyard because no one passes here . . . This is the end of the line, and if you’re buried here you’re really forgotten.”

—Moreese Bickham[†]

“It’s sad if you have to grow up in prison to change. But we have changed . . . We’re motivated. We’re ambitious. We just want a second chance.”

—Shavonne Robbins[‡]

INTRODUCTION

Since the decline of the rehabilitative ideal and the ascendancy of “tough on crime” politics during the 1970s and ’80s, life without parole (LWOP) statutes have become almost universal within the United States’ many legal jurisdictions.¹ One reason for the rise of LWOP sentences is that they are often promoted as an alternative punishment to the death penalty in murder cases and as a means of abolishing capital punishment that attracts public support.² LWOP sentences are politically popular because, on their face, they claim to hold prisoners incarcerated until they die, with zero prospect of release via the regular channel of parole.

However, this view is procedurally shortsighted. After parole there is generally another remedial option for lessening or abrogating punishment: executive clemency. Clemency is a mitigation or abrogation of a criminal sentence by the executive branch of government, such as by a president, state governor, or pardons board. The power to grant clemency originates from

[†] Moreese Bickham, a former LWOP prisoner at Louisiana State Penitentiary (Angola), was released by parole in 1996 after receiving clemency from the Governor of Louisiana in 1995. During his sentence, Bickham spent two years as a caretaker of the prison graveyard. See Kevin Sack, *After 37 Years in Prison, Inmate Tastes Freedom*, N.Y. TIMES, Jan. 11, 1996, at A18.

[‡] Shavonne Robbins’s mandatory LWOP sentence as a juvenile was declared unconstitutional by the U.S. Supreme Court in *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). Robbins was resentenced to time served after having spent twenty-five years in prison in Pennsylvania. Samantha Melamed, *Women Lifers, Locked Away as Children, Taste Freedom*, PHILA. INQUIRER (July 28, 2017, 5:39 AM), <https://www.inquirer.com/philly/living/women-lifers-locked-away-as-children-taste-freedom-20170728.html> [<https://perma.cc/SU66-VBGV>]; *Shavonne’s Story*, YOUTH SENT’G & REENTRY PROJECT, https://ysrp.org/our_work/shavonnes-story/ [<https://perma.cc/G5RA-K8DD>].

¹ ASHLEY NELLIS, THE SENT’G PROJECT, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA* 3–4 (2013), <https://www.sentencingproject.org/app/uploads/2022/08/Life-Goes-On.pdf> [<https://perma.cc/JVF5-C8LD>].

² Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 605 (2007); Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 190, 208 (Charles J. Ogletree Jr. & Austin Sarat eds., 2012); ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 480 (5th ed. 2015).

the ancient sovereign powers of absolute monarchs.³ As a permanent remedy, clemency can be exercised by two mechanisms: (1) commutations, which reduce sentence severity or convert one sentence into another type, and (2) pardons, which release the prisoner from prison altogether—sometimes accompanied by a vindication of innocence and the restoration of civil rights.⁴

Increasingly, U.S. legal jurisdictions also provide for the possibility of compassionate release for lifers, usually granted by a parole board. Compassionate release ensures, in theory, that LWOP prisoners will not suffer the indignity of dying of old age or terminal illness while in prison. Yet, in practice, two-thirds of state statutes exclude those on death row and some serving life sentences from their ambit.⁵ This practical limitation shifts attention back to executive clemency as a more universal remedy.

On paper, clemency and compassionate release are thus direct challenges to the default expectation that an LWOP sentence will lead to the prisoner's death while incarcerated.⁶ Few previous studies, however, have examined the finality of LWOP empirically.

In this Article, I relay the results of the first exploratory study on the relationship between LWOP sentences and the release mechanisms of pardon, commutation, and compassionate release in both state and federal cases. Ultimately, the findings of this research reaffirm the status of LWOP as a death by incarceration sentence in the United States, despite the availability, in theory, of at least three potential release procedures.

This Article advances two main contributions. First, it empirically assesses the finality of LWOP. Despite its title, a sentence of life without parole does not inevitably mean that the recipient dies in prison. The U.S.

³ Paul J. Larkin Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 454–55 (2020).

⁴ See Andrew Novak & Daniel Pascoe, *Emerging Trends and Best Practices in Comparative Clemency*, in EXECUTIVE CLEMENCY: COMPARATIVE AND EMPIRICAL PERSPECTIVES 187, 187 (Andrew Novak & Daniel Pascoe eds., 2021).

⁵ See *infra* note 159 and accompanying text.

⁶ DIRK VAN ZYL SMIT & CATHERINE APPLETON, LIFE IMPRISONMENT: A GLOBAL HUMAN RIGHTS ANALYSIS 50, 260 (2019); ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 24 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [<https://perma.cc/2AWW-LLHT>]; Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of Life Without Parole*, in LIFE WITHOUT PAROLE, *supra* note 2, at 282, 298. Executive clemency and compassionate release are not the only theoretical challenges to the finality of an LWOP sentence. Below, I also briefly discuss retrospective legislative abolition of certain types of sentences and legislative amnesties. Appleton & Grøver, *supra* note 2, at 603, also mention the possibility of escape from prison. About 1.4% of prisoners escape annually in the United States, but over 90.0% are recaptured. William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 906 (2010).

Supreme Court confirmed the ultimate malleability of lifelong detention in *Harmelin v. Michigan*, stating that “if [a] petitioner’s sentence [of LWOP] forecloses *some* ‘flexible techniques’ for later reducing his sentence [e.g., parole] . . . it does not foreclose *all* of them, since there remain the possibilities of retroactive legislative reduction and executive clemency.”⁷ However, whether this legal malleability on paper makes any difference in practice is another matter entirely. On the side of death penalty opponents who grudgingly support LWOP as a pragmatic replacement, together with death penalty supporters favoring LWOP as an alternative sentence to death where mitigating circumstances exist, two critical empirical questions arise.⁸ First, do LWOP sentences really result in prisoners’ death by incarceration when there still exists the residual option to release through pardon, or via executive commutation, followed later by parole?⁹ Second, are parallel compassionate release schemes used often enough in practice to diminish the “lifelong” expectation of an LWOP sentence?

To investigate these issues, I present descriptive data on clemency grants made in U.S. state and federal LWOP cases between January 1, 1990 and January 20, 2021. I necessarily derive this data from media sources, supplemented by civil society and government publications. I also summarize the existing literature covering the scant publicly available data

⁷ 501 U.S. 957, 996 (1991) (emphasis added). Under the banner of legislative changes also come legislative amnesties and “second look” provisions allowing offenders to be resentenced by a court of parole board after a period of good behavior. Such provisions already exist in California, the District of Columbia, Illinois, Louisiana, Oregon, and Washington, although each scheme contains restrictions based on age, offense, waiting periods, or prosecutorial discretion. See Famm, Existing Second Look Laws and Models (2023), https://docs.google.com/spreadsheets/d/1jN_fuvit4lBhldCOmevD51DvAwsOxL-ydFTPxyVo1I/edit#gid=0 [<https://perma.cc/P7AV-ZCS2>]. For more detail, see Van Zyl Smit & Appleton, *supra* note 6, at 50, 261, and Jing Cao, Commuting Life Without Parole Sentences: The Need for Reason and Justice over Politics 19–20 (Mar. 2015) (SJD dissertation, Fordham University School of Law), <https://ir.lawnet.fordham.edu/sjd/1/> [<https://perma.cc/UAD9-Y96Y>].

⁸ Appleton & Grøver, *supra* note 2, at 605; Charles J. Ogletree Jr. & Austin Sarat, *Lives on the Line: From Capital Punishment to Life Without Parole*, in *LIFE WITHOUT PAROLE*, *supra* note 2, at 1, 3; Hood & Hoyle, *supra* note 2, at 480.

⁹ Jason Iuliano, *Why Capital Punishment Is No Punishment at All*, 64 AM. U. L. REV. 1377, 1431 (2015) (“There is a common misperception that life without parole . . . does not actually mean life without parole. The majority of Americans believe that criminals who receive this sentence will, at some point, be released.”). This belief may derive from a conceptual confusion with parole-eligible life sentences, which used to result in around ten to twenty years of incarceration. See Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES (Oct. 2, 2005), <https://www.nytimes.com/2005/10/02/us/to-more-inmates-life-term-means-dying-behind-bars.html> [<https://perma.cc/QFG5-K9UR>]. Outright pardons for LWOP prisoners are generally not problematic for these supporters: no one would begrudge a wrongfully convicted prisoner from being released if new evidence comes to light after all judicial appeals fail. See Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America’s Other Death Penalty*, 88 PRISON J. 328, 332 (2008); Marion Vannier, *NORMALIZING EXTREME IMPRISONMENT: THE CASE OF LIFE WITHOUT PAROLE IN CALIFORNIA* 24 (Lorraine Gelsthorpe, Kyle Treiber & Alison Liebling eds., 2021).

on compassionate release. I aim to verify whether, according to the claims of three scholars who have previously written on this topic, “governors nationwide have denied *virtually all* clemency requests [for LWOP prisoners] over the past three decades”;¹⁰ “clemency [has] disappeared as a *dependable* avenue for prisoners serving life”;¹¹ and LWOP clemency simply does not happen. As one prisoner lamented, “my hope to someday be released is like hoping to be one of the first people to live on Mars.”¹² On compassionate release, I interrogate the literature’s rather pessimistic reading of such procedures and their recent use. According to Professor Gregory O’Meara, “the word *compassionate* will need to do heavy lifting if [such schemes are actually] to make a difference in the lives of inmates” in the future.¹³ In other words, in considering recent grants of both clemency and compassionate release, I aim to determine whether, in actual practice, “life means life.”¹⁴

This Article’s second contribution is to provide qualitative data on the use of executive clemency and the publicly available justifications for it in LWOP cases. For LWOP abolitionists, if in a realist view the natural life penalty is to be retained in the United States in the medium-term, the post-appellate remedy of clemency stands to play a critical role in enabling individualized sentencing and providing relief from excessive punishment.¹⁵ For that reason, it is important to comprehend under precisely what circumstances commutations and pardons have been granted to LWOP

¹⁰ NELLIS, *supra* note 1, at 19 (emphasis added).

¹¹ Christopher Seeds, *Governors and Prisoners: The Death of Clemency and the Making of Life Sentences Without Release in Pennsylvania*, 46 SOC. JUST. 81, 81 (2019) [hereinafter Seeds, *Governors and Prisoners*] (emphasis added); see also CHRISTOPHER SEEDS, DEATH BY PRISON: THE EMERGENCE OF LIFE WITHOUT PAROLE AND PERPETUAL CONFINEMENT 19 (2022) [hereinafter SEEDS, DEATH BY PRISON] (using the phrase “no reasonable possibility of release” to describe the current era).

¹² Spoon Jackson, *Dead Man Living*, in TOO CRUEL, NOT UNUSUAL ENOUGH 116, 118 (Kenneth E. Hartman, John Purugganan & Robert C. Chan eds., 2013).

¹³ Gregory J. O’Meara, *Compassion and the Public Interest: Wisconsin’s New Compassionate Release Legislation*, 23 FED. SENT’G REP. 33, 33 (2010).

¹⁴ On the political usage of this phrase, see NELLIS, *supra* note 1, at 14. Another area that the empirical data will potentially affect will be rulings on the extradition of prisoners to the United States from Europe. See *Murray v. Netherlands*, App. No. 10511/10, ¶ 99 (Apr. 26, 2016), <https://hudoc.echr.coe.int/eng?i=001-162614> [<https://perma.cc/T8DH-TNGT>]; VAN ZYL SMIT & APPLETON, *supra* note 6, at 263–64. Leading life-imprisonment scholar Professor Dirk van Zyl Smit has previously stated that a “factual inquiry” of all clemencies granted in U.S. LWOP cases would be useful, yet difficult to conduct in practice. Rather than systematically collect data, “[i]n extradition cases courts tend to rely largely on diplomatic assurances” that some prospect of release exists. Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FED. SENT’G REP. 39, 45 (2010).

¹⁵ See Michael M. O’Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT’G REP. 1, 4 (2010); Barkow, *supra* note 2, at 190. There is no certainty of this, given recent international legal developments. Nevertheless, as Professor O’Hear points out, “international developments will not necessarily prove wholly irrelevant to the future of LWOP in the United States.” O’Hear, *supra*, at 4.

prisoners in the recent past. Qualitative analysis can identify the relevant demographic, geographical, and offense-based patterns. Moreover, such analysis can help assess whether clemency has become an *effective* check against penal excess in life imprisonment cases.

Again, previous studies provide only limited guidance on clemency outcomes. This research considers whether the underlying assumptions of several previous studies are empirically true. Have almost all of these recipients spent a long period incarcerated before clemency is granted, as the existing literature regarding LWOP clemency recipients anecdotally suggests?¹⁶ Do juveniles form a large category of recipients?¹⁷ And, in states such as Pennsylvania, even during the “tough on crime” era,¹⁸ could lifers “still earn release through a combination of good behavior, time served and good relationships with prison staff”?¹⁹ No study has attempted to systematically confirm these kinds of assumptions, which each go to the effectiveness of clemency as a check on LWOP sentencing in cases with significant mitigating features. The gap in the literature is presumably explicable due to the mammoth size of the data-collection task across all state and federal jurisdictions.

Following this introductory section, Part I of this Article introduces LWOP sentencing in the United States, noting its increasing ubiquity as a judicial punishment for the most serious crimes. Part II lays out the empirical methodology employed, focusing primarily on content analysis of media reports, supplemented by nongovernmental organization (NGO) and government publications. Parts III and IV present the study’s quantitative and qualitative findings, respectively. Parts III and IV rely heavily upon data presented in three Online Appendices. Online Appendix A contains a list of lifers granted clemency by Donald Trump, the most recent outgoing U.S.

¹⁶ See Cao, *supra* note 7, at 32.

¹⁷ See Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 334 (2011) (noting that juveniles are noticed by governors seeking inmates “worthy of a commuted sentence”).

¹⁸ The “tough on crime” era in U.S. politics ran from the mid-1970s to the mid-2000s, thereby incorporating much of the period under study. See Mark V. Holden, *Clemency Must Play a Pivotal Role in Reversing the Damage Caused by the “Tough on Crime Era,”* 16 U. ST. THOMAS L.J. 358, 359 (2020); GARRICK L. PERCIVAL, SMART ON CRIME: THE STRUGGLE TO BUILD A BETTER AMERICAN PENAL SYSTEM 5, 56–57 (2016). That era is generally thought to be followed by the “smart on crime” era, focusing more on evidence-based policies. Garrick L. Percival, “Smart on Crime”: How a Shift in Political Attention Is Changing Penal Policy in America 3 (Aug. 28, 2011) (unpublished manuscript), https://papers.ssrn.com/a1918345_code1457839.pdf?abstractid=1918345&mirid=1 [<https://perma.cc/QA4V-VUA9>].

¹⁹ Laura Benschhoff, *With Commutation, the Window to Freedom Opens a Crack for Lifers in Pa.*, WHYY (May 31, 2016), <https://why.org/articles/with-commutation-the-window-to-freedom-opens-a-crack-for-lifers-in-pa/> [<https://perma.cc/JCB6-ZNQV>].

president, whereas the state LWOP clemency grants analyzed in Part IV are listed in Online Appendices B and C. Part V provides a discussion, several policy implications, and a summary of this Article's contribution to the future scholarly research agenda on life imprisonment.

I. LWOP IN THE UNITED STATES

Today, LWOP is available as a criminal punishment in every U.S. state except Alaska, in addition to the federal and military jurisdictions and the District of Columbia.²⁰ In this Part, I describe the growth of LWOP throughout U.S. jurisdictions as an alternative to the death penalty and sentences with parole. I first portray the landscape of retentionist and abolitionist states as well as the crimes underlying LWOP sentences. I then chart the growth of the LWOP prison population through the “tough on crime” era to the present.

Although the oldest legal provision allowing for LWOP sentencing in the United States dates to 1841 (from Maine), the near-universal availability of LWOP for crimes deemed the most serious is a relatively recent

²⁰ *Life Without Parole*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/sentencing-alternatives/life-without-parole> [<https://perma.cc/F2GR-ZCG7>]; VAN ZYL SMIT & APPLETON, *supra* note 6, at 49–50. Nevertheless, Alaska's mandatory ninety-nine-year fixed term in aggravated murder cases could hardly be described as lenient, and, in practice, approaches an LWOP sentence. Barkow, *supra* note 2, at 192. Note that this research focuses on “formal” sentences of LWOP. See VAN ZYL SMIT & APPLETON, *supra* note 6, xi–xii. I exclude from the scope of this study clemency in cases of “virtual” or “de facto” LWOP sentences. These are LWP or fixed-term prison sentences which include nonparole periods that exceed prisoners' normal life expectancy. For example, in 2000 Maurice Clemmons was granted a commutation by Governor Mike Huckabee of Arkansas after serving just eleven years of an initial fixed term of 108 years. Huckabee commuted the fixed term to forty-seven years. Mike Huckabee, *Mike Huckabee: Why I Commuted Maurice Clemmons' Sentence*, SEATTLE TIMES (Dec. 8, 2009), <https://www.seattletimes.com/opinion/mike-huckabee-why-i-commuted-maurice-clemmons-sentence/> [<https://perma.cc/Q73P-3RMG>]. In 2015, Barry Beach was granted a commutation to time served by Governor Steve Bullock of Montana after serving more than thirty years of a one-hundred-year sentence for murder. *Montana Governor Frees Man Convicted in 1979 Beating Death of Classmate*, GUARDIAN (Nov. 20, 2015), <https://www.theguardian.com/us-news/2015/nov/20/montana-governor-grants-clemency-barry-beach> [<https://perma.cc/MQ6D-NGJD>]. Focusing on a formal definition of LWOP, as the head sentence passed by a court, I also exclude LWP sentences where parole is very unlikely to be granted anyway due to the severity of the crime and related public opprobrium. See Barkow, *supra* note 2, at 192; Cao, *supra* note 7, at 7; VAN ZYL SMIT & APPLETON, *supra* note 6, at 49–50. Of the permanently inhabited U.S. external territories, Puerto Rico, the U.S. Virgin Islands, and Guam each possess LWOP as a sentencing option. *State & Federal: Puerto Rico*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/puerto-rico> [<https://perma.cc/G4JA-GGJ2>]; 9 GUAM CODE ANN. § 16.30; V.I. CODE ANN. Tit. 14, § 923. The Northern Mariana Islands and American Samoa each stipulate an LWP sentence with a long nonparole period. 6 N. MAR. I. CODE § 4252; AM. SAMOA CODE ANN. § 46.3513.

phenomenon.²¹ During the first half of the twentieth century, most life sentences allowed prisoners to apply for parole.²² By 1970, only seven states allowed for LWOP sentences: Massachusetts, Michigan, Mississippi, Nebraska, Nevada, Pennsylvania, and West Virginia.²³

Thereafter, life with (the possibility of) parole (LWP) sentences declined as an alternative to the death penalty in retentionist U.S. states in favor of LWOP. In 2022, all twenty-seven death penalty retentionist states provided LWOP as an alternative penalty available for capital crimes such as aggravated murder.²⁴ In the twenty-two states that had abolished the death penalty, prison sentences for serious crimes could still encompass a natural-life penalty. In fourteen such abolitionist states, the most aggravated murders committed by adults must be sentenced to LWOP and to no lesser penalty.²⁵ In these cases, once a guilty verdict is pronounced, the judge is required to sentence the offender to prison for the term of their natural life. In 2013, the American Civil Liberties Union reported that more than 80% of LWOP prisoners surveyed had been sentenced mandatorily.²⁶ In eight states—a group that includes an equal number of death penalty retentionists (Florida, Louisiana, Pennsylvania, South Dakota) and abolitionists (Illinois, Iowa, Maine, Virginia)—“life means life” is taken at face value for newly imposed sentences. As of 2021, LWP sentences have been completely abolished in these jurisdictions, leaving only LWOP as a formal life-sentencing option.²⁷

²¹ Thomas Davidson, *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR. (Aug. 2, 2010), <https://deathpenaltyinfo.org/stories/year-that-states-adopted-life-without-parole-lwop-sentencing> [<https://perma.cc/2ZP9-YR28>].

²² Cao, *supra* note 7, at 3.

²³ Davidson, *supra* note 21; Cao, *supra* note 7, at 3.

²⁴ SEEDS, DEATH BY PRISON, *supra* note 11, at 183.

