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**THE MEANING OF “LIFE”:  
LONG PRISON SENTENCES IN CONTEXT**

**BY**

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## INTRODUCTION

*There's a popular misconception that life in prison doesn't mean all of one's natural life. In just the last year, there are 21 Georgia lifers who are no longer around to tell you otherwise. If they could, they'd let you know that parole for a life sentence is a rare commodity.<sup>1</sup>*

-- Georgia State Board of Pardons and Parole

*A crime prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society.<sup>2</sup>*

-- Council of Europe

Over the past three decades the political climate in the United States has increasingly embraced “get tough” policies as the primary focus of a crime control strategy. These policies have been wide-ranging in their impact, and include such features as high levels of drug law enforcement, greater reliance on determinate sentencing, and most significantly, a vastly expanded use of imprisonment. Along with these changes has come a virtual abandonment of the principles of rehabilitation that had been central to the nation’s correctional philosophy, even if not always implemented to a significant degree, as recently as the 1960s.

In the past several years there has been a significant shift both in public discussion and policy attention to the use of imprisonment. At the state level, many policymakers are now advocating changes in sentencing policy and practice that reflect new thinking and options for lower-level drug offenders in particular. These proposals emphasize shorter prison terms and/or diversion to treatment programs for cases in which substance abuse is an underlying contributor to crime, and for which it is believed that these approaches will provide greater public safety benefits.

In contrast to these developments, a variety of policy changes beginning in the 1970s and increasing in recent decades have set in motion a movement to extend considerably the length of time that other offenders spend in prison. These changes include such policies as mandatory sentencing, “truth in sentencing,” and cutbacks in parole release. While many of these initiatives apply primarily to persons convicted of a violent offense, in some cases they mandate long-term incarceration even for persons convicted of property or drug offenses.

Foremost among the changes affecting the prison population in recent years are laws affecting “lifers,” those persons receiving a sentence that *may* result in an offender never being released from prison.<sup>3</sup> Policy considerations for persons sentenced to life are very different than for offenders who appear far less threatening, such as low-level drug offenders. For violent

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<sup>1</sup> News release, Georgia State Board of Pardons and Paroles, “More Violent-Crime Lifers Die in Prison Than Are Paroled,” June 1, 1998.

<sup>2</sup> “Life Imprisonment,” United Nations, 1995, p.5.

<sup>3</sup> The term “life sentence” has been used in a variety of ways over time and consequently there is much public confusion regarding its meaning. While the intuitive definition of a life sentence is a prison term for the remainder of one’s natural life, in fact the term also includes various indeterminate sentences, or sentences whose length can be reduced by commutation, parole, or pardon.

offenders who have taken lives or who pose a serious threat to public safety, incapacitation as a means of assuring public safety is a legitimate and compelling concern at sentencing. In addition, under current laws and sentencing philosophies, lifetime incarceration is deemed an appropriate punishment for the harm done by serious violent offenders.

However, the issue of life sentences is far more complex and cannot be regarded as merely strict sentencing for a deserving population of serious violent offenders. A closer examination of the number of people serving life sentences, their offense characteristics, and the judicial process by which their sentences were imposed, challenges many of the assumptions about the composition of the lifer population. Among those serving life are persons who themselves have not committed violent acts and others whose life circumstances suggest they are more vulnerable than violent. A selection of such cases is highlighted throughout this report.

Most notable in this regard is California’s “three strikes and you’re out” law, under which any felony following two previous “strikes” can result in a life term in prison. A recent high-profile example is the case of Leandro Andrade, whose third strike involved thefts of children’s videotapes worth \$153 and intended as Christmas gifts for his nieces. In affirming the conviction, the U.S. Supreme Court upheld the California law in 2003 and he is now serving a sentence of 50 years to Life.<sup>4</sup>

#### *Santos Reyes*

In 2003 a federal appeals court upheld a “three strikes” sentence of 26 years to life for Santos Reyes, whose third strike in California involved trying to take the written portion of a driver’s license test for his illiterate cousin. The court ruled that Reyes’ claim of cruel and unusual punishment had been foreclosed by a previous ruling on the law by the U.S. Supreme Court. Reyes admitted his perjury in filling out the license application, stating that his cousin needed the license in order to work as a roofer. The conviction followed two previous offenses, one for a juvenile burglary conviction in 1981 and another for an adult robbery conviction in 1987. Reyes had been offered a four-year prison term if he pled guilty, but chose to go to trial, believing he could demonstrate that he had not understood what constituted perjury when he took the exam. At the time of his sentencing in 1998, Reyes was married and had children ages 1 and 3.