²⁵ This group consists of Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Vermont, Virginia, and Washington. COLO. REV. STAT. ANN. § 17-22.5-104(d)(I) (West 2021); CONN. GEN. STAT. ANN. § 53a-35a(1)(B) (West 2013); DEL. CODE ANN. Tit. 11, § 4209(a) (West 2023); HAW. REV. STAT. ANN. § 706-656(1) (West 2024); MASS. GEN. LAWS ANN. Ch. 265, § 2(a) (West 2014); MICH. COMP. LAWS ANN. § 750.316(1) (West 2022); MINN. STAT. ANN. § 609.106 (West 2023); N.H. REV. STAT. ANN. § 630:1 (2019); N.J. STAT. ANN. § 2C:11-3 (West 2017); N.M. STAT. ANN. § 31-20A-2 (West 2009); N.Y. PENAL LAW § 70.00 (McKinney 2019); VT. STAT. ANN. Tit. 13, § 2311 (West 2019); VA. CODE ANN. § 18.2-10 (West 2021); WASH. REV. CODE ANN. § 10.95.030 (West 2023).

²⁶ JENNIFER TURNER ET AL., ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 26 (2013), <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses> [<https://perma.cc/8JF7-98SW>].

²⁷ Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 348 & n.120 (2021); WIS. STAT. ANN. § 973.014 (West 2000); ARIZ. REV. STAT. ANN. § 13-718 (2018). Wisconsin’s “release on extended supervision” for LWOP prisoners is functionally equivalent to LWP. On formal and informal life sentences, see Benshoff, *supra* note 19.

The same applies in the U.S. federal jurisdiction, where all prisoners sentenced to formal life sentences since 1987 are serving LWOP.²⁸

Typically, first-degree, second-degree, and felony murder are the crimes punishable by LWOP in most states, yet LWOP is also imposed in the United States for various nonhomicide crimes. In Florida, LWOP punishments have been applied in cases of “kidnapping, sexual battery, . . . molestation, and armed robbery.”²⁹ LWOP sentences are available for first-time drug offenders in Alabama, Michigan, Mississippi, Texas, and Virginia, among other states, as well as the federal jurisdiction following the Anti-Drug Abuse Act of 1986.³⁰ An LWOP sentence can also result from a “three-strikes” law designed to punish habitual felony offenders, including nonviolent drug offenders. All fifty states, plus the federal jurisdiction and the District of Columbia, possess habitual offender statutes. In 2015, in at least twenty-five of these states plus the federal jurisdiction, a habitual conviction could lead to an LWOP sentence.³¹ Nationwide totals from 2020 revealed that around 75% of the U.S. LWOP population were convicted of a homicide crime, whereas around 4%–8% committed a nonviolent offense.³²

As for temporal trends, the number of prisoners sentenced to LWOP increased dramatically from the 1970s. More states enacted LWOP statutes as the prevailing philosophy of punishment shifted from one based upon rehabilitation to one based on retribution and deterrence.³³ From the early 1970s, the practical meaning of LWOP in the states also began to change, as clemency, at one time not uncommon as a parole-like remedy rewarding good behavior in state LWOP cases,³⁴ began to disappear from view.³⁵ The combined result has been a skyrocketing natural-lifer population.

²⁸ NELLIS, *supra* note 6, at 10, 24. The federal system still holds more than 1,000 prisoners sentenced before 1987 to LWP.

²⁹ Cao, *supra* note 7, at 10.

³⁰ *Id.* at 12.

³¹ *Id.* at 13 & n.93.

³² See ROSS KLEINSTUBER, JEREMIAH COLDSMITH, MARGARET E. LEIGEY & SANDRA JOY, LIFE WITHOUT PAROLE: WORSE THAN DEATH? 219 (2022).

³³ Cao, *supra* note 7, at 14.

³⁴ SEEDS, DEATH BY PRISON, *supra* note 11, at 19, 45–46; Cao, *supra* note 7, at 27–28.

³⁵ HUM. RTS. WATCH, “I JUST WANT TO GIVE BACK”: THE REINTEGRATION OF PEOPLE SENTENCED TO LIFE WITHOUT PAROLE 7 (2023), <https://www.hrw.org/report/2023/06/28/i-just-want-to-give-back/reintegration-of-people-sentenced-to-life-without-parole> [<https://perma.cc/S2YE-6EVB>]; SEEDS, DEATH BY PRISON, *supra* note 11, at 19; Marie Gottschalk, *No Way Out? Life Sentences and the Politics of Penal Reform*, in LIFE WITHOUT PAROLE, *supra* note 2, at 227, 255.

All told, the total LWOP population in the United States increased from 12,453 in 1992 to 55,595 in 2020.³⁶ The rate of increase has been even faster than that of the general prison population³⁷ and the LWP population.³⁸ In 2020, the largest LWOP populations were found in Florida (10,438), Pennsylvania (5,375), California (5,134), Louisiana (4,377), Michigan (3,882), and the U.S. federal jurisdiction (3,536).³⁹ As of 2021, the U.S. LWOP population continues to expand,⁴⁰ now accounting for more than 80% of recorded natural life sentences worldwide.⁴¹ As such, future LWOP developments in the United States, including on potential release mechanisms like clemency and compassionate release, are likely to influence policymakers in both domestic and international contexts.

II. LWOP CLEMENCY PRACTICE: AN EMPIRICAL INVESTIGATION

In this Part, I discuss previous scholarship on LWOP clemency and the need for an exploratory empirical analysis to characterize its use throughout the United States. I then explain my methodology for data collection and analysis.

The existing academic scholarship on LWOP clemency in the United States has commonly taken a doctrinal or normative position, including the work of Dr. Jing Cao, Professor Marie Gottschalk, Molly Gill, Professor Dirk van Zyl Smit, Professor Catherine Appleton, Professor Christopher Seeds, Professor Craig Lerner, Professor Regina Austin, Professor Ross Kleinstuber, Dr. Jeremiah Coldsmith, Professor Margaret Leigey, Professor Sandra Joy, Terrell Carter, Professor Rachel López, and Kempis Songster.⁴²

Such literature has so far largely overlooked an empirical perspective on clemency use. The nonprofit organization The Sentencing Project issues detailed regular reports on the state of life imprisonment in the United

³⁶ NELLIS, *supra* note 6, at 16; ASHLEY NELLIS & RYAN S. KING, THE SENT'G PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 9 (2009), https://www.sentencingproject.org/app/uploads/2023/01/inc_NoExitSept2009.pdf [<https://perma.cc/DLV4-EHH6>].

³⁷ Cao, *supra* note 7, at 15.

³⁸ NELLIS, *supra* note 6, at 15.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 15.

⁴¹ *Id.* However, in 2022, KLEINSTUBER ET AL., *supra* note 32, at 59, noted that if complete statistics were available for every country imposing LWOP, the United States' share of natural life sentences would fall to about 50%—still a huge proportion for a country with only 4.25% of the global population.

⁴² See generally Cao, *supra* note 7; SEEDS, DEATH BY PRISON, *supra* note 11; Gottschalk, *supra* note 35; Molly M. Gill, *Clemency for Lifers: The Only Road Out Is the Road Not Taken*, 23 FED. SENT'G REP. 21 (2010); VAN ZYL SMIT & APPLETON, *supra* note 6; Craig S. Lerner, *Life Without Parole as a Conflicted Punishment*, 48 WAKE FOREST L. REV. 1101 (2013); Regina Austin, "Second Looks, Second Chances": *Collaborating with Lifers Inc. on a Video About Commutation of LWOP Sentences*, 22 U. PA. J.L. & SOC. CHANGE 71 (2019); Carter et al., *supra* note 27; KLEINSTUBER ET AL., *supra* note 32.

States.⁴³ However, there is no exhaustive list or representative sample of LWOP clemency grants across U.S. jurisdictions that incorporates the actual or suspected reasons why those grants were made. The nonprofit organization Death Penalty Information Center has achieved this mammoth task with the 313 capital clemency grants (as of December 2023) issued for humanitarian reasons since the death penalty's reinstatement in 1976.⁴⁴ Yet, nobody has managed the same for LWOP sentences, despite (or perhaps, because of) the fact that LWOP detainees dwarf the number of prisoners sentenced to death.⁴⁵

Systematic studies of executive clemency grants and reasoning in the United States tend to be hampered by a perception that grants differ too widely between political administrations to establish clear patterns. As I proceed to demonstrate in Parts III and IV, when many different cases are considered over a multidecade period, this assumption proves erroneous. Although the absolute numbers may vary over time, the identities of clemency recipients often reflect a path-dependency that transcends political personalities and agendas.⁴⁶

For both death and LWOP sentences, once finalized by the courts, clemency becomes the presumptive procedural avenue to mitigate the harshness of the original penalty. Nevertheless, a much larger number of finalized LWOP sentences over time does not necessarily mean that LWOP clemency numbers coextensively dwarf those for death row prisoners. Some consider both death penalty execution and LWOP, broadly construed, as “killings by the state.”⁴⁷ While death-sentenced prisoners may have arguably

⁴³ E.g., MARC MAUER, RYAN S. KING & MALCOLM YOUNG, THE SENT'G PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT (2004) (on file with *Northwestern University Law Review*); NELLIS & KING, *supra* note 36; NELLIS, *supra* note 1; NELLIS, *supra* note 6; ASHLEY NELLIS, THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES (2017), <https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf> [<https://perma.cc/4YZT-9VZM>].

⁴⁴ *List of Clemencies Since 1976*, DEATH PENALTY INFO. CTR. (2023), <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> [<https://perma.cc/35NC-VH DU>]. This list includes only “humanitarian” grants and excludes “reductions of sentence granted for judicial expediency.” *Id.*

⁴⁵ See *The DPIC Death Penalty Census*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/death-penalty-census> [<https://perma.cc/9WNC-3T86>] (showing 9,820 death sentences imposed in the United States since 1972); NELLIS, *supra* note 6, at 16 (reporting 55,595 detainees serving LWOP as of 2020).

⁴⁶ See DANIEL PASCOE, LAST CHANCE FOR LIFE: CLEMENCY IN SOUTHEAST ASIAN DEATH PENALTY CASES 240 (2019) (referencing “rules of thumb” that decision-makers abroad abide by when deciding clemency cases).

⁴⁷ See Michelle Miao, *Replacing Death with Life? The Rise of LWOP in the Context of Abolitionist Campaigns in the United States*, 15 NW. J.L. & SOC. POL'Y 173, 184, 186 (2020); Tanisha Bhat, *Effort to*

committed more severe crimes in retentionist jurisdictions, there are distinct questions of humanity, immediacy, and decision-making responsibility that apply in considering death penalty clemency. It may be that death penalty clemency is, ironically (given the greater severity of its underlying offenses), granted at higher rates than LWOP clemency. Only a systematic search can reveal both exactly how widespread LWOP clemency has been over the years and the actual or suspected reasons for LWOP clemency across the United States.

A. Data Collection

Using unofficial data sources is a necessary evil when researching executive clemency. As one respected NGO has recently reported, “[t]here is not a comprehensive data source on the numbers of commutations granted across the 50 states.”⁴⁸ As part of her 2015 doctoral dissertation at Fordham Law School, Dr. Jing Cao contacted the Boards of Pardons and Paroles in all fifty states to ask for LWOP clemency data.⁴⁹ She undertook this tedious process after she recognized that most states do not make clemency data available to the public except via special requests. Dr. Cao was only able to obtain data from around twenty states using this method.⁵⁰ Often the data was presented in aggregate form, covering smaller timespans or relating to the period before 1990, rather than providing demographic information and clemency reasoning on a case-by-case basis up to the date of the request.⁵¹ Following her rigorous doctoral research, Dr. Cao concluded that “[t]he most accessible information could be derived from news reports.”⁵²

Indeed, media reports are one of the most prominent sources used by legal scholars in common law jurisdictions to study contemporaneous

End Life Without Parole in Mass. Gets Hearing, BAY STATE BANNER (Aug. 2, 2023), <https://www.baystatebanner.com/2023/08/02/effort-to-end-life-without-parole-in-mass-gets-hearing/> [<https://perma.cc/EBD8-X9RT>].

⁴⁸ Press Release, Jorge Renaud, Prison Pol’y Initiative, Eight Keys to Mercy: How to Shorten Excessive Prison Sentences (Nov. 2018), <https://www.prisonpolicy.org/reports/longsentences.html> [<https://perma.cc/9KAE-NBM6>].

⁴⁹ Cao, *supra* note 7, at 29 n.177. Dr. Cao’s dissertation, with a normative focus on fair procedures for clemency applications in U.S. LWOP cases, recommended the adoption of a “guided discretion” system for commuting LWOP sentences to lesser punishments. Data collection on numbers of and reasons for clemency grants in LWOP cases served as important background, shaping Cao’s final normative recommendations for reform.

⁵⁰ *Id.*

⁵¹ *See id.* at 29 & n.177, 30 & nn.183–86, 31 & n.192.

⁵² *Id.* at 32 n.202 (regarding the terms of imprisonment that LWOP prisoners who received commutations had served).

clemency grants and their justifications.⁵³ Given that around two-thirds of executive decision-makers in U.S. states are under no legal obligation to provide official reasons for their grants or refusals, only media reports stand to reveal the reasons for clemency.⁵⁴

Accordingly, to collect records of LWOP pardons and commutations and the associated reasoning, I relied primarily upon digitally-archived newspapers, supplemented by other online sources, such as NGO and official government records.⁵⁵ In order to conduct a comprehensive case-by-case analysis, I used the available subscription database with the widest possible reach on media sources: Dow Jones's Factiva.⁵⁶ Within all sources, I employed a range of search strings designed to capture as many records of LWOP clemency grants as possible. For example, the term "clemency" has many synonyms, such as "pardon," "mercy," "commutation," "reduction," "amnesty," "remittance," "remission," "release," and "substitution." Where one of these terms appeared in conjunction with "life without parole," "LWOP," "life sentence," "life without the possibility/chance/opportunity of parole," "natural life," "life imprisonment," or "irreducible life," I faced a further interpretive exercise to ensure that only commutations or pardons granted by the executive branch of government where the offender was sentenced to life without the possibility of parole were recorded in the data.

I chose a starting point of January 1, 1990 for several reasons. First, the online availability of federal data from the George H.W. Bush Presidency onwards and the digitization of newspapers since the 1990s facilitate access to data.⁵⁷ Moreover, by the early 1990s, around half of U.S. jurisdictions had

⁵³ See Andrew Novak & Daniel Pascoe, *Executive Clemency During the Coronavirus Pandemic: A Global Analysis of Law and Practice*, 2 INT'L CRIMINOLOGY 84, 84 (2022); see also George Lardner, *The Role of the Press in the Clemency Process*, 31 CAP. U. L. REV. 179, 180–81 (2003); PASCOE, *supra* note 46, at 24–25.

⁵⁴ The governor must provide to the public or to the state legislature reasons for each grant of clemency in Arizona, Arkansas, California, Colorado, Iowa, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio, Oregon, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In Tennessee this depends on a request by the legislature. See Margaret Colgate Love, *50-State Comparison: Pardon Policy & Practice*, RESTORATION RTS. PROJECT (Oct. 2023), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/#2> [https://perma.cc/8HR6-6W3Y].

⁵⁵ On qualitative empirical research using available documentary materials, see Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 926, 938–39 (Peter Cane & Herbert M. Kritzer eds., 2010).

⁵⁶ *Factiva*, DOW JONES, <https://www.dowjones.com/professional/factiva/> [https://perma.cc/H8QG-SRMM].

⁵⁷ *Clemency Recipients*, OFF. OF THE PARDON ATT'Y, DOJ (2023), <https://www.justice.gov/pardon/clemency-recipients> [https://perma.cc/Z2ZG-D8QM]. Clemency and pardon grants made by Presidents Richard Nixon, Gerald Ford, Jimmy Carter, and Ronald Reagan are listed only by recipient name and provide no details of the offense committed or the original sentence.

legislated for LWOP sentences as “tough on crime” became an entrenched political platform.⁵⁸ Further, by the end of 2020, LWOP cases from the early 1990s have resulted in prisoners being incarcerated for twenty-five years or more. International jurisprudence points to twenty-five years as an acceptable maximum exclusion period for life sentence “review,” whether through parole or via clemency.⁵⁹ I chose to end the federal- and state-based data with the inauguration of Joseph Biden as the forty-sixth U.S. president on January 20, 2021.

I also supplemented the media reports with government publications when available. Florida is presently the only state that provides a single list of every prisoner whose sentence has been commuted by the relevant pardons board or state governor since 1990.⁶⁰ However, the list has not been updated since 2018, and it does not contain an account of clemency reasoning.⁶¹ Additionally, the Office of the Pardon Attorney, housed within the U.S. Department of Justice, provides a complete record of presidential pardons and commutations. During recent presidencies, the Department of Justice’s online information has become more detailed, incorporating the offense committed, the original sentence passed, and the terms of the grant.⁶² Concurrent with the Department of Justice publication, the Obama and Trump Administrations issued press releases providing reasons for presidential pardons and commutations—previously a rarity among presidents.⁶³ Evidently, the federal clemency system is now voluntarily more

⁵⁸ Lennox Yearwood Jr., *The Tough on Crime Era Needs to End*, HILL (Sept. 23, 2016, 10:41 AM), <https://thehill.com/blogs/pundits-blog/crime/297446-the-tough-on-crime-era-needs-to-end/> [<https://perma.cc/TUE7-XZF4>]; SEEDS, DEATH BY PRISON, *supra* note 11, at 3–6.

⁵⁹ *Murray v. Netherlands*, App. No. 10511/10, ¶ 99 (Apr. 26, 2016), <https://hudoc.echr.coe.int/eng?i=001-162614> [<https://perma.cc/T8DH-TNGT>]; *As the Death Penalty Becomes Less Common, Life Imprisonment Becomes More So*, ECONOMIST (July 6, 2021), <https://www.economist.com/international/2021/07/06/as-the-death-penalty-becomes-less-common-life-imprisonment-becomes-more-so> [<https://perma.cc/4GF4-EXGN>]; NELLIS, *supra* note 1, at 17; *see also* SEEDS, DEATH BY PRISON, *supra* note 11, at 173 (noting that most LWP sentences in the United States have a mandatory minimum term of about twenty-five years).

⁶⁰ *See* STATE OF FLA., COMMUTATION OF SENTENCE CASES GRANTED 1980 THROUGH JANUARY 1, 2018 (2019), <https://www.fcor.state.fl.us/docs/clemency/CommutationofSentences.pdf> [<https://perma.cc/PVJ2-NEHV>].

⁶¹ *Id.*

⁶² *See Commutations Granted by President George W. Bush (2001–2009)*, OFF. OF THE PARDON ATT’Y, DOJ (Apr. 28, 2021), <https://www.justice.gov/pardon/commutations-granted-president-george-w-bush-2001-2009> [<https://perma.cc/BV2W-XQPW>].

⁶³ *E.g.*, *A Nation of Second Chances: President Obama’s Record on Clemency*, OBAMA WHITE HOUSE (Jan. 17, 2017), <https://obamawhitehouse.archives.gov/issues/clemency> [<https://perma.cc/7ZUH-F3GG>]; *Search Results for “Clemency,” TRUMP WHITE HOUSE*, <https://trumpwhitehouse.archives.gov/search/?s=clemency> [<https://perma.cc/X3JT-R7GN>] (yielding thirty-one results for Statements from the Press Secretary Regarding Executive Clemency).

transparent than that of most states, well justified given the greater public scrutiny that presidential pardons and commutations tend to receive.

Part III's descriptive quantitative data relies solely upon sources which reveal the total number of LWOP clemency grants within a U.S. jurisdiction during the period 1990–2021, or within a significant subset of those years. Two examples, discussed above, are Florida and the U.S. federal jurisdiction.

Part IV, on the other hand, relies upon a coded summary of official reasons given for granting clemency. After compiling all available individual and collective reports on LWOP clemency within U.S. jurisdictions from 1990 to 2021, I coded the text and extracted data into theoretically relevant categories, adopting a content analysis approach.⁶⁴ Here, I only included and coded clemency grants where, at the very least, the jurisdiction, the crime committed, and the year of the grant were ascertainable. Moreover, to qualify, the prisoner must have been sentenced to life *without parole*, as opposed to just LWP. Where available, I also coded other characteristics, including: the stated reasons for the grant (such as case-based reasons, demographic reasons, or political motives); the number of years the prisoner served incarcerated before clemency;⁶⁵ any conditions imposed on the clemency grant; and the type of relief ordered (whether pardon, commutation to time served, commutation followed by parole, or compassionate release).

Of all the coded fields, the reasons for clemency are the most difficult to articulate. Drawing guidance from the existing literature on justifications for clemency, which tends to focus on the conversion of death sentences to life imprisonment on the basis of retributive, redemptive, and utilitarian considerations,⁶⁶ I coded the possible state and federal justifications into the following categories:

⁶⁴ See SANDRA HALPERIN & OLIVER HEATH, *POLITICAL RESEARCH: METHODS AND PRACTICAL SKILLS* 160–61, 345–46 (2d ed. 2017); Richard Kirkham & Elizabeth A. O'Loughlin, *A Content Analysis of Judicial Decision-Making*, in *ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS* 329–32 (Naomi Creutzfeldt, Marc Mason & Kirsten McConnachie eds., 2020).

⁶⁵ The most relevant figure here is the total number of years spent in detention from the time of arrest through to when clemency was granted, excluding time spent out on bail. However, some reports only provide the number of years since the prisoner was first sentenced, which may be close to, but not exactly the same as, the former figure. A suspect is unlikely to receive bail for an offense that attracts LWOP, although it is not impossible depending on the jurisdiction.

⁶⁶ A summary is provided in PASCOE, *supra* note 46, at 45–50. Retributive justifications for clemency signify that the punishment itself, or at least its level of severity, is undeserved either at the time of sentencing or at the time clemency is granted and thus clemency must redress the imbalance. Redemptive justifications for clemency emphasize the transformation of prisoners and their relationships with others when under incarceration or clemency's use as a reward for prior meritorious service. Utilitarian clemency incentivizes or rewards actions by the prisoner that contribute toward the public good. Utilitarian clemency also encompasses cases where the grant itself benefits the public. A fourth category, "Mercy from the Sovereign," is generally only applicable in historical cases of clemency grants by absolute monarchs or by the leaders of modern autocracies.

- Youth at the time the offense was committed;
- Old age bearing upon the past or future impact of imprisonment;
- Terminal illness risking the prisoner’s imminent death;
- Rehabilitation, good behavior in prison, remorse and acceptance of responsibility, combined as a catchall “redemptive” category;⁶⁷ and,
- Other stated reasons, which may include possible innocence, various mitigating circumstances demanding a lesser punishment, extending sentencing reforms retrospectively to existing prisoners, and the prisoner assisting law enforcement or prison authorities, among numerous possible justifications.

Aside from cases where state governors or pardons boards publicly announce their reasoning in the press or are required to do so to the state legislature, scholars researching clemency decision-making are often left to conduct educated guesses on the possible reasons for clemency grants.⁶⁸ Such conjecture is based on the kind of theoretically informed justifications mentioned above. In this study, my approach has been to take the reasons given at face value rather than to second-guess the decision-maker’s true motives, even if a journalist has done exactly that.⁶⁹ If the media report describes the reasons for commutation being stated by the governor, the pardons board (in states where the pardons board is the final decision-maker), or even as confirmed by the prisoner’s lawyers, I have coded it. But when the media article does *not* report a particular reason (and I have endeavored to use more than one source per clemency grant), I have not speculated further.

A summary of the relevant data is provided in the Online Appendices. Online Appendix A reports clemency during the Trump Administration, 2017–2021; Online Appendix B details individual reports of clemency in state cases, 1990–2021; and Online Appendix C includes collective reports of clemency in state cases, 1990–2021. As for LWOP clemency grants made during the terms of Presidents George H.W. Bush, Bill Clinton, George W. Bush, and Barack Obama (collectively in office between 1989 and 2017), I provide a detailed summary in Part IV of this Article.

There are, of course, several shortcomings with the data collected and coded. Media reports are not equivalent to government records as they are compiled for different purposes altogether—to inform the public and to make

⁶⁷ In the academic literature, clemency as “redemption” also covers religiosity in prison, compensation paid to or forgiveness granted by the victim or victim’s family, compensation paid to the state for economic offenses, and significant previous service to the nation. *Id.* at 48–49.

⁶⁸ See Colgate Love, *supra* note 54.

⁶⁹ See Kirkham & O’Loughlin, *supra* note 64, at 336.

a profit, rather than to provide an official account.⁷⁰ Not all commutations and pardons in LWOP cases are reported by the newspapers,⁷¹ and those that are reported (and captured by keywords) may be somewhat unrepresentative of the whole.⁷² On the other hand, in a democracy where the media plays a key role in keeping the government accountable, chief executives often provide a more detailed articulation of their clemency reasoning within press releases and interviews than in the executive orders that issue the grants themselves or within their statements to state legislatures.⁷³

Media reports of clemency grants may be biased by the time period of this study and the subject matter of the grants. Because the relevant sample primarily derives from digitized news media, more recent cases are probably overrepresented since internet use became widespread in the mid- to late-1990s. Moreover, sometimes only the most newsworthy or salacious cases are reported—those involving grisly murders, for example. In contrast, clemency grants for habitual “three-strike” offenders imprisoned for life for an unremarkable theft or burglary may be underreported. Politics can also impact clemency reporting: politicians from one political party may seek to more widely publicize, or alternatively downplay, grants made by state governors from another party in order to promote a particular political agenda. Biases in the sample also arise from imprecision in reporting. It can be difficult for both journalists and their readers to differentiate between LWP and LWOP sentences for which the executive makes a commutation or pardon, particularly as most states allow for both penalties and both forms of mitigation.

Coding the reasoning behind clemency grants presents additional challenges. Missing from the Online Appendices are further (often hidden political) reasons for commutation or pardon not revealed through the official accounts provided by executives.⁷⁴ What the content analysis best

⁷⁰ See Webley, *supra* note 55, at 939.

⁷¹ This is clearly evident if the qualitative data subject to content analysis is compared with the available descriptive quantitative data for each relevant state. See *infra* Parts III–IV. Comparing Online Appendices B and C with the limited quantitative data presented in Part III, a rough estimate is that I have uncovered codable media reports of approximately one quarter of the total number of state grants over the period under study (half the true total in half the number of potential states).

⁷² See Webley, *supra* note 55, at 941.

⁷³ See TRUMP WHITE HOUSE, *supra* note 63; OBAMA WHITE HOUSE, *supra* note 63.

⁷⁴ PASCOE, *supra* note 46, at 30–31. Federal and state executives have previously pardoned or commuted death and prison sentences to gain popularity with the public, to reward political supporters, or even precipitate political donations or bribes. Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C.L. & C.R. 191, 192 (2003); Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 98 (2005); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 202–04

captures are presidents', governors', and boards' *outward* or *public* justifications for executive clemency, as opposed to their true reasoning, which is inevitably conducted behind closed doors. The public and private justifications may be the same, or they may be different.

Further, while this study presents a significant advance in the collection of LWOP clemency grants and reasoning, the results are nonetheless limited by available reports across jurisdictions. In total, Part III provides data on eleven state jurisdictions for executive clemency and discusses compassionate release in thirty states. Part IV provides clemency reasoning data deriving from twenty different states. For those states that do not appear in the analysis, no assumptions can be made about whether their executive decision-makers have granted clemency or compassionate release in LWOP cases other than where those remedies are entirely prohibited by law.

As with comparable criminal justice research conducted in difficult circumstances around the world, the only feasible solutions to these data shortcomings are to (a) triangulate using different primary and secondary sources (particularly NGO reports, scholarly works, and government publications) and (b) be transparent regarding the shortcomings in the data to allow the reader to draw their own conclusions.⁷⁵ My hope is that future scholarship builds on the findings presented in this Article to provide an ever clearer picture of the number and characteristics of U.S.-based lifers who have been released or denied release through different relief mechanisms. Although imperfect, under the circumstances, the methodology in this Article is the most systematic way of collecting national data on LWOP clemency grants and the associated reasoning. In the next two Parts, I relay the empirical findings.

III. FINDINGS: DESCRIPTIVE QUANTITATIVE DATA ON LWOP CLEMENCY AND COMPASSIONATE RELEASE

This Part addresses the question of whether “life means life” for those sentenced to LWOP across U.S. jurisdictions. First, I present the available quantitative data on executive clemency between 1990 and 2021. Despite the availability of clemency as a potential release mechanism, I find that in a sample of eleven states, executives only very rarely authorize release. By contrast, recent U.S. presidents and governors of California have granted clemency at much higher rates. I then discuss the significance of these

(1989); Jeffrey Crouch, *President Trump's Clemency Record: Extraordinary or Just Ordinary?*, 52 *PRESIDENTIAL STUD.* Q. 692, 695–96 (2022).

⁷⁵ Daniel Pascoe, *Researching the Death Penalty in Closed or Partially Closed Criminal Justice Systems*, in *CHANGING CONTOURS OF CRIMINAL JUSTICE* 197, 204, 206–07 (Mary Bosworth, Carolyn Hoyle & Lucia Zedner eds., 2016).

findings for those sentenced to LWOP. Finally, I address compassionate release as an alternative way for LWOP prisoners to receive a reduced sentence. As with executive clemency, the available data shows that compassionate release is currently not a viable method for release in a majority of U.S. states.

A. *LWOP Executive Clemency*

Table 1 presents all available quantitative data on executive clemency falling within the period of January 1990 to January 2021. In total, the data covers eleven states plus the federal jurisdiction. The table reports the number of LWOP commutations per reported time period and the rate of commutations within that period. For comparative reference, I also include the LWOP population of each jurisdiction at the relevant chronological endpoint, where available. By way of example, in Arizona there were only three LWOP commutations between 1989 and 2012, at a rate of 0.13 commutations per year.⁷⁶ For perspective, in 2012 Arizona held 441 LWOP prisoners.⁷⁷

The frequency of LWOP commutations in some jurisdictions warrants further discussion. In California, the first commutation since the 1976 inception of LWOP sentencing was issued in 2011 by Governor Arnold Schwarzenegger.⁷⁸ From 1990 to 2011, this resulted in a minuscule average of 0.05 commutations per year. California held 4,603 LWOP prisoners in 2012.⁷⁹ However, in line with the reversal of “tough on crime” as a political slogan, the two most recent governors of California, Jerry Brown (2011–2019) and Gavin Newsom (2019–present), have granted LWOP clemency at much greater rates than their predecessors. For example, Brown granted clemency to 147 LWOP prisoners in 2018 shortly before leaving office.⁸⁰ Newsom granted clemency to thirty-eight natural lifers between taking office in January 2019 and October 2022 (approximately ten LWOP grants per year

⁷⁶ *America's Longest-Serving Female Inmate, 69, Walks Free 49 Years After Strangling 15-Month-Old Baby to Death*, DAILY MAIL (Aug. 14, 2012), <https://www.dailymail.co.uk/news/article-2188166/Betty-Smithey-Americas-longest-serving-female-inmate-freed-49-years.html> [https://perma.cc/U6FQ-K6DF].

⁷⁷ NELLIS, *supra* note 1, at 6.

⁷⁸ Davidson, *supra* note 21; Steve Nolan, *Pictured: The Californian Women Locked Up as a Teen in 1994 and Sentenced to Life After Killing Her Pimp as She Is Set Free*, DAILY MAIL (Oct. 29, 2013), <https://www.dailymail.co.uk/news/article-2478768/Sara-Kruzan-jailed-teen-1994-killing-pimp-set-free.html> [https://perma.cc/X7JR-R893].

⁷⁹ NELLIS, *supra* note 1, at 6.

⁸⁰ SEEDS, DEATH BY PRISON, *supra* note 11, at 246 n.45.

during his term to date).⁸¹ Nevertheless, complete figures for either governor are presently unavailable. For perspective, California held 5,134 LWOP prisoners in 2020.⁸²

Florida is notable for both the size of its LWOP population and its prisoners' meager opportunity for release. As it was in 2016,⁸³ Florida was the most prolific LWOP state in the nation in 2020, with 10,438 LWOP inmates.⁸⁴ Yet, since the beginning of LWOP sentencing in 1994 up to 2018, there were only two commutations—a rate of approximately 0.1 per year.⁸⁵

In Massachusetts, one source states that there were only four LWOP commutations granted from 1991 to 2010.⁸⁶ A second source asserts that there were no such commutations from 1998 to 2021.⁸⁷ Combining the two totals, for the period 1991–2021, I find there were approximately 0.1 commutations per year, in a jurisdiction with 1,057 LWOP prisoners in 2020.⁸⁸

In Montana, since the inception of LWOP sentencing in 1995, no LWOP prisoner had received a commutation or pardon up to 2012.⁸⁹ In 2012, Montana held fifty-three LWOP prisoners, and in 2020, it held fifty-five such prisoners.⁹⁰ No clemency data is available after 2012, although that does not mean that no grants have been made after that date.

In Vermont, by 2012 there had only been two LWOP sentences mitigated to lesser punishments.⁹¹ Vermont enacted LWOP sentencing in 1987, resulting in a commutation rate of 0.08 per year from 1987 to 2012, in a jurisdiction with only fourteen LWOP prisoners in 2012.⁹² However, it is important to note that Vermont's Constitution does not allow for *executive* commutation,⁹³ with the political power over sentence mitigation exercised exclusively by the state legislature, whereas the pardon power may be

⁸¹ *Advocates Urge Newsom to End 'the Other Death Penalty' of LWOP*, DAVIS VANGUARD (Oct. 11, 2022), <https://www.davisvanguard.org/2022/10/advocates-urge-newsom-to-end-the-other-death-penalty-of-lwop/> [http://perma.cc/MY76-2HD2].

⁸² NELLIS, *supra* note 6, at 10.

⁸³ NELLIS, *supra* note 43, at 10.

⁸⁴ See NELLIS, *supra* note 6, at 10.

⁸⁵ STATE OF FLA., *supra* note 60.

⁸⁶ Cao, *supra* note 7, at 28–29.

⁸⁷ Shelley Murphy, *Governor's Council Commutes First-Degree Murder Sentences for First Time in 25 Years*, BOS. GLOBE (Feb. 16, 2022), <https://www.bostonglobe.com/2022/02/16/metro/governors-council-commutes-first-degree-murder-sentences-first-time-25-years/> [https://perma.cc/7YJS-639H].

⁸⁸ NELLIS, *supra* note 6, at 10.

⁸⁹ Cao, *supra* note 7, at 30.

⁹⁰ NELLIS, *supra* note 1, at 6; NELLIS, *supra* note 6, at 10.

⁹¹ Cao, *supra* note 7, at 30.

⁹² NELLIS, *supra* note 1, at 6.

⁹³ See Carter et al., *supra* note 27, at 358.

exercised by the governor.⁹⁴ As such, it is doubtful whether Vermont's two legislatively sourced grants between 1987 and 2012 can truly be categorized as "clemency," alongside the executive actions seen in other state and federal jurisdictions.⁹⁵

Finally, I turn to the U.S. federal jurisdiction. All formal life sentences in this jurisdiction became LWOP sentences for those convicted after November 1, 1987.⁹⁶ Between 1990 and 2012, only one LWOP prisoner was granted a commutation by the end of President Obama's first term in office.⁹⁷ Of the jurisdictions with available data, the federal jurisdiction has provided more LWOP clemency grants per year than any of the states described above, with an average of 13.3 per year extrapolated over the period 1990–2020, despite being only the sixth-most populous jurisdiction for LWOP prisoners at the end of this period.⁹⁸ In 2020, there were 3,536 prisoners serving LWOP for federal crimes.⁹⁹

President Obama implemented a widely publicized clemency initiative during his second term (2013–2017), which was continued to a lesser extent by President Trump (2017–2021). I proceed to provide separate summaries of the grants made by Presidents Obama and Trump. First, from December 2013 to January 2017, President Obama granted commutations to 395 inmates serving LWOP.¹⁰⁰ In 2012, before these grants had begun, the federal jurisdiction held 4,058 LWOP prisoners,¹⁰¹ whereas in 2016 the federal jurisdiction held 3,861 such prisoners.¹⁰² By implementing a systematic policy to commute the sentences of federal drug offenders, President Obama

⁹⁴ VT. CONST. art. II, § 20.

⁹⁵ See Daniel Pascoe & Andrew Novak, *Executive Clemency: A Ubiquitous Part of the Constitutional Scheme*, in EXECUTIVE CLEMENCY, *supra* note 4 (describing executive branch decision-making as a key factor defining clemency).

⁹⁶ Gill, *supra* note 42, at 21.

⁹⁷ *Commutations Granted by President George H. W. Bush (1989–1993)*, OFF. OF THE PARDON ATT'Y, DOJ (Apr. 28, 2021), <https://www.justice.gov/pardon/commutations-granted-president-george-h-w-bush-1989-1993> [<https://perma.cc/2HRT-DF46>]; *Commutations Granted by President William J. Clinton (1993–2001)*, OFF. OF THE PARDON ATT'Y, DOJ (Apr. 28, 2021), <https://www.justice.gov/pardon/commutations-granted-president-william-j-clinton-1993-2001> [<https://perma.cc/6CAD-J3G9>]; *Commutations Granted by President George W. Bush (2001–2009)*, *supra* note 62; *Commutations Granted by President Barack H. Obama (2009–2017)*, OFF. OF THE PARDON ATT'Y, DOJ (Apr. 28, 2021), <https://www.justice.gov/pardon/commutations-granted-president-barack-h-obama-2009-2017> [<https://perma.cc/6G89-P5VL>].

⁹⁸ *Infra* Table 1; NELLIS, *supra* note 6, at 10.

⁹⁹ NELLIS, *supra* note 6, at 10.

¹⁰⁰ *Commutations Granted by President Barack H. Obama (2009–2017)*, *supra* note 97; see also Kevin Freking, *Obama Pardons 78, Shortens the Sentence for 153*, AP (Dec. 19, 2016), <https://apnews.com/article/91a2af333a0b41f99f9372ab3c3053c1> [<https://perma.cc/6X3Y-788J>].

¹⁰¹ NELLIS, *supra* note 1, at 6.

¹⁰² NELLIS, *supra* note 43, at 10.

reduced the federal LWOP population from its starting point by approximately 10%.

President Trump continued President Obama's policy of commuting the LWOP sentences of federal drug convicts, albeit on a more ad hoc basis between June 2018 and January 2021.¹⁰³ During his sole term in office, President Trump commuted the sentences of seventeen federal drug prisoners, in most cases reducing the penalty to time served and thereby allowing for immediate release, albeit usually under a period of further supervision.¹⁰⁴ President Trump also granted an unconditional pardon to one prisoner, Nicholas Slatten, who was convicted for first degree murder as a Blackwater security guard involved in the killing of Iraqi civilians in Baghdad in 2007.¹⁰⁵

¹⁰³ *Commutations Granted by President Donald J. Trump (2017–2021)*, OFF. OF THE PARDON ATT'Y, DOJ (Apr. 28, 2021), <https://www.justice.gov/pardon/commutations-granted-president-donald-j-trump-2017-2021> [<https://perma.cc/8EX8-7Q4Z>]; Online Appendix A. At the time of writing in late 2023, President Biden has continued commuting the LWOP sentences of drug convicts, albeit sparingly during his first term. *Commutations Granted by President Joseph Biden (2021–Present)*, OFF. OF THE PARDON ATT'Y, DOJ (Sept. 19, 2023), <https://www.justice.gov/pardon/commutations-granted-president-joseph-biden-2021-present> [<https://perma.cc/7XJR-XGEF>].

¹⁰⁴ Online Appendix A; *Commutations Granted by President Donald J. Trump (2017–2021)*, *supra* note 103. One of the drug convicts pardoned by President Trump, Jaime A. Davidson, also committed murder in the context of his drug operations.

¹⁰⁵ Online Appendix A; *UN Criticises Trump's Pardons for Blackwater Guards Jailed over Iraq Killings*, BBC NEWS (Dec. 23, 2020), <https://www.bbc.com/news/world-us-canada-55424397> [<https://perma.cc/B3PZ-JGFD>]. Trump also pardoned the other three Blackwater employees imprisoned for their part in the "Nisoor Square Massacre."

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TABLE 1: CLEMENCY RATES AND LWOP POPULATION ACROSS U.S. JURISDICTIONS

Jurisdiction	Timeframe	Number of LWOP Commutations	Rate per Year	LWOP Population (Approximate Endpoint Year)
AZ	1989–2012 ¹⁰⁶	3	0.1	441 (2012) ¹⁰⁷
	1990–2011	1	0.05	4,603 (2012) ¹⁰⁸
CA†	2011–2019	147+	18.4+	5,134 (2020) ¹⁰⁹
	2019–2022	38	9.5	5,134 (2020) ¹¹⁰
FL†	1994–2016	2	0.1	8,919 (2016) ¹¹¹
MA†	1991–2021	4	0.1	1,057 (2020) ¹¹²
MN	1992–2020 ¹¹³	0	0	142 (2020) ¹¹⁴
MT†	1995–2012	0	0	53 (2012) ¹¹⁵
NE	1991–2009	0	0.17*	213 (2008) ¹¹⁷
	2009–2013 ¹¹⁶	4		236 (2012) ¹¹⁸
OK	1990–2001 ¹¹⁹	0	0	460 (2003) ¹²⁰

¹⁰⁶ See generally DAILY MAIL, *supra* note 76 (detailing the 2012 release of a sixty-nine-year-old Arizona inmate).