California’s “three strikes” law is not an isolated example. Other policy changes in recent years have led to life sentences being imposed on a significant number of people for whom such sentences may not have been intended or for whom they are not necessarily appropriate. Further, opportunities which previously existed to review and modify life sentences which proved longer than necessary have been reduced or eliminated in many states. These changes have come about at a time of increased concern about the possibility of unjust convictions and sentencing, as dramatically evidenced in the imposition of the death penalty.

<sup>4</sup> *Lockyer v. Andrade*, 538 U.S. 63 (2003), decided with *Ewing v. California*, 538 U.S. 11 (2003).

In this report we assess the dramatic increase in the imposition of life sentences in the context of incapacitation and public safety, fiscal costs, and the sentencing goal of punishment, including the implications for both victims and offenders. Major findings of the report include:

- One of every 11 (9.4%) offenders in state/federal prison – 127,677 persons – is now serving a life sentence.
- Of the lifers in prison, one in four (26.3%) is serving a sentence of life without parole, having increased from one in six (17.8%) in 1992.
- The number of lifers in prison rose by 83% from 69,845 in 1992 to 127,677 in 2003.
- Time to be served for lifers admitted to prison increased by 37% from 1991 to 1997, rising from 21.2 years to 29 years.
- In six states -- Illinois, Iowa, Louisiana, Maine, Pennsylvania, and South Dakota -- all life sentences are imposed without the possibility of parole.
- Seven states -- Alabama, California, Florida, Illinois, Louisiana, Michigan, and Pennsylvania -- have more than 1,000 prisoners each serving sentences of life without parole.
- The increase in prison time for lifers is a result of changes in state policy and not continuous increases in violent crime.
- Four of every five (79.4%) lifers released in 1994 had no arrests for a new crime in the three years after their release. This compares to an arrest-free rate of just one-third (32.5%) for all offenders released from prison.
- Imposing a life sentence carries with it a potential cost to taxpayers of \$1 million.

Life sentences are of great consequence to the individuals who receive these sentences and to the society that imposes them. The findings in this report demonstrate that there are today a dramatically rising number of lifers and that they are serving increasingly longer terms of incarceration. This growth is linked to policy changes, not increases in crime rates. The analysis and discussion in this report raise serious questions about the fairness and reliability of the judicial process that leads to the imposition of life sentences. As a result, lifers include those for whom the length of sentence is either unjust or inappropriate. Life sentences in many cases represent a misuse of limited correctional resources. This report challenges the supposition that all of these sentences are necessary or effective in advancing public safety. We conclude with a set of recommendations for change in law, policy and practice which would, if adopted, address the principle deficiencies in the sentencing of lifers to prison.

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## AN OVERVIEW OF LIFE SENTENCES

The life sentence in the United States was initially created at the time of the founding of the nation, and was advanced in large part as a reaction to the frequent imposition of the death penalty in the Colonial period. The life sentence was developed as an indeterminate sentence; that is, as a term of imprisonment without a prescribed duration at the time of sentencing. Sentences such as “15 years to life” denote a minimum length of time to be served, but the actual length of the sentence to be served is undetermined and is decided by a parole board or other administrative body based on factors such as the inmate’s behavior while incarcerated. Indeterminate sentencing is based on the premise that in the face of good conduct and evidence of rehabilitative efforts while incarcerated (participation in counseling or drug programming, obtaining education or work skills), offenders can and should be released from prison.

Historically, life sentences have also been used to impose a sentence that is intended to last the offender’s natural life, or “life without the possibility of parole.” However, even this seemingly clear distinction can sometimes be blurred, since on rare occasions an offender serving life without parole may be granted a pardon or commutation for unusual circumstances.

The changes in sentencing policy and practice that will be documented in this report mirror those of the criminal justice system generally over the past several decades. Much of this change has involved a shift in decisionmaking at various stages of the system. Prior to the 1970s, a system of indeterminate sentencing had been the norm nationally for nearly a century. This structure was characterized by broad sentencing ranges established by legislative bodies, with great discretion given to judges to establish a sentence length within those ranges. In an ideal situation, such a system would allow for careful distinctions to be made among various combinations of offenders and offenses, informed by a consideration of individual circumstances. In practice, judicial discretion sometimes resulted in vastly different sentences being imposed on similarly situated offenders.

Similar dynamics and problems pertained to decisionmaking regarding release from prison as well. Parole boards generally maintained broad discretion, and were often critiqued for decisions that were viewed as either too lenient or too harsh in particular cases.