¹⁰⁷ NELLIS, *supra* note 1, at 6.

¹⁰⁸ *Id.*

¹⁰⁹ NELLIS, *supra* note 6, at 10.

¹¹⁰ *Id.*

¹¹¹ NELLIS, *supra* note 43, at 10.

¹¹² NELLIS, *supra* note 6, at 10.

¹¹³ See Sammi Nachtigal, *Pardons Remain Rare in Minnesota*, MESHESH & ASSOCS. (Mar. 10, 2020), <https://www.stevemeshesh.com/blog/2020/march/pardons-remain-rare-in-minnesota/> [<https://perma.cc/EB85-HRTK>]; Chase Madar, *The Case for Clemency*, AM. CONSERVATIVE (Dec. 21, 2015), <https://www.theamericanconservative.com/the-case-for-clemency/> [<https://perma.cc/X2Q5-QZ75>] (highlighting the difficulty in receiving a pardon or commutation from the Board of Pardons).

¹¹⁴ NELLIS, *supra* note 6, at 10.

¹¹⁵ NELLIS, *supra* note 1, at 6.

¹¹⁶ See generally Cao, *supra* note 7, at 29–30 (highlighting the issuance of commutations after decades of nonissuance).

¹¹⁷ NELLIS & KING, *supra* note 36, at 8.

¹¹⁸ NELLIS, *supra* note 1, at 6.

¹¹⁹ *Parole Board Drops Proposal to Change Policy*, AP NEWSWIRE (Mar. 31, 2002) (on file with *Northwestern University Law Review*). Even after incorporating Governor Mary Fallin’s 29+ grants to nonviolent drug offenders made during 2016, 2017, and 2018, Oklahoma’s yearly LWOP clemency rate does not rise above one. Online Appendices B, C. Fallin’s grants do not appear in Table 1 as the summative clemency figure for her time in office is unavailable, as is the summative figure for LWOP clemency grants issued 2001–2016.

¹²⁰ Mauer et al., *supra* note 43, at 10.

Jurisdiction	Timeframe	Number of LWOP Commutations	Rate per Year	LWOP Population (Approximate Endpoint Year)
PA	1996–2020 ¹²¹	25	1	5,375 (2020) ¹²²
VT†	1987–2012	2	0.15	14 (2012) ¹²³
WA	1985–2013 ¹²⁴	15	0.5	623 (2012) ¹²⁵
	1990–2013	1		4,058 (2012) ¹²⁶
U.S. Fed†	2013–2017	395	13.3*	3,861 (2016) ¹²⁷
	2018–2021	17		3,536 (2020) ¹²⁸

Notes. Any overlap in timeframe is explained by changes in leadership. † Denotes further commentary supporting these results. * Yearly average calculated by combining entries from all years.

LWOP clemency has clearly proven extremely rare in the state jurisdictions surveyed above, other than those grants made by the last two governors of California. LWOP clemency was also very rare in federal cases until President Obama’s second term. During the entire period under study (1990–2021), other than in California, media summaries suggest that, on average, governors in each of the states listed granted commutation to *no more than one* LWOP prisoner per year.

Often foregone by choice, executive discretion may also be explicitly foreclosed by legislation. Three states have now banned discretionary commutation for LWOP prisoners altogether: Arizona, Connecticut, and

¹²¹ Samantha Melamed, *Two Sets of Brothers Spent Decades in Prison. This May Be Their Last Chance to Get Out*, PHILA. INQUIRER (Sept. 1, 2020), <https://www.inquirer.com/news/philly-brothers-prison-attorney-general-josh-shapiro-20200901.html> [<https://perma.cc/865P-PNJT>].

¹²² NELLIS, *supra* note 6, at 10.

¹²³ NELLIS, *supra* note 1, at 6.

¹²⁴ In Washington, there were fifteen commutations and pardons (the exact ratio is unclear) from LWOP cases *sentenced* between 1985 to 2013. Dakota Blagg et al., *Life Without Parole Sentences in Washington State 12* (May 2015) (unpublished honors thesis, University of Washington), <https://lsj.washington.edu/research/undergraduate/life-without-parole-sentences-washington-state> [<https://perma.cc/ML5P-2H92>].

¹²⁵ NELLIS, *supra* note 1, at 6.

¹²⁶ *Id.*

¹²⁷ NELLIS, *supra* note 43, at 10.

¹²⁸ NELLIS, *supra* note 6, at 10.

Nevada.¹²⁹ That said, Arizona does allow for *pardons* in LWOP cases,¹³⁰ and the state provides separate allowance for executive clemency benefiting prisoners, including natural lifers, who are close to death.¹³¹ The discretionary commutation bans in Arizona and Nevada operate prospectively; hence, LWOP clemency entries for those states appear in Online Appendix B.¹³² A fourth state, Vermont, does not allow for executive commutation but only for pardon, as discussed above.¹³³ Each of the four aforementioned states has resolved that the power to mitigate judicially imposed lifelong punishment is too dangerous and controversial to leave in the hands of the executive.

B. Does “Life Mean Life” in LWOP Cases?

The descriptive data presented above supports the assertion that for the most part, “life” means for the term of the prisoner’s natural life. Across the United States, the overwhelming majority of prisoners sentenced to LWOP have not been released,¹³⁴ and the legal availability of executive clemency has not made inroads into LWOP’s status as a terminal sentence in the jurisdictions for which sufficient data is available.

As described above, on average less than one grant of clemency has been made per year since 1990 in all but one of the sample states. Considering that the average LWOP population in those ten states in 2012 and 2020 was 1,639 and 1,946 prisoners, respectively, the chance of clemency is exceptionally rare.¹³⁵

Even in California, the state with the highest number of reported commutations, Governors Brown and Newsom were each confronted by a baseline LWOP population of about 5,000 prisoners. Their efforts to extend

¹²⁹ ARIZ. REV. STAT. ANN. § 13-751(A)(1) (2019); NEV. REV. STAT. ANN. § 213.085 (West 2017); STATE OF CONN. BD. OF PARDONS & PAROLES, COMMUTATIONS (July 26, 2023), <https://portal.ct.gov/-/media/BOPP/Pardons/Policy-III02-Commutations.pdf> [https://perma.cc/8L55-56WL].

¹³⁰ See Carter et al., *supra* note 27, at 357–62. In Arizona, pardons for lifers are further restricted based on the type of offense and record of the applicant. See *Arizona Pardon Information*, PARDON411 (May 22, 2017), https://www.pardon411.com/wiki/Arizona_Pardon_Information [https://perma.cc/28CP-CVCG].

¹³¹ FAMM, COMPASSIONATE RELEASE STATE BY STATE (Mar. 18, 2022), <https://famm.org/wp-content/uploads/CCR-State-Chart-2022indd-03-18-22.pdf> [https://perma.cc/UF3M-8P3V].

¹³² NEV. ADMIN. CODE § 213.110; see also DAILY MAIL, *supra* note 76 (detailing the clemency and release of an “old code” Arizona prisoner sentenced before 1973).

¹³³ VT. CONST. art. II, § 20.

¹³⁴ Appleton & Grøver, *supra* note 2, at 598; KLEINSTUBER ET AL., *supra* note 32, at 212; Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in LIFE WITHOUT PAROLE, *supra* note 2, at 66, 77.

¹³⁵ NELLIS, *supra* note 1, at 6; NELLIS, *supra* note 6, at 10. These averages exclude California’s LWOP population.

the opportunity for freedom to several hundred natural lifers may have, at most, matched President Obama's LWOP commutation rate of approximately 10%. More likely though, it may only amount to less than half that proportion.¹³⁶ Even in California, the overwhelming majority of prisoners sentenced to natural life for murder since its inception in 1976 remain under that sentence, if they remain alive at all.

In the states, including California, for which data is available, there are additional challenges before an LWOP prisoner can truly benefit from a grant of clemency. Even when commutation does occur, about 60% of the time (based on the sample presented in Online Appendices B and C), the prisoner is not immediately released by the governor or pardon board. Instead, the prisoner must subsequently satisfy the relevant parole board that they meet the relevant parole criteria or await the end of a longer fixed-term sentence. While media sources do not report any examples, it is possible that, even after a commutation from LWOP to LWP or to a lengthy fixed term, the beneficiary could still die in prison of natural causes.¹³⁷ Yet these cases are likely to be very unusual. Most LWOP commutation beneficiaries are, in due course, paroled from prison and released into the community.¹³⁸

In evaluating these results, another important comparison to make is between lifetime LWOP clemency rates and the clemency rates for finalized death sentences in each jurisdiction. Available sources do not reveal the number of LWOP prisoners who die in prison each year, which impedes the calculation of an approximate lifetime LWOP clemency rate within each jurisdiction.¹³⁹ Other researchers have managed to calculate the rate of finalized death sentences which lead to commutation (usually to formal life imprisonment), rather than to death via execution.¹⁴⁰ Excluding California

¹³⁶ HUM. RTS. WATCH, *supra* note 35, at 11 (“Commutations, however, are extremely rare, and in the last 10 years [to 2023], fewer than 200 of the over 5,000 people sentenced to LWOP [in California] have had their sentences commuted.”).

¹³⁷ See ASHLEY NELLIS, THE SENT’G PROJECT, NOTHING BUT TIME: ELDERLY AMERICANS SERVING LIFE WITHOUT PAROLE 5 (2022), <https://www.sentencingproject.org/app/uploads/2022/10/Nothing-But-Time-Elderly-Americans-Serving-Life-Without-Parole.pdf> [<https://perma.cc/P3TW-T5TH>].

¹³⁸ See *infra* note 213 and accompanying text.

¹³⁹ The otherwise comprehensive report on mortality in state and federal prisons issued by the U.S. Department of Justice in 2019 does not disaggregate deaths by sentence length. E. ANN CARSON, DEP’T OF JUST., MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2019 – STATISTICAL TABLES (2021), <https://bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf> [<https://perma.cc/2CLJ-BQ56>].

¹⁴⁰ See Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 J. LEGAL STUD. 255, 274 (2004); Matthew C. Heise, *The Geography of Mercy: An Empirical Analysis of Clemency for Death Row Inmates*, 39 T. MARSHALL L. REV. 3, 12 (2013); Daniel Pascoe, *Towards a Global Theory of Capital Clemency Incidence*, in COMPARATIVE CAPITAL PUNISHMENT 116, 121 (Carol S. Steiker & Jordan M. Steiker eds., 2019). Cao, *supra* note 7, at 23 also describes clemency “rates” in death penalty cases, but instead provides the ratio

but combining the other ten state jurisdictions discussed above, which together hold approximately 41% of the United States' 2020 state LWOP population,¹⁴¹ the proportion of prisoners granted clemency compared with the number who die in prison is likely to be less than one percent.¹⁴²

A figure near or below one percent is comparable with the clemency rates for finalized death sentences among the world's most frugal retentionist countries (e.g., Singapore, Japan, Pakistan),¹⁴³ and, at various times, some of the most frugal of retentionist U.S. states (e.g., Texas, Florida).¹⁴⁴ It signals that executive clemency, while formally available on paper, is not a viable procedural check on the harshness of a natural life sentence in a number of states. This is especially so in states where a mandatory LWOP sentence forecloses any discretion to the sentencing judge or jury. At present, within these jurisdictions, clemency provides only a theoretical prospect of release to LWOP prisoners. For critics of penal excess, the grim figures presented in this Part reflect an ever-growing LWOP population in the United States combined with a reluctance by state and federal executives to alleviate these sentences during the "tough on crime" era in U.S. politics.¹⁴⁵

However, the situation may change in the coming years. LWOP petitioners and their legal representatives may derive some small measure of comfort from the fact that the clemency rate, relative to deaths in prison, is likely to increase as lifers become older on average (especially in the thirty-eight state and federal jurisdictions that only implemented LWOP sentencing since 1980).¹⁴⁶ Clemency decision-making is discretionary, being largely unbound by judicial and political precedent,¹⁴⁷ as President Obama demonstrated by granting the highest number of clemency petitions for all

of clemency to death *sentences*. Such a calculation would need to exclude those prisoners granted LWOP clemency due to terminal illness because this largely replicates the function of compassionate release statutes.

¹⁴¹ NELLIS, *supra* note 6, at 10. This national total excludes California's and the federal jurisdiction's contribution.

¹⁴² California's rate is certainly higher than 1%, but likely less than 10%. *See* HUM. RTS. WATCH, *supra* note 35, at 11.

¹⁴³ Pascoe, *supra* note 140, at 122–23.

¹⁴⁴ *See List of Clemencies Since 1976*, *supra* note 44 (revealing no grants of death row clemency in Florida since 1983 and only three such grants in Texas since 1976). Since 1984, Florida has executed 105 prisoners, whereas since 1976, Texas has executed 586 prisoners. *See Execution Database*, DEATH PENALTY INFO. CTR. (2024), <https://deathpenaltyinfo.org/database/executions?state=Texas&state=Florida&federal=No> [<https://perma.cc/WF82-C546>].

¹⁴⁵ However, LWOP numbers may be past their peak. NELLIS, *supra* note 6, at 15; SEEDS, DEATH BY PRISON, *supra* note 11, at 5.

¹⁴⁶ Davidson, *supra* note 21. This presumes that executives' level of compassion for prisoners over a certain age (e.g., fifty-five years or sixty years) remains static over time.

¹⁴⁷ PASCOE, *supra* note 46, at 239–41; VAN ZYL SMIT & APPLETON, *supra* note 6, at 261.

crimes since President Harry S. Truman (1945–1953).¹⁴⁸ Incoming U.S. presidents or state governors are not constrained by the practices of their predecessors and may grant clemency more liberally to LWOP inmates in the future. The past two governors of California have demonstrated this possibility, reversing a long trend of executive frugality in their state. State and federal legislators also have the power to retrospectively abolish LWOP sentences for some categories of crimes and offenders, to pass general amnesties, or to enact “second look” statutes enabling later resentencing.¹⁴⁹ Future political leaders will be faced with an enormous aging LWOP population temporally and psychologically removed from their original crimes.¹⁵⁰ Very old or very sick prisoners impose a higher fiscal burden on the states. However, whether chief executives will have the political will to follow through with penal moderation efforts remains to be seen.

C. Compassionate Release and the Finality of LWOP

An important coda to the discussion in this Part is that executive clemency is not the only procedural means by which individual LWOP prisoners may be released. There are also statutory provisions in some states and in the federal jurisdiction that allow for a court, corrections official, or parole board to release LWOP inmates for compassionate reasons.¹⁵¹ Sometimes this is referred to as “medical parole,” “medical release,” “geriatric parole,” or “geriatric release,” depending on the jurisdiction.¹⁵² In practice, compassionate release for lifers only appears to be granted where the prisoner is terminally ill and facing imminent death,¹⁵³ in much the same way that clemency is sometimes used for these purposes.¹⁵⁴ In most of its legislative incarnations, however, compassionate release does not equate to

¹⁴⁸ John Gramlich, *Trump Used His Clemency Power Sparingly Despite a Raft of Late Pardons and Commutations*, PEW RSCH. CTR. (Jan. 22, 2021), <https://www.pewresearch.org/fact-tank/2021/01/22/trump-used-his-clemency-power-sparingly-despite-a-raft-of-late-pardons-and-commutations/> [https://perma.cc/7BGD-X8MP].

¹⁴⁹ Harmelin v. Michigan, 501 U.S. 957, 996 (1991); MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES 155 (2018); FAMM, *supra* note 7.

¹⁵⁰ See Margaret E. Leigey & Doris Schartmueller, *The Fiscal and Human Costs of Life Without Parole*, 99 PRISON J. 241, 251 (2019); HOOD & HOYLE, *supra* note 2, at 490.

¹⁵¹ MARY PRICE, FAMM, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 1, 12–14 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [https://perma.cc/7TFV-JZQ8]; Christie Thompson, *Frail, Old and Dying, but Their Only Way out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release.html> [https://perma.cc/LM8E-SNTE]; NELLIS, *supra* note 137, at 23–25.

¹⁵² See NELLIS, *supra* note 137, at 2–3; PRICE, *supra* note 151, at 28–33; Stephanie Grace Prost & Brie Williams, *Strategies to Optimize the Use of Compassionate Release from US Prisons*, 110 AM. J. PUB. HEALTH S25, S25 (2020).

¹⁵³ Gill, *supra* note 42, at 21.

¹⁵⁴ VAN ZYL SMIT & APPLETON, *supra* note 6, at 262; PASCOE, *supra* note 46, at 48.

executive clemency because it does not derive from the discretionary prerogative powers of the jurisdiction's chief executive.¹⁵⁵ Instead, it usually *adds* to clemency as a procedural, nonpoliticized means of releasing natural lifers before their imminent deaths in prison.

Global life imprisonment scholars van Zyl Smit and Appleton have questioned whether compassionate end-of-life release truly amounts to release at all since the prisoner is not afforded an unimpeded opportunity to rejoin society.¹⁵⁶ Yet, alongside executive clemency, compassionate release practices may affect the statistical assertion that “life means life.” Compassionate release could, therefore, impact the continued political popularity of LWOP sentences and the likelihood of some jurors to impose them. Recall that much of the political appeal of LWOP sentences is the promise to the electorate that the “worst” offenders will never be released during their lifetimes. Dr. Evi Girling goes so far as to label this promise a “*covenant with victims . . . in the finality of an unconditionality of the sentence.*”¹⁵⁷ Professor Jonathan Simon has argued that the widespread use of compassionate release would change the very meaning of LWOP itself.¹⁵⁸ In the way that it is currently practiced in U.S. jurisdictions, does compassionate release mount a sterner challenge than clemency to the finality of LWOP sentences?

The simple answer is no. From the perspective of lifers, the statistical picture of compassionate release is just as bleak as executive clemency. Legally, about two-thirds of U.S. jurisdictions with geriatric or medical parole schemes refuse, either fully or partially, to extend these benefits to prisoners sentenced to LWOP.¹⁵⁹

¹⁵⁵ Novak & Pascoe, *supra* note 4, at 7, 10–12. Nevertheless, eight states (Arizona, Arkansas, Indiana, Michigan, Missouri, Tennessee, Virginia, and West Virginia) have passed laws specifically authorizing executive clemency in situations of imminent death in prison. These laws hold several distinct advantages: they may minimize some of the regular procedural hurdles to granting clemency, they may serve to deflect political controversy from the governor, and they create exceptions to blanket LWOP clemency bans that exist in states such as Arizona. See FAMM, *supra* note 131.

¹⁵⁶ VAN ZYL SMIT & APPLETON, *supra* note 6, at 53–54. By extension, the same argument would apply to executive clemency granted solely to terminally ill prisoners.

¹⁵⁷ Evi Girling, *Sites of Crossing and Death in Punishment: The Parallel Lives, Trade-offs and Equivalencies of the Death Penalty and Life Without Parole in the US*, 55 HOW. J. CRIME & JUST. 345, 353 (2016) (emphasis added).

¹⁵⁸ See Simon, *supra* note 6, at 298. This argument presumably also extends to the widespread use of executive clemency itself.

¹⁵⁹ PRICE, *supra* note 151. In 2021, the seventeen state schemes with no blanket exclusions for LWOP prisoners or for LWOP-eligible offenses were those of Alaska, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Pennsylvania, Utah, Vermont, and West Virginia. See NELLIS, *supra* note 137, at 23–25 (showing eleven out of twenty-five listed jurisdictions that bar geriatric release for LWOP prisoners); Tina Maschi, George

For the remaining minority of states that do legally permit natural lifers compassionate release, the statutes are grossly underutilized, although precise figures are unavailable on the public record. Previous scholarship provides some description of how frugal compassionate-release grants have been in the United States. Combining all sentence lengths, including life imprisonment, in 2009, Mary Price reported that no more than twenty compassionate release petitions were sought by the Federal Bureau of Prisons each year analyzed by the report, and even fewer are granted in the states for which data is available.¹⁶⁰ Based on data from the five-year period 2013–2017, Dr. Lindsey Martin observed an annual average of 62.4 compassionate releases in the federal jurisdiction and an average of 6.2 prisoners per state per year across thirty states.¹⁶¹ The extrapolated national total comes to approximately 366 compassionate releases per year across all categories of sentences.

For perspective, the national LWOP population in 2012 was 49,081 prisoners; in 2020, it was 55,945 prisoners; and in 2022, 47% of U.S. natural lifers were over fifty years old.¹⁶² Based on this data, a rough estimate suggests that far fewer than one percent of LWOP prisoners benefit from compassionate release per year. Thus, as with executive clemency, compassionate release does not begin to challenge the notion that “life means life” for the vast majority of LWOP sentences.

Liebowitz, Joanne Rees & Lauren Pappacena, *Analysis of US Compassionate and Geriatric Release Laws: Applying a Human Rights Framework to Global Prison Health*, 1 J. HUM. RTS. & SOC. WORK 165, 170 (2016) (noting that in twenty-five jurisdictions, a prisoner must have the potential for parole to be eligible for early release); REBECCA SILBER, ALISON SHAMES & KELSEY REID, VERA INST. OF JUST., AGING OUT: USING COMPASSIONATE RELEASE TO ADDRESS THE GROWTH OF AGING AND INFIRM PRISON POPULATIONS 1, 9 (2017), <https://www.prisonpolicy.org/scans/vera/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirm-Prison-Populations-Full-Report.pdf> [<https://perma.cc/WC3S-XP4Q>] (highlighting how many states exclude LWOP prisoners from compassionate release).

¹⁶⁰ Mary Price, *A Case for Compassion*, 21 FED. SENT'G REP. 170, 171 (2009); see also PRICE, *supra* note 151, at 12–13.

¹⁶¹ These figures again combine all sentence lengths. Lindsey Martin, *The Use of Compassionate Release Policies for Elderly Offenders* 59–61 (Feb. 2019) (Ph.D. dissertation, Walden University), <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=7517&context=dissertations> [<https://perma.cc/PE9Q-2TG7>] (relaying totals for “compassionate release/medical furlough/medical parole (dependent on the specific policy used in the selected state)”; see also NELLIS, *supra* note 1, at 19 (detailing how few individuals benefit from compassionate release); SILBER ET AL., *supra* note 159, at 8, 12–15 (same). Within the federal system, hundreds of compassionate release applicants have died while awaiting the outcome of their petitions or after their petitions were rejected. Chris Feliciano Arnold, *The Dying American Prisoner*, ATLANTIC (Dec. 23, 2019), <https://www.theatlantic.com/politics/archive/2019/12/compassionate-release-lets-prisoners-die-free/603988/> [<https://perma.cc/4RTR-PD2P>]. Complete usage data on compassionate release schemes is unavailable to the public. See *id.*; PRICE, *supra* note 151, at 12; Sarah Lucy Cooper, *International Legal Cooperation and the Principles of Recognition and Enforcement: Lessons from Healthcare Law*, 23 REVISTA JURIS POIESIS 600, 603 (2020).

¹⁶² NELLIS, *supra* note 1, at 6; NELLIS, *supra* note 6, at 16; NELLIS, *supra* note 137, at 5.

Nevertheless, as with executive clemency, compassionate release may be granted more often in the near future. First, an increasing number of states have introduced legislation to allow compassionate release for natural lifers.¹⁶³ Additionally, the LWOP prison population has grown substantially since 1990 and contains many more elderly prisoners than it once did.¹⁶⁴ Most promisingly, an emerging moral norm against allowing lifers to die in prison may slowly be taking shape across the world.¹⁶⁵ Separate from executive clemency, compassionate release is rapidly emerging as a focus area for litigation, policy innovation, and criminal justice research in its own right.¹⁶⁶

IV. FINDINGS: QUALITATIVE DATA ON LWOP CLEMENCY RECIPIENTS

Next, I turn to the study's qualitative findings on the characteristics of LWOP clemency recipients since 1990. The sources I rely upon differ by jurisdiction and political administration. First, for the U.S. federal jurisdiction, I use media-sourced reasoning for the single LWOP clemency case from the Bush (Junior and Senior) and Clinton Presidencies. The U.S. Justice Department provides aggregate clemency reasoning for the 395 federal LWOP prisoners granted commutations during the Obama Presidency. The White House provides individual clemency reasoning for President Trump's eighteen LWOP commutations and pardons.

For state cases, government, media, and NGO reports cover 126 individual clemency cases. Aggregate clemency reasoning covers an additional 262 cases.¹⁶⁷ Although clemency is exceptionally rare in comparison to the total number of LWOP prisoners across the United States, there are enough publicly reported cases to draw out several important trends.

¹⁶³ NELLIS, *supra* note 137, at 14–15 (“In the 2022 legislative cycle, seven states introduced bills to allow some type of early release of older people.”).

¹⁶⁴ See Marion Vannier & Ashley Nellis, *Time's Relentless Melt': The Severity of Life Imprisonment Through the Prism of Old Age*, 25 PUNISHMENT & SOC'Y 1271, 1272 (2023) (describing how the “increase of life sentences and the growth of the older prisoners' sub-group coincide”).

¹⁶⁵ See Daniel Pascoe, *Life Imprisonment in Hong Kong*, in LIFE IMPRISONMENT IN ASIA 109, 122 (Dirk van Zyl Smit, Catherine Appleton & Giao Vucong eds., 2023) (arguing that Hong Kong's practice of releasing the vast majority of life sentenced prisoners into the community before they die may reflect an emerging moral norm). *But see* Vannier & Nellis, *supra* note 164, at 1284 (noting that in the United Kingdom and the United States, many prisoners die of old age while incarcerated).

¹⁶⁶ On the existing academic literature, see generally Gill, *supra* note 42; O'Meara, *supra* note 13; PRICE, *supra* note 151; Maschi et al., *supra* note 159; and Cooper, *supra* note 161.

¹⁶⁷ On the generalizability of these cases, see *supra* note 67 and accompanying text.

A. Federal Cases

I start with LWOP commutations by U.S. presidents for federal crimes.¹⁶⁸ During the administrations of Presidents George H.W. Bush and Bill Clinton, there were no executive clemency grants to LWOP prisoners at all. Thereafter, President George W. Bush only granted clemency to *one* LWOP prisoner in 2008. Moreover, President Clinton was the only president of the preceding three to commute a federal death sentence *to* life without parole.¹⁶⁹

The one LWOP prisoner to benefit under George W. Bush was Reed Raymond Prior, convicted of a drug offense under a federal habitual offender statute in 1996.¹⁷⁰ Prior was granted a sentence commutation by President Bush on December 23, 2008.¹⁷¹ Prior's path to commutation is demonstrative of the near-impossibility of receiving LWOP clemency during this period. The U.S. Pardon Attorney rejected Prior's first petition for clemency. He then applied a second time with

the support of influential family friends, senior judges and the wife of Iowa's then-governor. In addition to petitioning through the pardon office, Prior's lawyer met with Fred Fielding, the White House counsel. . . . "Going through the pardons office didn't work Going directly to the White House did."¹⁷²

Moreover, Prior was successful in persuading the White House that he deserved to be released because of his rehabilitation and remorse. As Prior's lawyer explained:

"There was evidence that he had been rehabilitated and adjusted well during his prison sentence He seemed to have shown remorse for his actions and was very active in his prison community, helping others out and had been a changed man."¹⁷³

Following the Bush Administration, President Obama commuted 395 LWOP sentences from 2013 to 2017.¹⁷⁴ All were lifers detained under the

¹⁶⁸ My research found no recorded clemency grants in U.S. military or District of Columbia cases since 1990 whose final decision-maker is also the president.

¹⁶⁹ *Commutations Granted by President George H. W. Bush (1989–1993)*, *supra* note 97; *Commutations Granted by President William J. Clinton (1993–2001)*, *supra* note 97; *Commutations Granted By President George W. Bush (2001–2009)*, *supra* note 62.

¹⁷⁰ Gill, *supra* note 42, at 22.

¹⁷¹ *Commutations Granted by President George W. Bush (2001–2009)*, *supra* note 62; Cao, *supra* note 7, at 31.

¹⁷² Dafna Linzer, *Justice Department Shortchanges Prisoners Who Ask for Less Jailtime*, ATLANTIC (May 14, 2012), <https://www.theatlantic.com/national/archive/2012/05/justice-department-shortchanges-prisoners-who-ask-less-jailtime/328169/> [<https://perma.cc/YEL7-8EPT>] (quoting Prior's lawyer).

¹⁷³ *Id.* (quoting Prior's lawyer).

¹⁷⁴ *Commutations Granted by President Barack H. Obama (2009–2017)*, *supra* note 97. Note that Obama did not grant any *pardons* to lifers, only commutations to lesser penalties.

new federal sentencing regime that prospectively abolished parole in 1987, and hence none were serving LWP sentences.¹⁷⁵ All except one inmate committed at least one drug offense that resulted in the LWOP sentence.¹⁷⁶ A minority of the prisoners who benefited under President Obama were sentenced concurrently with associated crimes, such as firearms and ammunition, money laundering, and unlawful use of communication facilities offenses. Most of the sentences were commuted to time served, leaving existing supervised-release conditions intact.¹⁷⁷ This reflects the Obama Administration's stated clemency policy from 2014, to prioritize the release of those federal prisoners who:

- “would have received a substantially lower sentence if convicted of the same offense(s) today”—which in practice prioritized those convicted of drug trafficking and related drug crimes;
- “are non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;”
- “have served at least 10 years of their prison sentence;”
- “do not have a significant criminal history;”
- “have demonstrated good conduct in prison;” and,
- “have no history of violence prior to or during their current term of imprisonment.”¹⁷⁸

The Department of Justice's criteria for clemency in President Obama's second term summarizes clemency reasoning as well as any coding system could manage from statements setting out the official reasoning on a case-by-case basis. In December 2013, the first six of President Obama's LWOP commutations came before the official Clemency Initiative was announced, yet these grants were likely made for similar reasons.¹⁷⁹ Each of these earlier inmates “were convicted of crack cocaine offenses that [President Obama] deemed to be unduly harsh.”¹⁸⁰ Eventually, the Obama Administration ran

¹⁷⁵ *Id.*; see also NELLIS, *supra* note 6, at 24.

¹⁷⁶ *Commutations Granted by President Barack H. Obama (2009–2017)*, *supra* note 97. The exception was Gerardo Hernandez, a Cuban spy originally sentenced to life imprisonment for, among other crimes, conspiracy to commit murder.

¹⁷⁷ *Id.*

¹⁷⁸ *Clemency Initiative*, DOJ (Apr. 23, 2014), <https://web.archive.org/web/20170120215137/https://www.justice.gov/pardon/clemency-initiative> [<https://perma.cc/PS43-CJZ5>].

¹⁷⁹ *Commutations Granted by President Barack H. Obama (2009–2017)*, *supra* note 97.

¹⁸⁰ Cao, *supra* note 7, at 26; *President Obama Grants Commutations and Pardons*, DOJ (Dec. 19, 2013), <https://www.justice.gov/opa/pr/president-obama-grants-commutations-and-pardons> [<https://perma.cc/2ZJ3-THN9>]. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, reduced the hundred-fold disparity in drug weight required to trigger federal felony penalties, originally

out of time to vet all cases that might have met the criteria above.¹⁸¹ Even more than 395 federal LWOP prisoners might have benefited from the Clemency Initiative had it started during President Obama's first term.

President Trump followed President Obama's LWOP clemency model, albeit on a far less systematic basis.¹⁸² President Trump commuted the sentences of seventeen LWOP prisoners sentenced under punitive drug laws (one of whom was also convicted of murder), and he unconditionally pardoned one lifer sentenced exclusively for murder. Although these numbers are much smaller than President Obama's LWOP commutations, President Trump was more generous to LWOP prisoners than Presidents Bush Senior, Clinton, and Bush Junior. A compilation of Trump's public reasoning for the eighteen cases commuted is available in Table 2. In some cases, more than one reason was provided.

enacted by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. Critics argued that the Anti-Drug Abuse Act, in punishing possession of crack cocaine much more harshly than powder cocaine by weight, exacerbated existing racial disparities in U.S. federal sentencing and incarceration rates. *See, e.g.,* DEBORAH VAGINS & JESSILYN MCCURDY, ACLU, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 2* (2006), <https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law> [<https://perma.cc/29W8-JE6E>]. The Fair Sentencing Act of 2010 only operated prospectively, thereby providing President Obama an opportunity to use his clemency powers to extend systemic change. President Trump cited the reform of mandatory drug sentencing laws in four of his own commutations. *See* Online Appendix A; *supra* Table 1.

¹⁸¹ *See* CTR. ON THE ADMIN. OF CRIM. L., N.Y.U., *THE MERCY LOTTERY: A REVIEW OF THE OBAMA ADMINISTRATION'S CLEMENCY INITIATIVE* 6 (2018), https://www.law.nyu.edu/sites/default/files/upload_documents/The%20Mercy%20Lottery.Report%20on%20Obama%20Clemency%20Initiative.2018.pdf [<https://perma.cc/K9AQ-NL5Y>] (highlighting the thousands of unresolved clemency applications as of 2018).

¹⁸² Jill Colvin & Darlene Superville, *Celebrities, Conservatives and 'Witch Hunts': Pardons Only Come for Those That Trump Identifies With*, NAT'L POST (June 1, 2018), <https://nationalpost.com/news/world/trump-pardons-celebrity-connections-conservative-causes> [<https://perma.cc/C7H8-EGQ5>].

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TABLE 2: OFFICIAL JUSTIFICATIONS FOR PRESIDENT TRUMP’S CLEMENCY GRANTS
IN FEDERAL LWOP CASES

Justification	Number of Cases	Percentage of Cases
Good behavior, rehabilitation, remorse expressed in prison, accepting responsibility	15	83%
First-time offender, nonviolent offense, nonviolent offender	9	50%
Employment or housing available on release	5	28%
Reform of mandatory drug sentencing statute or guidelines which did not operate retrospectively, disproportionate sentence, marijuana-only offense	4	22%
Possible innocence	2	11%
Prior good character or national service	2	11%
Prisoner with children	1	6%
Public support	1	6%

President Trump’s commutations reflect an ad hoc continuation of President Obama’s policies towards nonviolent drug offenders, benefiting some of those offenders who slipped through the cracks of the previous administration’s policies. Of those who received clemency under President Trump, fifteen of the eighteen were immediately released following a commutation to time served. Two received commutations to a fixed term, whereas the remaining individual received an unconditional pardon. These clemency outcomes were similar to those of the beneficiaries under President Obama. However, as compared to President Obama’s more principled commutations, President Trump’s grants were more overtly influenced by personal connections and political or business interests as opposed to recommendations from the U.S. Pardon Attorney.¹⁸³ In fact, compared with

¹⁸³ Crouch, *supra* note 74, at 692–93, 699, 703; Jeffrey Crouch, *The Office of the Pardon Attorney: What Comes Next?*, 33 FED. SENT’G REP. 337, 337, 339 (2021); Gramlich, *supra* note 148.

the Obama Clemency Initiative, President Trump almost completely sidelined the Pardon Attorney as a vetting tool.¹⁸⁴

As noted, the Trump White House provided an official account of the reasons for commutation or pardon for each LWOP inmate. Yet, the official set of justifications does not reveal the background political motivations for his clemency grants. Instead, they merely convey the President's public penological or criminological explanations.¹⁸⁵ Observing both the typical remedies (commutation to time served) and methods by which many of the cases came to Trump's attention (endorsements from prominent people, political allies, and Trump's own family), what emerges is a regal "all or nothing" approach to commutation. Without a systematic policy designed to remedy unfairness within the federal criminal justice system, Trump's method echoed that of a medieval monarch using his prerogative to spare life as an "act of grace." Arguably, this method benefitted a few lucky prisoners with the right connections and served to enhance the status of the decision-maker himself.¹⁸⁶ It was a throwback to a more personal style of pardon politics.

Still, even by providing an official account of presidential reasoning, the Trump White House's press releases significantly improved transparency from most previous presidential administrations. This move is in line with calls from recent clemency scholarship¹⁸⁷ and the legal position in a number

¹⁸⁴ See Matthew Gluck & Jack Goldsmith, *Donald Trump and the Clemency Process*, 33 FED. SENT'G REP. 297, 298 (2021).

¹⁸⁵ See, e.g., Press Release, Trump White House, Statement from the Press Secretary Regarding Executive Grants of Clemency (Jan. 20, 2021), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/> [<https://perma.cc/WPM9-STRQ>] (noting that justifications included: taking responsibility for the offense, remorse, old age, clean prior record, dependent family members, prior national service, possible innocence, rehabilitation in prison, religious convictions, prospective-only amendment to sentencing law, contributions to the community, youth, addiction or abuse contributing to the offense, and lesser harm caused by the offense).

¹⁸⁶ See Leslie Sebba, *The Pardoning Power: A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83, 83 (1977) (highlighting the monarchical origin of the pardon power); AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 16 (2005) (recalling the historical power of a sovereign over life and death); Larkin, *supra* note 3, at 476–78 (detailing the various, often personal, reasons monarchs granted pardons); MOORE, *supra* note 74, at 63, 202–03 (recounting the history of the pardon power as a political and financial tool).

¹⁸⁷ Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 753–54 (2012); Novak & Pascoe, *supra* note 4, at 212; Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J.L. REFORM 817, 841–43 (2016); Mark William Osler, *Clemency for the 21st Century: A Systemic Reform of the Federal Clemency Process* 5 (Apr. 10, 2013) (unpublished manuscript), <https://papers.ssrn.com/a=2248361> [<https://perma.cc/G3KY-4FV8>]. *Contra* Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 FED. SENT'G REP. 150, 152 (2000–2001) (maintaining skepticism about the proposition that "implementing a requirement that presidents provide reasons for all of their clemency decisions would markedly enhance use of the power").

of states whereby official reasoning must be reported to the legislature.¹⁸⁸ A partial disclosure of the true presidential reasons for commutation is preferable to no disclosure at all.

B. State Cases

In state cases, the data collection identified 388 instances of LWOP clemency over thirty-one years. Approximately two-thirds (262) of the cases are collective listings (Online Appendix C) and one-third (126) are individual listings (Online Appendix B). In the vast majority of all state cases (372 cases, or 96%), I was able to identify at least one official reason for mitigating the prisoner's sentence. Below, I provide the patterns identified through content analysis. However, I note again a likely sampling bias toward more recent and more "newsworthy" cases.

Twenty states are represented in the codable data, although six contain only one entry in Online Appendices B and C. Adding the figures from Online Appendix B to those in Online Appendix C, the most numerous clemency grants took place in California (175 commutations and 1 pardon), Michigan (54 commutations), Illinois (34 commutations), Oklahoma (29 commutations), Louisiana (21 commutations), and Pennsylvania (19 commutations).

In this Section, I evaluate several trends in the state data. Namely, I find that state LWOP clemency grants reflect: (1) systemic reforms implemented by individual governors; (2) gender differences; and (3) different kinds of relief offered, although complete pardons remain incredibly unlikely. I further find state clemency grants are distinguishable by the underlying offenses committed. Finally, I evaluate the publicly reported reasons for clemency. Despite the overall low clemency rates, I find that most clemency grants have been awarded to prisoners who display evidence of rehabilitation.

1. Actions of Individual Governors

Several state totals are dominated by the actions of a single governor. For example, Michigan's total is dominated by the more than fifty lifers whose LWOP sentences were commuted by Governor Jennifer Granholm during her second term from 2007 to 2011.¹⁸⁹ I elaborate further on Granholm's commutations below.

With state legislatures typically enacting prospective-only reforms to habitual offender or mandatory minimum statutes, it falls upon state governors and pardons boards to provide relief to those prisoners whose

¹⁸⁸ See Colgate Love, *supra* note 54.