The critique of indeterminate sentencing led to policy changes in sentencing and parole that now impose a much greater level of restriction on judges and parole officials. At an extreme, such policies as mandatory sentencing take away virtually all discretion from judges at the time of sentencing. In other cases, legislative and executive mandated changes have resulted in increased numbers of offenders being sentenced to prison and/or increases in length of time served in prison.

For lifers, the changes in public policy have been most significant in terms of the length of time to be served in prison. Given the serious nature of offenses for which most lifers have been convicted, virtually all would be sentenced to prison under any sentencing system. But, as will be seen in this report, the determination of how much time should be served in prison is a challenging policy issue. This raises considerations of public safety, concern for victims, fiscal costs, and prospects for rehabilitation. The findings of this report suggest that the movement toward reduced discretion in such cases has resulted in lengthier periods of incarceration than are necessary to achieve public safety goals.

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## STATE POLICY CHANGES

Policymaker action intended to increase the duration of incarceration by lengthening sentences and reducing the use of discretionary parole has played a large role in the growing lifer population. This has come about in varying ways over the past twenty years.

Life without parole has always been a sentencing option, but the frequency with which this has been used has increased in recent decades. In many instances, this has been a reflection of the use of more punitive sentencing policies in general, but in some cases it also results from the increased use of life without parole as an alternative to the death penalty.

Many states have moved toward more determinate sentencing structures that have significantly affected consideration for lifers' release. This has often resulted in much lengthier periods of imprisonment before parole eligibility. And in some states, while parole remains a possibility, executive restrictions have diminished considerably the number of persons actually gaining release.

The growing number of lifers in prison is not primarily a by-product of increasing crime rates. In looking at the growth of the lifer population documented in this report, first doubling from 1984 to 1992 and then increasing by 83% from 1992 to 2003, we see two distinct crime trends. The rate of violent crime (more relevant for lifers than total crime) rose by 40% from 1984 to 1992, but declined by 35% from 1992 to 2002 (2003 figures not yet available). While the rate of violent crime is not unrelated to the number of lifers, clearly factors other than crime rates have contributed to those trends.

These changes can be seen in the experience of a number of states in recent years:

### *California*

In California, the parole board is obligated to enter the cases of lifers entering the system on a matrix (noting the minimum and maximum years to be served), and to periodically review each prisoner's progress. However, this practice changed under Governor Gray Davis, who refused to release lifers convicted of murder.

In one California case, the “no parole” policy for murderers led to a constitutional challenge. Robert Rosenkrantz had been recommended for parole by the state parole board, and was further supported for parole by the judge who sentenced him, members of the victim's family, and both the Los Angeles Superior Court and the Court of Appeals, which ruled that the offense was not sufficient to deny him parole.<sup>5</sup> Rosenkrantz was considered a model prisoner, had completed therapy and become a computer expert since his imprisonment, and had received several job offers. Yet his suit was denied by the California Supreme Court, which ruled that the governor had the right to reinterpret a case beyond the findings of a jury.<sup>6</sup>

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<sup>5</sup> “ACLU and Religious Groups Bring Constitutional Challenge to CA Governor's ‘No Parole’ Policy.” <http://www.aclu.org/CriminalJustice.cfm?ID=7222&c=52&Type=s&insearch=lifers>, April 18, 2001.

<sup>6</sup> Mentor, Marvin. “California Governor has Carte Blanche in Denying Lifer Paroles.” *Prison Legal News*, 14 (7), 30-1, July 2003.

Overall, Governor Davis turned down all but 8 of the 294 paroles in murder cases approved by the parole board (not all of whom received a life sentence). During his first two months in office, new Governor Arnold Schwarzenegger approved parole release for eight persons convicted of murder.

### *Illinois*

In Illinois, in 1978, indeterminate sentencing for lifers was changed so that all life sentences did not offer the possibility of parole; whereas previously a life sentence meant parole eligibility after eleven years, today there is no parole possibility for any life sentence. Over the past decade, there are no known cases in which a person with a life sentence has received clemency.

### *Louisiana*

In Louisiana, until the 1970s, a life sentence commonly translated into a ten-year prison term. By the 1990s a life sentence came to mean life in prison, inspiring the popular saying "in Louisiana life means life." By law, a life sentence in Louisiana is now life-long unless the parole board commutes the sentence; like other states, such parole is given rarely. As of February 2003 Louisiana had 3,822 lifers, of whom 3,392 were housed at Angola Prison, a prison scheduled to soon house only lifers.