¹⁸⁹ Gill, *supra* note 42, at 23.

convictions and sentences predate the reforms. Governors such as Mary Fallin (Republican, Oklahoma, 2011–2019), John Engler (Republican, Michigan, 1991–2003), and Jay Inslee (Democrat, Washington, 2013–present) have taken the lead on this issue, much like President Obama did at the federal level. Republican Governor Mary Fallin’s twenty-nine listed commutations in Oklahoma largely arose as a policy response to that state’s outdated habitual offender law, which targeted drug trafficking recidivists with mandatory LWOP sentences. Acknowledging Louisiana’s world-leading incarceration rate, Governor John Bel Edwards (Democrat, Louisiana, 2016–present) has regularly commuted the sentences of LWOP prisoners. Unusually, Governor Edwards’s commutations benefited elderly lifers previously convicted of violent offenses rather than habitual drug or property offenders.¹⁹⁰ Similarly, outgoing Governor Jerry Brown of California sought to systematically undo the state’s legacy of punitive sentencing, including his own support for “tough on crime” policies during his earlier terms as governor (1975–1983).¹⁹¹

In this way, state governors have used executive clemency as a tool to initiate or extend policy outcomes over a large number of cases. However, in doing so, they usually individually vetted each case that was to benefit under the policy. Scholars have long identified pardons and commutations as a means of benefiting entire classes of prisoners and mitigating the inflexibility inherent in mandatory minimum sentencing statutes.¹⁹² For state governors, executive clemency is one means of undoing the ongoing collective damage caused by punitive policies implemented during the 1980s and 1990s.¹⁹³

¹⁹⁰ See Julia O’Donoghue, *John Bel Edwards Reduces 22 Prisoners’ Terms—and Gets Angola Inmates’ Attention*, NOLA.COM (Mar. 9, 2017), https://www.nola.com/news/politics/article_13317f8f-7f6b-55e5-a4ea-455c7456dbb9.html [<https://perma.cc/4LCD-7AY7>]; *Louisiana Governor Increases Sentence Commutations in 2020*, AP (Jan. 23, 2021), <https://www.katc.com/news/covering-louisiana/louisiana-governor-increases-sentence-commutations-in-2020> [<https://perma.cc/PKA4-JTK9>].

¹⁹¹ Abbie Vansickle, *The Jerry Brown Way of Pardoning: Former Inmates Facing Deportation Place Their Hope in California’s Outgoing Governor*, THE MARSHALL PROJECT (Nov. 20, 2018), <https://www.themarshallproject.org/2018/11/20/the-jerry-brown-way-of-pardoning> [<https://perma.cc/AZY3-N72Q>]. It was during Brown’s first term, in 1976, that California adopted LWOP as an alternative sentence for capital murder. Davidson, *supra* note 21.

¹⁹² See, e.g., Daniel T. Kobil, *Reviving Presidential Clemency in Cases of “Unfortunate Guilt.”* 21 FED. SENT’G REP. 160, 161 (2009); Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 302 (2010); Daniel Pascoe, *Is Diya a Form of Clemency?*, 34 B.U. INT’L L.J. 149, 166 (2016).

¹⁹³ See Holden, *supra* note 18, at 360; SEEDS, DEATH BY PRISON, *supra* note 11, at 180, 184–85; Cynthia W. Roseberry, *From the Death Penalty to Marijuana, Clemency Is a Tool for Justice*, ACLU (Dec. 14, 2022), <https://www.aclu.org/news/smart-justice/from-the-death-penalty-to-marijuana-clemency-is-a-tool-for-justice> [<https://perma.cc/U2YE-E776>].

2. *Clemency by Gender*

The second notable pattern from the data relates to gender: of the 126 individual listings, 26 were women. This is a much higher proportion (21%) of female clemency grants than the proportion of female LWOP prisoners in the United States (3% in 2020).¹⁹⁴ These twenty-six women were granted commutations for a variety of reasons, but long-term domestic violence that led them to kill was a factor in at least eight cases. In twenty-four of the twenty-six cases, the defendant committed murder.

A high number of female commutations relative to the female LWOP population is also consistent with the prior literature on clemency in U.S. death penalty cases. Indeed, the literature identifies gender itself as a key mitigating factor influencing clemency decision-makers.¹⁹⁵ The Sentencing Project observed in 2012 that 84% of life-sentenced women in the United States (encompassing both LWOP and LWP prisoners) had been sexually or physically abused before their crimes took place.¹⁹⁶ In states with mandatory LWOP sentencing for first- or second-degree murder, commutation becomes a key means of taking into account domestic violence, postpartum depression, and even gender itself as case characteristics demanding leniency in punishment.¹⁹⁷

3. *Characteristics of Relief*

Third, the type of relief offered by the governor or board varies across the coded cases. Most generous was commutation to time served (in at least sixty-four cases), thereby enabling immediate release from incarceration. At least seventeen LWOP sentences were commuted to a fixed term of imprisonment, ranging from 20 to 237 years, with the median figure being 60 years. In eighty-five cases, the LWOP sentence was commuted to

¹⁹⁴ Of the 55,945 LWOP prisoners in 2020, 1,897 of them were women. *See* NELLIS, *supra* note 6, at 10, 18; ASHLEY NELLIS, THE SENT'G PROJECT, IN THE EXTREME: WOMEN SERVING LIFE WITHOUT PAROLE AND DEATH SENTENCES IN THE UNITED STATES 6 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/In-the-Extreme-Women-Serving-Life-without-Parole-and-Death-Sentences-in-the-United-States.pdf> [<https://perma.cc/DT2B-MV4S>]. Including the collective record of Governor Brown's commutations in California, which provides data on gender, the total comes to 57 women of 273 LWOP clemency cases (21%). Governor Brown's grants were the only collective record of clemency that provided data on gender.

¹⁹⁵ Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 968, 982 (2001); HOOD & HOYLE, *supra* note 2, at 318; MOORE, *supra* note 74, at 208–09.

¹⁹⁶ NELLIS, *supra* note 1, at 11; *see also* NELLIS, *supra* note 194, at 12.

¹⁹⁷ NELLIS, *supra* note 137, at 16. In 2020, there were 1,897 women serving LWOP sentences in the United States, 96% for homicide crimes. Given that this number has risen quickly, and with evolving legal views towards “battered women” who kill their abusers, there may be further gender-based commutations in the near future. *See* NELLIS, *supra* note 194, at 6, 9, 11.

LWP¹⁹⁸—often with a minimum nonparole period attached, ranging between fifteen and forty-nine years. Using clemency to reduce LWOP to LWP or to a “de facto life” fixed-term sentence means that the prisoner remains at the mercy of the state’s parole authorities for release, although in some cases, the board recommending commutation is also the state’s parole board.¹⁹⁹

In 221 cases, the source only mentioned “commutation,” and the precise terms of the grant were not described. The average term served by this cohort of prisoners before commutation was twenty-five years, where information was available. This term was shorter than the average of thirty-two years served by the group of prisoners whose LWOP sentences were commuted to time served. Instead, the average term for these 221 cases was equivalent to that of prisoners whose sentences were commuted to LWP, with or without a minimum term. The overall picture that emerges is that state governors seem more willing to immediately release LWOP prisoners who have served more than thirty years incarcerated. Prisoners who have served fewer than thirty years might instead be given an opportunity to convince the state parole board that they are sufficiently rehabilitated for release.

Most strikingly, in only one of the 388 state cases surveyed, was a *pardon* granted to an LWOP prisoner. In November 2017, California’s Governor Jerry Brown pardoned Craig Richard Coley on the grounds of innocence.²⁰⁰ Aside from this one case, *commutations* to LWP, to a fixed term, or to time already served were the forms of clemency documented in state cases. In other words, barring Coley’s case, no LWOP prisoner’s entire sentence was vacated by the executive. This is notable because pardons typically signify that the punishment was undeserved in the first place. Within the data set are several cases where the justifications for clemency explicitly mentioned possible innocence (eleven cases, including Coley’s) or the absence of an intent to kill in a murder case (five cases). Yet only in Coley’s case did the petitioner receive a pardon.²⁰¹ Moreover, in only two identifiable cases of the remaining fifteen (Naomi Blount, Pennsylvania,

¹⁹⁸ This includes a stated reduction to LWP in *most* of Governor Fallin’s twenty commutations listed collectively in Online Appendix C.

¹⁹⁹ See *supra* note 20 (defining a “de facto life” sentence).

²⁰⁰ Hans Sherrer, *Craig Richard Coley*, WRONGLY CONVICTED DATABASE REC., <http://forejustice.org/db/Coley--Craig-Richard-.html> [https://perma.cc/Z5T9-G4CG].

²⁰¹ At least two of these fifteen prisoners later received pardons (Cheryl Beridon and Frank LaPena), although each only benefited after being released from incarceration. See Maurice Possley, *Cheryl Beridon*, NAT’L REGISTRY OF EXONERATIONS (before June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3022> [https://perma.cc/7W3A-HF63]; Bill Dentzer, *Accused Murder Mastermind Frank LaPena Granted Pardon*, LAS VEGAS REV.-J. (Nov. 6, 2019), <https://www.reviewjournal.com/crime/courts/accused-murder-mastermind-frank-lapena-granted-pardon-1887052> [https://perma.cc/XCX3-YT3J].

2019 and Marilyn Munero, Illinois, 2020) was there an LWOP sentence commuted to time served, thereby enabling immediate release.²⁰²

As such, the decision-makers in most of the preceding fifteen cases seemingly treated the legal or factual innocence argument as a *mitigating* factor rather than an *exculpatory* one. Again, there is an analogy with the U.S. death penalty here. In several death penalty cases since 1976, politically cautious state governors have been receptive to innocence arguments, but often only to the extent that they justified reducing a death sentence to life imprisonment instead of pardoning the prisoner outright.²⁰³ One clear explanation is the presence of state legal prohibitions on pardons until applicants have entirely completed their prison sentences or upon life-sentenced prisoners *per se*.²⁰⁴ With relevance to the fifteen aforementioned LWOP cases, such provisions currently apply in Iowa, Louisiana, Maryland, and North Carolina, but not in Arkansas, Colorado, Illinois, Nevada, and Pennsylvania.²⁰⁵ In California, a ten-year waiting period after completing a sentence may be waived in exceptional circumstances, such as for innocence cases.²⁰⁶ Yet, even taking into account prohibitions or mandatory waiting periods imposed by legislation, it is incongruous that only 1 LWOP prisoner of 388 clemency recipients was immediately vindicated via pardon.

4. *Characteristics of the Underlying Offenses*

As for the crimes committed by prisoners whose LWOP sentences were eventually commuted, a key difference between the coded federal and state practices is that far fewer of the commuted state cases involved drug offenses (26%, or 49 in total, most of which came under habitual offender statutes). Of the remaining sentences, 5% (9 in total) were for robbery or burglary (again, most under habitual offender statutes), with the bulk (70%, or 134 in total) being passed for murder, including first-degree murder, second-degree

²⁰² As with more than twenty-five other LWOP prisoners released by Illinois Governor J.B. Pritzker in 2020, Marilyn Munero's immediate release was also heavily influenced by the need to stop COVID-19 spreading in prison. See Online Appendices B, C.

²⁰³ See *List of Clemencies Since 1976*, *supra* note 44.

²⁰⁴ See Carter et al., *supra* note 27, at 349; see, e.g., *Arizona Pardon Information*, *supra* note 130 (detailing waiting period restrictions in Arizona).

²⁰⁵ See Colgate Love, *supra* note 54 (stating that Nevada's eligibility requirement is waivable with the consent of a board member).

²⁰⁶ OFF. OF THE GOVERNOR, STATE OF CAL., HOW TO APPLY FOR A PARDON 1 (2004), https://publicdefender.saccounty.gov/Documents/Apply_for_Pardon.pdf [<https://perma.cc/B3RH-ZQZX>].

murder, and felony murder, sometimes committed in combination with further serious offenses.²⁰⁷

The substantial difference between the state and federal practice on drug offenses here is presumably explicated by (a) President Obama's historic initiative to prioritize commutation for nonviolent drug offenders at the expense of other crimes, continued to a lesser extent by President Trump, and (b) the much higher proportion of drug offenders in the federal LWOP system. By the end of the Obama Presidency, 50% of federal LWOP prisoners had committed a drug offense, whereas only 5% of LWOP prisoners nationally had done likewise.²⁰⁸

Within both federal and state cases, the much-higher proportion of commutations for drug cases compared with the prevalence of drug convicts within the LWOP population is explicable due to reforms to habitual offender and mandatory sentencing statutes, which disproportionately impact drug cases. The broader political context is a recognition by many state governors and recent U.S. presidents that the "War on Drugs"—which began in the 1970s with the Nixon Administration—has failed and that more humane punishments are needed for drug offenders.²⁰⁹

5. *Explicit Reasoning*

Finally, leaving aside systemic reforms initiated by individual governors, I turn to the remaining explicitly stated reasons for commutation. Within the 321 state-level cases for which such data was available, the cited justifications for clemency are reported in Table 3, bearing in mind that in most cases more than one factor is cited.²¹⁰

²⁰⁷ This figure excludes cases from Online Appendix C where all of the crimes covered by a group commutation were not ascertainable. The remaining three LWOP sentences not covered by this list were passed for kidnapping, manslaughter, and rape. See Online Appendix B.

²⁰⁸ NELLIS, *supra* note 43, at 12–13.

²⁰⁹ See TURNER ET AL., *supra* note 26, at 11–13.

²¹⁰ Importantly, these state aggregates exclude former Michigan Governor Jennifer Granholm's commutations to more than fifty LWOP prisoners (including at least fifteen drug traffickers and thirty-five convicted murderers) during her second term from 2007 to 2011. Gill, *supra* note 42, at 23. Granholm's individual reasoning on a case-by-case basis remains unavailable, hence making a comparison with the above figures impractical. However, her publicly stated policy was to commute sentences where the prisoner was "nonviolent, aging, ill, or deportable." *Id.* Some commutations may have been prompted by more than one of these characteristics. Additionally, Granholm's policy had an underlying fiscal motivation—to save Michigan's public money by incarcerating fewer long-term prisoners. It is unclear how many times each of these various justifications were invoked, unlike the case with the collectively reported grants made by Governors John Bel Edwards (Louisiana, 2016) and Mary Fallin (Oklahoma, 2017), hence their inclusion within Table 3.

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TABLE 3: JUSTIFICATIONS FOR COMMUTATION IN STATE LWOP CASES 1990–2021

Justification	Number of Cases	Percentage of Cases
Good behavior, rehabilitation, acceptance of responsibility, remorse, as expressed in prison	222	69%
Reform of mandatory sentencing or habitual offender statutes which did not operate retrospectively	33	10%
Commutation to stop the spread of COVID-19	33	10%
Youth	25	8%
Old age	23	7%
Accomplice rather than a principal offender, or other sentencing disparity when compared with like cases	19	6%
Possible innocence or no intent to kill	16	5%
Addiction, domestic violence, or mental health issues contributing to the crime	12	4%
Terminal illness	4	1%
Assisting prosecutors, police, or prison wardens	4	1%
Prior good character or national service	3	<1%
Support from victim’s family	3	<1%
(Other)	8	2%

Good behavior and rehabilitation in prison, grouped with remorse and accepting responsibility for the offense committed, are by far the most cited justifications in state cases, according to Table 3. In around 70% of the state cases with available clemency reasoning, we see commutation resurrecting and replicating the function of parole for lifers,²¹¹ not least because both parole and clemency recommendations are often made by similar groups of

²¹¹ AS SEEDS, DEATH BY PRISON, *supra* note 11, at 45–46, observes, in this sense we actually see clemency reverting to one of its original functions. Before the advent of parole in the early twentieth century, “a well-oiled clemency system operated not unlike parole (or as a complement to parole) for lifers.” *Id.*

people exhibiting similar expertise and institutional memory.²¹² Noticeably, many of the cases listed in Online Appendices B and C witness a close temporal alignment between a governor's decision to commute an LWOP sentence after many years of good behavior in prison and the release of the prisoner into the community.²¹³ Recall that the political premise of an LWOP sentence is to lock the offender up until they die in prison, with zero prospect of release, no matter how well rehabilitated. Even before considering parole outcomes, nearly 70% of the state clemency cases documented here suggest otherwise. They demonstrate that lenient discretion, when foreclosed at one stage of case processing, simply reappears elsewhere, in this case at the very "back-end" of the criminal justice system.²¹⁴ Respect for a component of human dignity as fundamental as the ability to change and evolve cannot be eradicated entirely through legislation.²¹⁵

Another notable trend is the relative infrequency of *age* as a justification for clemency. Youth appears in the governor's explicit reasoning in twenty-five individual cases, twenty-three of which took place within just two states (California and Colorado). Moreover, youth was never explicitly mentioned as a factor justifying clemency within the group-based data from California, Illinois, Louisiana, Michigan, and Oklahoma, leaving it operative in only 7%

²¹² Barkow, *supra* note 2, at 193. Of the twenty states that are mentioned at least once in Online Appendix B, Arizona, Arkansas, California, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Missouri, North Carolina, Oklahoma, South Dakota, and Virginia each possess a single board of pardons *and* paroles. See Colgate Love, *supra* note 54 (referring to individual state profiles). Of these fourteen states, the advisory boards in Arizona, Louisiana, Massachusetts, Oklahoma, and South Dakota must make an affirmative recommendation to the governor when the governor grants clemency. *Id.*

²¹³ This group includes all prisoners who received commutations to time served, plus most of the prisoners whose sentences were commuted by Governor Newsom of California in 2019 and 2020, plus numerous other prisoners listed in Online Appendices B and C. Several examples are Joel Kinney (Nevada, commuted in 1999 and paroled in 2000), Betty Smithey (Arizona, commuted and paroled in 2012), Debra Lynn Gindorf (Illinois, commuted and paroled in 2009), and Moreese Bickham (Louisiana, commuted in 1995 and paroled in 1996). See *News Briefs*, L.V. SUN (Feb. 16, 2000), <https://lasvegassun.com/news/2000/feb/16/news-briefs/> [<https://perma.cc/ZBV8-VFZK>]; E.J. Montini, *Freed Killer Betty Smithey IS Jodi Arias – in 50 Years*, ARIZ. REPUBLIC (Apr. 26, 2015), <https://www.usatoday.com/story/news/nation/2015/04/26/freed-killer-betty-smithey-is-jodi-arias/26434005/> [<https://perma.cc/Z5X6-RLWG>]; *Gov. Commutes Woman's Life Sentence*, ABC7 CHI. (May 2, 2009), <https://abc7chicago.com/archive/6792819/> [<https://perma.cc/VMR8-UJWT>]; Melanie Eversley, *Man Jailed for 38 Years for Killing Alleged Klansmen Dies*, USA TODAY (Apr. 6, 2016), <https://www.usatoday.com/story/news/2016/04/06/man-jailed-38-years-killing-alleged-klansmen-dies/82686046/> [<https://perma.cc/L6FG-B2AV>].

²¹⁴ See Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, in *THE USES OF DISCRETION* 32, 36 (Keith Hawkins ed., 1992); Veronica Horowitz & Christopher Uggen, *Consistency and Compensation in Mercy: Commutation in the Era of Mass Incarceration*, 97 SOC. FORCES 1205, 1209 (2019).

²¹⁵ See Marion Vannier, *A Right to Hope? Life Imprisonment in France*, in *LIFE IMPRISONMENT AND HUMAN RIGHTS* 192, 199 (Dirk van Zyl Smit & Catherine Appleton eds., 2016); VAN ZYL SMIT & APPLETON, *supra* note 6, at 299–301; Carter et al., *supra* note 27, at 323.

of all documented cases with reasons. Perhaps most significantly, in no documented case was youth the *sole* justification for clemency. Invariably, youth appears alongside other justifications, such as long-term rehabilitation.²¹⁶ Young offenders act more impulsively and are more influenced by their peers than are adults. Based on its status as a common mitigating factor in sentencing and as a key previous justification for death penalty clemency, youth might have been expected to appear within the coded data on LWOP clemency reasoning more often.²¹⁷

A series of U.S. Supreme Court decisions have restricted LWOP sentencing in cases involving offenders under eighteen years of age. Following *Graham v. Florida* (2010) and *Miller v. Alabama* (2012), juvenile LWOP is no longer constitutional for nonhomicide crimes or as a mandatory sentence for homicide crimes.²¹⁸ In *Montgomery v. Louisiana* (2016), the Supreme Court expanded the reach of *Graham* and *Miller* retrospectively.²¹⁹ As of 2017, more than 2,000 juveniles were due a resentencing or parole hearing following these decisions.²²⁰

Yet, these decisions have not changed the outlook for all young offenders originally sentenced to natural life. A number of juvenile offenders convicted of the most egregious forms of homicide have been resentenced to LWOP if, in the sentencing court's opinion, they remain "irredeemable."²²¹ In 2020, the nationwide juvenile LWOP population still stood at 1,465,²²² and juvenile homicide offenders continue to be sentenced to LWOP at the

²¹⁶ See Online Appendices B, C. In two cases—Daniel Peters (Pennsylvania, 2016) and Curtis A. Brooks (Colorado, 2018)—youth as an explicit justification appears alongside the governors' responses to U.S. Supreme Court decisions invalidating LWOP for defendants under the age of eighteen in some circumstances (e.g., *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016)).

²¹⁷ See PASCOE, *supra* note 46, at 47; *Roper v. Simmons*, 543 U.S. 551, 659 (2005).

²¹⁸ *Graham v. Florida*, 560 U.S. 48, 82 (2010); *Miller*, 567 U.S. at 470.

²¹⁹ *Montgomery*, 136 S. Ct. at 736.

²²⁰ NELLIS, *supra* note 43, at 34 n.2 (2017), <https://www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf> [<https://perma.cc/SF3V-R82Z>]; KLEINSTUBER ET AL., *supra* note 32, at 196. To circumvent the effect of *Miller*, in 2016 Iowa Governor Terry Branstad granted thirty-eight juvenile prisoners a "commutation" whereby their LWOP sentences were reduced to LWP with a sixty-year minimum term. Unsurprisingly, these commutations were later declared void in the Iowan courts. PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER MILLER V. ALABAMA 37 (July 8, 2015), <https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/55f9d0abe4b0ab5c061abe90/1442435243965/Juvenile+Life+Without+Parole+After+Miller++.pdf> [<https://perma.cc/UZ5C-U64Y>].

²²¹ Parag Dharmavarapu, Note, *Categorically Redeeming Graham v. Florida and Miller v. Alabama: Why the Eighth Amendment Guarantees All Juvenile Defendants a Constitutional Right to a Parole Hearing*, 86 U. CHI. L. REV. 1439, 1453, 1461–62 (2019).

²²² JOSH ROVNER, THE SENT'G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW I (2021), <https://www.sentencingproject.org/app/uploads/2022/08/Juvenile-Life-Without-Parole.pdf> [<https://perma.cc/QH4Y-YCKN>].

time of writing this Article.²²³ Based on the data presented here, juvenile natural lifers' prospects of commutation or pardon in the near future do not look particularly promising. They will likely have to base their clemency petitions on grounds other than their immaturity at the time of the offense, particularly their rehabilitation and remorse demonstrated in prison. And they will likely only begin to receive consideration for commutation once they reach middle age.

As for old age, it is mentioned as a justificatory factor in 23 of the 321 cases listed in Table 3. It is also mentioned in some, but not all, of the more than fifty commutations by Governor Granholm not included in Table 3.²²⁴ In contrast, old age was never mentioned by Presidents Obama and Trump in commuting federal prisoners' LWOP sentences. Nevertheless, the sheer number of years LWOP prisoners spend incarcerated and the degree of certainty over rehabilitative progress required by most state governors and pardons boards before granting commutations suggests that advancing age is more relevant than is first evident. Where individualized state data is available, the average time spent incarcerated between sentencing and commutation was 28.1 years.²²⁵ This suggests that, to receive clemency, prisoners must necessarily spend many years incarcerated while working to convince the relevant decisionmaker of their rehabilitation.

As further evidence of the likely role of aging in justifying LWOP commutations, consider the following examples. Age appears as an explicit factor for several of the Pennsylvania prisoners who spent thirty-five or more years incarcerated as accomplices to murder—for Tyrone Werts at fifty-nine years old, William Fultz at fifty-eight years old, and Keith Smith at fifty-five years old.²²⁶ It also appears as an explicit justification in three comparable Californian cases—for Paris Dixon at sixty-three years old, Dwayne Allen

²²³ See NELLIS, *supra* note 1, at 11; Hannah Duncan, Note, *Youth Always Matters: Replacing Eighth Amendment Pseudoscience with an Age-Based Ban on Juvenile Life Without Parole*, 131 YALE L.J. 1936, 1991, 1998, 2005–06 (2022); Matthew Fahr, *State Considering Juvenile Life Without Parole Sentencing Ban*, OAKLAND PRESS (Jan. 8, 2024), <https://www.theoaklandpress.com/2024/01/07/state-considering-juvenile-life-without-parole-sentencing-ban/> [<https://perma.cc/9XEJ-KFBW>]; Allie Gross, *Georgia Leading Nation in New Juvenile 'Lifers'*, ATLANTA J.-CONST. (Sept. 10, 2023), <https://www.ajc.com/news/investigations/ga-legislators-file-bill-to-ban-juvenile-life-without-parole-following-ajc-investigation/4V4QZGESYNA5VANLO4YQQGIQ34/#:~:text=Tanya%20Miller%2C%20D%20Atlant%2C,their%20differing%20capacity%20for%20rehabilitation> [<https://perma.cc/7ZGW-YSQZ>]; Katharine Blake, *My Cousin Killed a Child at Age 16. Does He Deserve to Die in Prison?*, WASH. POST (Nov. 7, 2021), https://www.washingtonpost.com/outlook/my-cousin-killed-a-child-at-age-16-does-he-deserve-to-die-in-prison/2021/10/29/87d5bd26-3811-11ec-8be3-e14aaacfa8ac_story.html [<https://perma.cc/UEJ4-YHEU>].

²²⁴ See Gill, *supra* note 42, at 23.

²²⁵ On ways to measure time spent in prison, see *supra* note 65.

²²⁶ See Online Appendix B.

at sixty-two years old, and Thomas Waterbury at sixty-one years old.²²⁷ Given that age was explicitly factored into these commutations, it is likely that age was also a factor in the clemency decisions for even older prisoners. For example, consider Betty Smithey (sixty-nine years old, incarcerated for forty-nine years in Arizona), Eugene Tanniehill (seventy-two years old, incarcerated for forty-seven years in Louisiana), Thurmond Berry (sixty-eight years old, incarcerated for thirty-nine years in Pennsylvania), and Rasberry Williams (sixty-seven years old, incarcerated for thirty-eight years in Iowa). It is unlikely that, in these commutations, age was not considered relevant alongside evidence of rehabilitation in prison and the other justifying factors explicitly mentioned.²²⁸

The relevant academic literature argues that old age, in and of itself, should be considered as a justification for clemency when the effects of imprisonment begin to bear more heavily on a prisoner because of their age.²²⁹ Depending on the prisoner's state of health, in most cases, by their early sixties the "pains of imprisonment" will be greater than for a younger detainee, thereby affecting the proportionality of a punishment initially imposed at a much younger age.²³⁰ The familiar "age-crime curve" also suggests that older offenders are far less dangerous upon release than their younger counterparts.²³¹ Why, then, the relative silence over old age from state governors and pardons boards? The answer presumably lies in long-term rehabilitation and remorse being more politically acceptable reasons for commutation and eventual release than aging per se.²³²

Finally, a small number of prisoners suffering from terminal illness have been afforded immediate release from prison through commutation in at least seven of Governor Granholm's cases, plus the cases of Dennis James Fredericksen (Iowa, 2001), Sheila Mae Schertz (Iowa, 2011), Larry

²²⁷ See STATE OF CAL., CLEMENCY CERTS ATTESTED 14, 23, 36 (2020), <https://www.gov.ca.gov/wp-content/uploads/2020/06/June-2020-Clemency-Certs-attested.pdf> [<https://perma.cc/YX9D-PSLA>].

²²⁸ See Online Appendix B.

²²⁹ See Matthew C. Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 284–85 (2003); JEFFREY P. CROUCH, THE PRESIDENTIAL PARDON POWER 25 (2009); PASCOE, *supra* note 46, at 215; MOORE, *supra* note 74, at 173.

²³⁰ NELLIS, *supra* note 6, at 37; NELLIS, *supra* note 137, at 4; and Aging Inmate Comm., *Aging Inmates: Correctional Issues and Initiatives*, 74 CORR. TODAY 84, 84–87 (2012) have all argued that lifers may develop medical problems earlier and more severely than the general population. The states vary in their classification of "elderly" prisoners, ranging between fifty and sixty-five years of age. The lower end of such definitions is itself revealing.

²³¹ On the age-crime curve, see TIM NEWBURN, CRIMINOLOGY 911–12 (3d ed. 2017).

²³² Old age is, however, a distinct factor to rehabilitation. There may be elderly prisoners who have poor disciplinary records throughout their time in prison, who have not used their time productively, but who are nonetheless released because the impact of imprisonment becomes more severe, and cruel, at an advanced age.

Yarbrough (Oklahoma, 2016), and Donnie Daniel (Oklahoma, 2016).²³³ The sparseness of terminal illness clemency within the data collected, extending only to three states,²³⁴ is a further unexpected result. In the “tough on crime” political environment that formerly prevailed within many U.S. states and in the federal jurisdiction, terminal illness is theoretically one of the most politically defensible grounds for LWOP commutation.

There are three possible explanations for why terminal illness commutations are not more widespread across federal and state jurisdictions. First is the increasing availability of statutory compassionate release schemes that extend to LWOP detainees. However, as described in Part III, these provisions have not been frequently used. This leads to the second possible explanation: that terminal illness is not yet very common or well-diagnosed among LWOP prisoners. But this may change over the next few decades as states’ LWOP statutes, and therefore their LWOP prisoners, age and receive closer medical attention. The median year that U.S. state and federal jurisdictions legislated to provide LWOP sentencing is 1992.²³⁵

The third possible explanation, applicable also to the dearth of “old age” commutations described above, is the simple underreporting of terminal illness and geriatric clemency as not particularly newsworthy. Even in Arkansas, Nevada, and New Hampshire, which have each had LWOP statutes for more than forty-five years and where lifers are ineligible to be released on medical or geriatric parole,²³⁶ the available news media does not uncover any terminal illness *or* old age commutations from 1990 onwards. Across the nation, media outlets are more likely to report salacious criminal justice stories involving presumably dangerous prisoners who somehow receive parole or commutation from permissive elites, as if they had just escaped from prison early in their sentences to threaten the public.²³⁷ The story of an aging lifer dying of cancer, who is released by commutation to

²³³ Online Appendices B, C.

²³⁴ As of 2022, Iowa was the only state without dedicated compassionate release legislation altogether. FAMM, *supra* note 131.

²³⁵ See Davidson, *supra* note 21.

²³⁶ See *supra* note 163; Davidson, *supra* note 21.

²³⁷ See Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT’G REP. 27, 28 (2010). Two media examples from the cases under study are David Rose, *Captured: ‘Three Strikes’ Offender Who Fled State in 2019 After Release on Clemency Arrested in Colorado*, FOX 13 SEATTLE (June 27, 2021), <https://www.q13fox.com/washingtons-most-wanted/tracy-hoggatt-three-strikes-offender-who-fled-state-following-release-on-clemency-now-wanted-for-new-crimes-in-california> [<https://perma.cc/5QTE-E7F5>], and James Stratton, *Governor Pritzker Commutes Sentences During COVID-19, Some with Violent Crimes*, WREX.COM (Apr. 21, 2020), https://www.wrex.com/coronavirus/governor-pritzker-commutes-sentences-during-covid-19-some-with-violent-crimes/article_4b7b6f67-5296-5a1d-89e2-ba5d8d3187c9.html [<https://perma.cc/L3E4-WTEK>].

time served in order to spend his last months with remaining family members, is less newsworthy by comparison.

In sum, I find rehabilitation and the systemic reform of mandatory sentencing or habitual offender statutes to be the most prevalent stated reasons for state clemency, together with release to stop the spread of COVID-19, which appeared in thirty-two cases from Illinois and one from California. Youth, old age, and terminal illnesses are less common motivations. Of course, for many of the clemency grants identified, not all the factors that are relied upon in clemency decision-making are listed in media reports, particularly overt political motivations. Future research may aim to interrogate the textual findings summarized above through further triangulation, such as via “elite” interviews with pardons board members and former state governors, as well as via Freedom of Information Act requests or archival research on the paper trail left by the clemency process in each state.²³⁸ Absent such extrinsic sources, the conclusions outlined above regarding the justifications for LWOP clemency are based on the best documentary information presently available.

A second important caveat is that some governors’ stated reasons for commutation and refusal are partly shaped by preexisting legal restrictions. Some jurisdictions actively restrict the scope of executive discretion. For example, LWOP prisoners in Oklahoma are ineligible to receive commutation solely on the basis of rehabilitation. They must argue that their sentence itself is unjust or excessive. Prisoners in Louisiana must demonstrate future employability rather than rehabilitation in prison alone. In New Mexico, only prisoners providing “unusual meritorious service” (such as saving the life of another prisoner or a prison employee) may be considered for executive clemency. In Missouri, an LWOP prisoner may only receive clemency based on an innocence claim after serving more than twenty-five years incarcerated, or if they are more than seventy years old with at least twelve years served.²³⁹ However, such exclusionary qualifications are only found in a minority of states. Chief executives legally possess a mostly free hand in deciding when or for whom to commute an LWOP sentence.²⁴⁰

Subject to the data shortcomings discussed at length in Part III, the reasons and trends documented above are, therefore, a good approximation

²³⁸ See PASCOE, *supra* note 46, at 23–30. However, Cao, *supra* note 7, at 27; VANNIER, *supra* note 9, at 32; and Carter et al., *supra* note 27, at 360, note that such paperwork is exceedingly difficult to obtain and, in many cases, may not be available to the wider public. For a discussion on methodological difficulties with the data collection, see *supra* Part II.

²³⁹ See Carter et al., *supra* note 27, at 366.

²⁴⁰ Colgate Love, *supra* note 54.

of the ways that governors' and pardons boards' unfettered discretion is publicly justified in natural life cases across the United States. Future research may replicate and build upon these findings.

*C. Federal and State Justifications for Clemency:
Do Prisoners Have Agency?*

The publicly provided justifications for commutation can be organized into two groups: those that are within prisoners' direct or indirect control, and those that are not. Reoccurring retributive justifications for clemency in U.S. LWOP cases include old age and terminal illness (both also relevant for compassionate release); gender; youth; legal or factual innocence claims; unintentional killings; being a minor player in the crime; committing a murder contributed to by domestic abuse, mental illness, or substance addiction at the time of the offense; having a record clear of previous convictions or violence; and legislative reform of sentencing laws extended retrospectively by executive action. Once the defendant has been sentenced to LWOP and has exhausted judicial appeals, there is little that they can do to bring about these backward-looking clemency justifications. However, knowing what kinds of arguments have swayed previous executive decision-makers will undoubtedly help in drafting clemency petitions and in public campaigning efforts. Even for blanket grants benefitting many prisoners at once, commutation is usually a two-way process, requiring input from skilled attorneys and civil society campaigners who prioritize particular types of cases and demographics.²⁴¹

Subject to the prevailing prison regime,²⁴² several other factors *are* within prisoners' control. These are forward-looking redemptive or utilitarian grounds for clemency.²⁴³ Based on the data presented here, the surest way to receive LWOP commutation is to (a) serve decades (approximately twenty years at the federal level and between twenty-five and thirty years in the states covered here) as a (b) model, rehabilitated prisoner, who (c) has accepted responsibility and expressed genuine remorse for the crime committed. Where the opportunity arises, often at risk to their own personal safety, prisoners may assist police, prosecutors, and prison authorities in bringing other cases to justice. Reconciliation with victims' families, if possible, may also have a role to play. And as with parole in non-LWOP cases, some grants have been partly justified by immediate housing and employment available to the prisoner upon release.²⁴⁴

²⁴¹ See Austin, *supra* note 42, at 72.

²⁴² See MAUER & NELLIS, *supra* note 149, at 44–49.

²⁴³ PASCOE, *supra* note 46, at 48–50; Gottschalk, *supra* note 35, at 258.

²⁴⁴ Online Appendices A, B.

Future research may attempt to identify how exactly rehabilitation, good behavior, and other modes of redemption are defined and favored by governors on a state-by-state basis. Is the most important factor a lack of disciplinary infractions in prison, helping other inmates, maintaining cordial relations with prison staff, upskilling that may benefit life upon release, genuine remorse for the crime committed, or some combination of the above? Whose opinion on this assessment carries the greatest weight, and have the answers to these questions changed over time? Answers to these questions stand to help not only individual prisoners as they seek commutation but also prisons as corrective institutions.

Nevertheless, the odds of receiving clemency should not be overstated. Even a case exhibiting all these relevant retributive, redemptive, and utilitarian attributes may still be overlooked for commutation from a state governor or U.S. president. Although rates of LWOP commutation may have recently increased to undo the carceral damage imposed during the “tough on crime” era in American politics, they are still infinitesimally small in most of the states covered here, which together account for more than half of the U.S.-state LWOP population in 2020.²⁴⁵ This suggests an interaction between such explicit, rational grounds for granting commutation and a high degree of arbitrariness. As with the imposition of a death sentence, the frequency for alleviation of an LWOP sentence through executive discretion can be compared with being struck by lightning²⁴⁶ or, more pertinently, with “buying a lottery ticket in a contest for a multi-million dollar payoff.”²⁴⁷

Even a model LWOP prisoner over a quarter-century period still has to be both extremely lucky and in the right place at the right time to receive a sentence commutation to LWP, a fixed sentence, or to time served. Clemency grants made by executives to reduce prison overcrowding to slow the spread of COVID-19 are a clear illustration.²⁴⁸ As evidence of the sheer unpredictability of LWOP clemency, commutations prompted by COVID-19 make up 9% of all the state cases sampled here.²⁴⁹ Many of these thirty-three prisoners who benefited from clemency might still be incarcerated had it not been for the pandemic.

²⁴⁵ See *supra* Part III.

²⁴⁶ *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring); Carter et al., *supra* note 27, at 362.

²⁴⁷ Austin Sarat, *Toward a New Perspective on Clemency in the Killing State*, in *THE FUTURE OF AMERICA'S DEATH PENALTY* 297, 300 (Lanier et al. eds., 2009).

²⁴⁸ See Novak & Pascoe, *supra* note 53, at 9–10.

²⁴⁹ This is 9% of all 372 cases, including the Granholm commutations, for which one or more reasons were codable.

A key element of luck with clemency is that an LWOP prisoner's petition must fall into the right hands. Some chief executives within the jurisdictions sampled here have proven more willing to grant executive clemency to LWOP prisoners than have others during recent American history, particularly Governors Jennifer Granholm (Michigan, 2003–2011), Mary Fallin (Oklahoma, 2011–2019), John Bel Edwards (Louisiana, 2016–present), J.B. Pritzker (Illinois, 2019–present), Jerry Brown (California, 2011–2019),²⁵⁰ and Gavin Newsom (California, 2019–present), together with U.S. Presidents Barack Obama (2009–2017) and Donald Trump (2017–2021). With some exceptions, commutations tend to arrive during the second of an elected chief executive's two terms, when there will be no electoral disadvantage to showing leniency.²⁵¹ Moreover, Democratic presidents and governors granted around 90% of the LWOP clemency grants documented here, compared with just 10% for Republican chief executives.²⁵² A state LWOP prisoner who reaches a threshold quarter century of incarceration during the second term of a Democratic Party governor stands a much better chance of receiving commutation by no action of their own.

Despite the clear unpredictability in decision-making, the LWOP prisoners that *do* receive commutations tend to exhibit some recurring characteristics, as described in this Section. While executive clemency may be granted on a discretionary basis and is not subject to the dictates of judicial precedent, the path dependency for clemency decision-making extends longitudinally across different political administrations and geographically across different state jurisdictions. Granting or refusing clemency for particular case-based or offender-based reasons can become part of the legal and political culture of a broader polity.²⁵³

In summary, many of the traditional retributive, redemptive, and utilitarian justifications appear to be *necessary, but not sufficient*, conditions for LWOP clemency in the U.S. jurisdictions sampled here. Even a case espousing a majority of the most important mitigating factors identified in the data presented here sees no guarantee, or even no likelihood, of securing executive clemency.

²⁵⁰ This observation does not apply to Brown's earlier two terms as Governor of California (1975–1983). See *supra* note 191 and associated text.

²⁵¹ Several commutations were also made in the final weeks of single-term governorships and the Trump Presidency.

²⁵² Online Appendices B, C. This directly contrasts with Horowitz and Uggen's finding that Republican governors are more likely than Democratic governors to issue clemency grants to prisoners in general. Horowitz & Uggen, *supra* note 214, at 1226.

²⁵³ See SEEDS, DEATH BY PRISON, *supra* note 11, at 9, 17; PASCOE, *supra* note 46, at 240–41.

V. DISCUSSION

This Article has considered the available public record of U.S. state and federal executive clemency grants made to life without parole prisoners between 1990 and 2021. It has also considered state and federal natural lifers' prospects of release through compassionate release statutes. Part III relayed the quantitative findings of the study, focusing on the number of LWOP prisoners who have been released by clemency and compassionate release in various U.S. jurisdictions since 1990. Part IV provided the qualitative findings, centered on the official reasons justifying each grant of clemency, where publicly reported.