#### *Leotha Brown*

While working at a bar to earn money for college in 1963, Leotha Brown shot and killed a man in a dispute tinged with racial overtones. Brown received a life sentence and at age 62 is now incarcerated at Louisiana's Angola Penitentiary. While Brown's early years in prison resulted in a number of disciplinary reports, not unlike many young offenders, he has for many years been engaged in leadership programs in the prison. He was one of seven prisoners selected for a negotiating team when the Department of Justice came to the prison in the 1970s to resolve conflicts between prisoners and staff. He now devotes his time to college correspondence courses and the prison's Bible College.

The procedure by which Louisiana lifers can gain clemency has been made considerably more restrictive in recent years. At the 1973 state Constitutional Convention, a provision was added to the Constitution requiring that the Governor could only grant clemency after receiving a recommendation from a newly-created Pardon Board. In 1995, the legislature added a provision that "at least" one of the five members of the Pardon Board be appointed from a list submitted by the membership of Victims and Citizens Against Crime, Inc., a New Orleans-based victims rights organization. Then in 1997, a new statute was adopted requiring that votes of four of the five members of the Pardon Board be gained for a favorable recommendation, as opposed to the previous requirement of a majority of the Board (or three votes).<sup>7</sup> Lifers in Louisiana are now ineligible to apply for clemency until 15 years after being sentenced; if denied, they cannot apply for six more years.

<sup>7</sup> Berrigan, Helen Ginger, "Executive Clemency, First-Offender Pardons; Automatic Restoration of Rights," *Louisiana Law Review*, Vol. 62, No. 1, 2001, pp. 49-57.



**Michigan**

Since 1942 Michigan law had required that parolable lifers would become eligible for parole after serving 10 years. In practice most such lifers were released within a few years of becoming eligible. In 1992, though, a change in state law required that lifers serve at least 15 years before parole eligibility. In addition, an increasingly conservative political climate in regard to lifers led to a position of the parole board that “life means life,” and that in order to be released, “something exceptional must occur.” This policy was in contrast to the understanding of judges when they imposed life sentences. In a 2002 survey of judges conducted by the Michigan State Bar, a majority responded that the possibility of parole was a factor in their sentencing decisions and that they had assumed that parolable lifers would serve 20 years or less. Data from the Department of Corrections show that while 124 lifers were paroled in the 1960s, only 31 were paroled in the 1990s (with a far larger prison population than in the 1960s).<sup>8</sup>

**Charles Lohn**

Charles Lohn was given a parolable life sentence in Michigan for armed robbery in 1968. After serving 20 years, he was released on parole in 1988. Unable to manage a family crisis, Lohn failed to report to his parole agent for several months. Despite having remained employed and crime-free, he was returned to prison on a technical violation of parole, with a recommendation from the parole agent that he get “another try at parole in the not too distant future.” Upon being returned to prison, the Parole Board member who interviewed Lohn concurred with the recommendation, adding that the Board “is ordering a short continuance to impress upon Mr. Lohn that the rules, regulations and conditions of parole must be adhered to.” With a new parole board policy that “life means life,” Lohn was given five-year setbacks on parole consideration twice in the 1990s. Charles Lohn has just turned 60.

**New Mexico**

In New Mexico, a life sentence had long translated into ten years time served before parole eligibility. But two state statutes were contradictory in prescribing the number of years to be served by lifers. In response to this, a 1986 opinion by the state Attorney General recommended that lifers serve at least 30 years before parole consideration and that they receive no good time credit.<sup>9</sup>

**Pennsylvania**

Since 1941 Pennsylvania law has required that all life sentences are imposed as life without parole. But for many years, governors frequently exercised their commutation powers so that considerable numbers of lifers were released after serving about 20 years. In the administration of Governor Raymond Shafer (R), for example, 95 lifers received a commutation from 1967-71. Following that, Governor Milton Shapp (D) issued 317 commutations in his two terms from 1971-79. Those figures dropped dramatically in the 1980s, with Governor Richard Thornburgh (R) commuting only seven cases from 1979-87. Since 1995 only one lifer has received a

<sup>8</sup> Information from *The High Cost of Denying Parole: An Analysis of Prisoners Eligible for Release*, Citizens Alliance on Prisons and Public Spending, November 2003.