All told, the eleven states plus the federal jurisdiction covered in Part III contained 50.3% of the total U.S. LWOP population in 2020. Moreover, a rough estimate suggests that Part IV analyzed the public reasoning of around 25% of the total number of LWOP clemency grants between 1990 and 2021.²⁵⁴ While future scholarship may seek to expand this national sample or else to analyze single-state LWOP populations in more detail, this Article's case coverage is sufficient to draw general conclusions about LWOP clemency frequency and justifications.

The findings in this study are clear: clemency and compassionate release for LWOP prisoners are exceedingly rare phenomena. This alone suggests that not only does "life mean life" but that being sentenced to LWOP means being largely forgotten by the public. Nevertheless, when state and federal executives do grant clemency, their publicly stated reasons tend to draw on proof of a prisoner's rehabilitation, among a confluence of other factors that mostly remain outside of a prisoner's control. These findings present important implications for existing legal scholarship and suggest several lines of future inquiry. They also prompt considerations for policy changes regarding LWOP sentencing. Moreover, they highlight the dearth of publicly available information regarding long-term outcomes for lifers.

A. Implications for Legal Scholarship

Most of the study's state-level findings appear to confirm the nonempirical predictions of previous academic scholarship. Both Dr. Ashley Nellis and Professor Seeds, who previously argued that state LWOP clemency grants have become so rare that they are no longer a dependable remedy for injustice at prior procedural stages, are vindicated by the data from Part III.²⁵⁵ Dr. Cao's assertion, based on a smaller, anecdotal sample of cases, that state LWOP prisoners would need to spend a "significant amount"

²⁵⁴ See *supra* note 71.

²⁵⁵ *Supra* notes 10–11 and accompanying text.

of time in prison before enjoying commutation is also validated over a larger case sample. By anyone's definition, an average of twenty-eight years incarcerated is a long stretch in prison, longer than the maximum period of incarceration permitted in several civil law jurisdictions around the world.²⁵⁶ According to international jurisprudence, twenty-five years is the maximum permitted length of a lifer's "minimum term" before they must be considered for release.²⁵⁷ Based on the available data, since 1990 only 3 state-level prisoners from a sample of more than 150 granted LWOP commutations (Henry Petty, Missouri, 2005; Travion Blount, Virginia, 2014; K.O. Cooper, Oklahoma, 2017) served less than ten years incarcerated before receiving clemency.²⁵⁸

On compassionate release, Professor O'Meara's plea for geriatric and medical parole statutes to actually be used compassionately has thus far not been heeded by the states or the federal jurisdiction, particularly as a majority of schemes fully or partially foreclose eligibility to LWOP prisoners altogether. Professor Simon's observation—that widespread compassionate release would change the very meaning of LWOP as a sentence—has not yet come to pass.

Other prior scholarly assumptions on commuted-case characteristics are not supported by the data presented here. Professor Lerner's prediction that youth would, in time, become one of the most important justifying factors in LWOP cases is presently unsupported.²⁵⁹ Laura Benschhoff's contention that certain prisoners could still look forward to commutation following time served and rehabilitation achieved during America's "tough on crime" era is not inaccurate; however, the prisoners to benefit this way in the 1990s and early 2000s were very few and far between.²⁶⁰ Since the end of the "tough on crime" era in the mid-2000s, LWOP prisoners now stand a

²⁵⁶ Notably, this is the case in Norway, Macau, Ecuador, and Paraguay. *See As the Death Penalty Becomes Less Common, Life Imprisonment Becomes More So*, *supra* note 59; MACAU PENAL CODE art. 41; *Life Imprisonment of Children in the Americas*, CHILD RTS. INT'L NETWORK (2019), <https://archive.crin.org/en/home/campaigns/inhuman-sentencing/problem/life-imprisonment/life-imprisonment-children-americas.html> [<https://perma.cc/52Q7-CFYF>].

²⁵⁷ *See As the Death Penalty Becomes Less Common, Life Imprisonment Becomes More So*, *supra* note 59.

²⁵⁸ *See* Online Appendices B, C.

²⁵⁹ Lerner, *supra* note 17, at 387. Professor Lerner's assertion was made prior to the Supreme Court decisions banning mandatory and nonhomicide LWOP for juveniles. *See supra* notes 218–219 and accompanying text.

²⁶⁰ *See supra* note 19 and accompanying text. The available data is insufficiently detailed to evaluate Benschhoff's observation on prisoners' relationships with prison staff, but, in any case, this is usually a factor that contributes towards an assessment of rehabilitation. *See* FOURTEENTH U.N. CONG. ON CRIME PREVENTION & CRIM. JUST., U.N. DOC. A/CONF.234/9, REDUCING REOFFENDING: IDENTIFYING RISKS AND DEVELOPING SOLUTIONS 11 (2021), https://www.unafei.or.jp/publications/pdf/14th_Congress/01_WholeText.pdf [<https://perma.cc/5J42-N5ZK>].

better, albeit still small, chance of commutation and eventual release.²⁶¹ Bearing in mind the caveat of a likely sampling bias toward more recent state cases, 91% of state and more than 99% of federal LWOP clemency grants in this data set were made since the beginning of 2007, during the second half of the period under study (1990–2021). Clemency is but one sign that, slowly but surely, penal moderation is on its way in, whereas “tough on crime” is on its way out.

In terms of their stated justifications, clemency grants to LWOP prisoners in the United States tend to broadly reflect the retributive, utilitarian, and redemptive clemency paradigms that previous scholarship has identified. Even the more unusual cases contributing to the data in this study—such as James Allen (Nevada, 2003), who serenaded the state Board of Pardons Commissioners with a self-composed song as a sign of remorse, and Joseph Yandle (Massachusetts, 1998), whose commutation was granted following his deceitful tale of heroic military service in Vietnam decades prior—can clearly be located within the literature on redemptive justifications for clemency.²⁶² Most recently, the threat posed by COVID-19, which partially justified the commutations and releases of thirty-two LWOP prisoners in Illinois, at least one LWOP prisoner in California in 2020, and probably several lifers in other states, is not unprecedented as a reason to grant clemency. Earlier cases in U.S. history have seen pardons or commutations used to stop the spread of tuberculosis and influenza in prison.²⁶³ As grants benefiting the general public, these fall under the utilitarian category.

Future scholarship on American LWOP clemency practice would be well served by interviews with key decision-makers, such as state legislators, pardons board members, and current and former governors, as well as freedom of information requests for documents associated with LWOP clemency grants. Of most practical use would be a detailed account of which types of redemptive behaviors by lifers most sway executive decision-makers when recommending or granting clemency, given that this category forms, overwhelmingly, the most common public justification for leniency within the jurisdictions analyzed here.

²⁶¹ See Holden, *supra* note 18, at 359 (noting that today, both crime and prison populations can arguably be reduced at the same time).

²⁶² Online Appendix B. Yandle’s claimed record of military service was later revealed to be highly exaggerated, resulting in his recall to prison. Carey Goldberg, *His Vietnam Tale Exposed as a Lie, a Killer Is Back in Custody*, N.Y. TIMES (Aug. 27, 1998), <https://www.nytimes.com/1998/08/27/us/his-vietnam-tale-exposed-as-a-lie-a-killer-is-back-in-custody.html> [https://perma.cc/6LVP-G5T4]; Alexis Chiu, *Freed Convict Is Back Behind Bars*, AP (Aug. 27, 1998) (on file with *Northwestern University Law Review*).

²⁶³ Novak & Pascoe, *supra* note 53, at 4.

Broadening to an international perspective, research on other jurisdictions outside of the United States—which have long employed natural life sentences in conjunction with the sovereign prerogative, such as Ghana, Kenya, Morocco, Thailand, and Ukraine—is necessary to lend global weight to the findings set out in this Article.²⁶⁴ Such research would raise additional comparative questions about U.S. penal policy. As with the sheer volume of LWOP sentencing itself, is it the case that LWOP clemency and compassionate release, in the extremely frugal way these each appear to be practiced, are features of U.S. penal exceptionalism?²⁶⁵ Do other jurisdictions with comparable criminal justice systems see a head sentence of LWOP as deterrent and retributive enough, without the punishment having to live up to its name? If, as both Adam Liptak and Professor Simon speculate, there is a difference between U.S. practice in this area and the rest of the world, what are its explanations?²⁶⁶ Are they the same as for the proliferation of U.S. LWOP sentences in general, or are they different?²⁶⁷

B. Potential Reforms

At least two striking features of the state and federal clemency practice documented in this research fatally compromise the viability of clemency as an effective check against excessive punishment. The first is that, despite multiple retributive grants of *commutation* made in circumstances where the executive decision-maker believed that an LWOP punishment was undeserved, only two LWOP prisoners have been released from detention by *pardon* since 1990, at least as far as the available data reveals (Craig Richard Coley, California, 2017; and Nicholas Abram Slatten, Federal Jurisdiction, 2020). This stands in contrast with U.S. death penalty practice, where 196

²⁶⁴ VAN ZYL SMIT & APPLETON, *supra* note 6, at 60, 262; SEEDS, DEATH BY PRISON, *supra* note 11, at 2; TURNER ET AL., *supra* note 26, at 202.

²⁶⁵ VAN ZYL SMIT & APPLETON, *supra* note 6, at 49; KLEINSTUBER ET AL., *supra* note 32, at 60.

²⁶⁶ Liptak, *supra* note 9; Simon, *supra* note 6, at 291. However, mirroring the position in several U.S. states, Haiti, Honduras, and Israel have banned clemency grants to LWOP prisoners, alongside some Mexican states. VAN ZYL SMIT & APPLETON, *supra* note 6, at 49, 262. The Netherlands has only seen one grant of executive clemency in a life imprisonment case since 1987. *Id.* at 53.

²⁶⁷ See, e.g., VAN ZYL SMIT & APPLETON, *supra* note 6, at 30–32, 300–06 (discussing different legal approaches toward human dignity, LWOP’s role in death penalty abolition, and law-and-order politics); Simon, *supra* note 6, at 283 (discussing the politics of race); MAUER & NELLIS, *supra* note 149, at 89 (discussing penal populism); Mary Rogan, *Discerning Penal Values and Judicial Decision Making: The Case of Whole Life Sentencing in Europe and the United States of America*, 57 HOW. J. CRIME & JUST. 321, 333 (2018) (comparing “citizenship dignity” with “human dignity”).

prisoners have been exonerated altogether due to legal or factual innocence since 1973, 8 of whom were released outright by governors' pardons.²⁶⁸

As with death penalty cases, wrongful convictions undoubtedly occur in LWOP cases. The National Registry of Exonerations reveals dozens of exonerations in LWOP cases since 1989 via other procedural methods, each based on new DNA evidence. Yet the Registry does not add to the two pardons already documented in this Article.²⁶⁹ Commuting a life sentence to time served operates to release a wrongly convicted person from further incarceration. It does not, however, serve to vindicate legal or factual innocence fully, nor to obviate the collateral consequences of conviction.²⁷⁰ In the United States, executive clemency is jurisprudentially well established as a failsafe remedy for miscarriages of justice.²⁷¹ It is especially relevant for lifers, whose reversal rate through regular judicial appeals is far below that of capital cases.²⁷² Where state laws allow, granting full pardons to lifers with strong innocence claims would serve to maintain the principle of legality, strengthen the presumption of innocence, and enable wrongly convicted persons a better chance at succeeding in their post-release lives.²⁷³ The possibility of innocence-based pardons need not detract from public support for LWOP as a replacement for the death penalty in retentionist states.

The second striking feature of U.S. LWOP clemency practice is its overall rarity in state cases, as described in detail in Part III. In *Graham v. Florida*, the U.S. Supreme Court stated that juvenile nonhomicide lifers require “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”²⁷⁴ International jurisprudence

²⁶⁸ These individuals are Wilbert Lee (Florida, 1975), Freddie Pitts (Florida, 1975), Earl Washington (Virginia, 2000), Aaron Patterson (Illinois, 2003), Madison Hobley (Illinois, 2003), Leroy Orange (Illinois, 2003), Stanley Howard (Illinois, 2003), and John Huffington (Maryland, 2023). *Innocence Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence-database> [<https://perma.cc/8YJX-SJ8H>]; *List of Clemencies Since 1976*, *supra* note 44; James T. Wooten, ‘It’s Over’ for 2 Wrongly Held 12 Years, N.Y. TIMES (Sept. 20, 1975), <https://www.nytimes.com/1975/09/20/archives/its-over-for-2-wrongly-held-12-years-its-over-for-two-men-wrongly.html> [<https://perma.cc/6LLL-8HK6>].

²⁶⁹ NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?SortField=Exonerated&View=%7bfaf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7%7d&FilterField1=Sentence&FilterValue1=Life%20without%20parole&FilterField2=DNA&FilterValue2=8%5FDNA&&SortField=Exonerated&SortDir=Asc> [<https://perma.cc/C3AK-ZF5Q>].

²⁷⁰ See Sarah Cooper & Hannah Burrows, *Remedying Wrongful Conviction: Comparisons Between the Royal Prerogative of Mercy in England and Wales and Clemency in the USA*, in EXECUTIVE CLEMENCY: COMPARATIVE AND EMPIRICAL PERSPECTIVES, *supra* note 4, at 96, 97–100; Novak & Pascoe, *supra* note 4, at 204–07.

²⁷¹ Gottschalk, *supra* note 35, at 257–58; Cooper & Burrows, *supra* note 270, at 99–100.

²⁷² TURNER ET AL., *supra* note 26, at 191; Miao, *supra* note 47, at 213.

²⁷³ See *supra* note 205 and accompanying text.

²⁷⁴ *Graham v. Florida*, 560 U.S. 48, 75 (2010).

now applies a similar principle to *all* life-sentenced prisoners, no matter what their age and offense. Pursuant to the European Convention on Human Rights, a life sentence cannot, as a matter of law or practice, be irreducible.²⁷⁵ Does a less than one percent lifetime chance of release count as a meaningful opportunity?²⁷⁶ Although redemptive justifications such as rehabilitation and remorse appear in around 70% of the state LWOP clemency grants, as documented in this Article, completely transforming yourself in prison seemingly offers no guarantee of a mitigated penalty and release in the future. For LWOP sentences, as Barkow argues, clemency so far “falls short as a check” on prolonged punishment, just as parole often does in relation to other noncapital sentences.²⁷⁷

Yet, based on state clemency practice in the nineteenth and early twentieth centuries, this need not necessarily be the case. There was an earlier time in U.S. penal history when clemency was granted far more often for lifers.²⁷⁸ What specific legal and policy reforms are necessary to ensure that natural lifers enjoy a nontrivial prospect of release before they die in prison? In other words, to provide natural lifers with something to work towards and to hope for? How might individual mitigating circumstances such as youth, old age, domestic violence, or sentencing disparities with co-offenders be more seriously considered by executive decision-makers?

Steadily expanding compassionate release schemes, while providing political cover for chief executives releasing LWOP prisoners near the end of their lives, are not a panacea for the overuse of natural life sentencing.²⁷⁹ Such programs can only account for a very limited number of mitigating circumstances—namely extreme old age and terminal illness—and, as a consequence, have not proven well-used in practice for lifers.²⁸⁰ More helpful would be legislating or amending state constitutions to specifically authorize clemency as an exercise of the governor’s discretion, regardless of sentence length,²⁸¹ in enumerated circumstances—such as youth, old age, terminal illness, innocence, or decades of good behavior. These efforts would concurrently serve as a backstop against excessive punishment, provide

²⁷⁵ *Vinter v. United Kingdom*, App. Nos. 66069/09, 130/10, 3896/10, Eur. Ct. H.R. ¶¶ 110–18 (2016); *Murray v. Netherlands*, App. No. 10511/10, Eur. Ct. H.R. ¶¶ 99, 103 (2016); VAN ZYL SMIT & APPLETON, *supra* note 6, at 51–52.

²⁷⁶ Barkow, *supra* note 2, at 192.

²⁷⁷ *Id.* at 211.

²⁷⁸ SEEDS, DEATH BY PRISON, *supra* note 11, at 19; Barkow, *supra* note 2, at 192–93. See Horowitz & Uggen, *supra* note 214, at 1206.

²⁷⁹ See NELLIS, *supra* note 137, at 14–15.

²⁸⁰ NELLIS, *supra* note 6, at 29; Vannier & Nellis, *supra* note 164, at 1283–84.

²⁸¹ Some states’ “compassionate release through clemency” provisions provide models for such reforms. See *supra* note 151 and accompanying text.

political cover for chief executives, and also maintain the deterrent and denunciatory value of an initial LWOP sentence. Many of the same policy aims can also be achieved by carving out “second look” resentencing exceptions for particular categories of LWOP prisoners, such as young offenders and prisoners who have already served more than two decades incarcerated.²⁸²

A more radical policy proposal could include publicly delegating the prime clemency decision-making responsibility to state pardons boards or the Pardon Attorney in federal cases. Such reforms would best serve to reduce the political costs of granting clemency to rehabilitated lifers and, therefore, to ensure that the most deserving LWOP prisoners have a good chance of receiving clemency.²⁸³ This is one reason why Governors Bob Miller and Kenny Guinn of Nevada, to take two prominent examples, were able to commute the sentences of at least nine LWOP prisoners during their first terms in office—the final decisions were actually made by the Nevada Board of Pardons Commissioners, of which the Governor of Nevada serves as chair.²⁸⁴ In line with the established global trend towards the professionalization of clemency decision-making, it would be an improvement to see similar technocratic systems in place in other states and the federal jurisdiction.²⁸⁵ Depoliticizing the clemency process in the states and the federal jurisdiction would serve to recognize commutations and pardons as essential “back end” components of the criminal justice system, particularly in extreme punishment cases.

Finally, this research has drawn attention to the need for greater public transparency over the numbers of, and official reasons for, clemency and compassionate release grants. The voluntary shift in presidential practice on clemency over the past two administrations in favor of disclosure provides a lead for states to follow. Nevertheless, even a legal obligation to provide reasons for clemency grants, let alone a voluntary undertaking to do so, may only serve to reproduce politically acceptable justifications rather than reveal the true causes of clemency.

²⁸² See *supra* note 149 and accompanying text; *Changes in the Law Expanding Parole Eligibility for Long-Term Offenders*, CAL. DEP’T OF CORR. & REHAB., <https://www.cdcr.ca.gov/bph/changes-in-the-law-expanding-parole-eligibility-for-long-term-offenders/> [<https://perma.cc/T2UY-6N39>].

²⁸³ See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT’G REP. 153, 154 (2009); Gill, *supra* note 42, at 23; Novak, *supra* note 187, at 826–28; Barkow, *supra* note 2, at 193.

²⁸⁴ Online Appendix B; Colgate Love, *supra* note 54. See generally NEV. BD. OF PARDONS COMM’RS, CRITERIA FOR THE EVALUATION OF INMATE APPLICATIONS FOR CLEMENCY, <https://pardons.nv.gov/uploadedFiles/pardonsnv.gov/content/About/Criteria%20for%20the%20Evaluation%20of%20Inmate%20Applications%20for%20Clemency%202023.pdf> [<https://perma.cc/374L-6QS2>] (describing the criteria and procedures for inmate clemency applications in Nevada).

²⁸⁵ Novak & Pascoe, *supra* note 4, at 193–96.

CONCLUSION

As this research has demonstrated using publicly available empirical data, good behavior, rehabilitation, remorse, and acknowledging responsibility may together constitute the most frequent grounds for LWOP commutation across the United States. But even on these bases, a life-sentenced prisoner's chances of release remain minuscule at best. Seeing that, since 1990, the numbers of clemency granted throughout the country have proven so small in practice, the decision of some states to ban clemency altogether in LWOP cases seems more grounded in political symbolism than in real policy concerns.

LWOP largely remains a sentence of death by incarceration despite the availability, on paper, of pardon, commutation, and compassionate release as three remedial options for prisoners. If U.S. state and federal jurisdictions remain insistent on the use of mandatory LWOP sentencing for aggravated murders committed by adults, for nonviolent drug crimes, or for habitual offenders convicted of robbery or burglary, chief executives possess a moral obligation to vigorously examine such cases for leniency.²⁸⁶ Given that prosecutorial discretion, judicial discretion, and compassionate release programs each currently fail as checks on excessive punishment, it is clemency that must step into the breach.

ONLINE APPENDIX

The Online Appendix is hosted on Digital Commons and can be accessed at <https://scholarlycommons.law.northwestern.edu/nulr/vol118/iss5/4/>.

²⁸⁶ HOOD & HOYLE, *supra* note 2, at 489.