<sup>9</sup> Op Atty. Gen. No. 86-01 (New Mexico, 23 Apr 1986).

commutation, a man who had served 20 years for lending a gun to a friend who then committed a robbery.<sup>10</sup>

The discretion inherent in these processes can be seen in examining parole actions for all prisoners, not just lifers. In 1992, 77.4% of eligible inmates were paroled; this proportion was cut in half, to 38.8%, by 1996 under a new governor. Another change in administration then led to an increase in paroles granted to 50.9% by 2002.<sup>11</sup>

### *Tyrone Werts*

In 1975, Tyrone Werts received a mandatory life sentence for second-degree murder resulting from his participation in a robbery with four other people. Werts had been in a car parked two blocks from the scene of the robbery, but because of a killing that resulted from the robbery was convicted due to his knowledge of the crime. In the 28 years he has since served at Graterford Prison in Pennsylvania, he went from being a high school dropout to earning a college degree. He also initiated a range of community service projects both within and outside the prison, including tutoring illiterate inmates, leading restorative justice initiatives, and organizing an Anti-Crime Summit at the prison. Among his many awards is a commendation for preventing serious injury to a guard who was being attacked by a prisoner.

### *Tennessee*

In Tennessee a life sentence with the possibility of parole now requires that a minimum of 51 years be served before meeting the parole board. Tony Baldwin had been convicted of murder in 1979 and sentenced to a life term. At the time of his sentencing, the state’s policy was that offenders had to wait 30 years before becoming eligible for parole. But Baldwin’s good institutional record had earned him sentence-reduction credits that moved up his hearing to 2001, after serving 22 years. His request for release was denied by the parole board, which also told him that he could not apply for release again for 20 more years, until 2021. In a challenge to the decision, the state Court of Appeals ruled in 2003 that the decision represented “an arbitrary exercise of the Parole Board’s authority,” and failed to recognize that “over time people can change, and that even a convicted felon may be able to live in accordance with the law.” The court concluded “the essential effect of the Board’s action is to change Mr. Baldwin’s sentence to life without parole, contrary to what the Legislature intended.”<sup>12</sup>

<sup>10</sup> Information from *Life Sentenced Prisoners*, Pennsylvania Prison Society, as obtained from the Pennsylvania Department of Corrections.

<sup>11</sup> *Annual Statistical Report*, Pennsylvania Department of Corrections, 2002, p. 45.

<sup>12</sup> Johnson, Rob. “Court strikes down long parole wait,” *The Tennessean*, August 20, 2003, p. 2B.

## LIFERS IN PRISON

The number of persons serving life sentences has grown along with the increase in the overall prison population of recent decades. Our national survey obtained data on lifers in prison from state and federal corrections systems as of 2002/2003. Data were obtained either from the website or direct contact with the departments of corrections. As seen in the table on the following page, there are now a record 127,677 persons serving a life sentence in state or federal prison. Overall, one of every eleven (9.4%) inmates is now serving a life term.

In recent years policy changes have also increased the number of persons serving a sentence of life without parole. Our survey finds that one of every four lifers – 33,633 persons – is now serving a sentence of life without parole.

Imprisonment of lifers has grown nationwide, but is particularly significant in a number of states:

- In 12 states more than 10% of the prison population is serving a life term; in California and New York the proportions are approaching one of every five inmates.
- The use of life without parole statutes is dramatic as well. In Louisiana and Pennsylvania one of every ten prisoners is serving a life sentence, *all* of which are sentences of life without the possibility of parole.
- In four other states -- Illinois, Iowa, Maine, and South Dakota -- and the federal system, all life sentences are life without parole. While mechanisms for release exist in each of these states, the presumptive sentence is that offenders will never be released.

There are also significant variations in the degree to which states employ both life sentences and life without parole. New York, for example, maintains the highest proportion (19.4%) of lifers in its prison population, yet uses sentences of life without parole very sparingly (0.1%). Overall, the lifer proportion of the prison population varies from 0.9% in Indiana to 19.4% in New York. And in terms of the use of life without parole, four states – Alaska, Kansas, New Mexico, and Texas – have no such inmates, while Louisiana leads the nation with 10.6%. (Note, though, that Texas holds the second largest number of people on death row in the nation.)

**Table 1 - State Variations in Lifer Populations**

% Lifers	States	% Life without Parole*	States
0-5%	Alaska, Arizona, Connecticut, Federal, Illinois, Indiana, Kentucky, Maine**, Montana, New Jersey, New Mexico, North Dakota, South Dakota, Vermont	0-1%	Alaska***, Arizona, Connecticut, Georgia, Indiana, Kansas***, Kentucky, Maryland, Minnesota, New Jersey, New Mexico***, New York, North Dakota, Ohio, Oregon, Montana, Rhode Island, Texas***, Vermont, Wyoming
5.1-10%	Arkansas, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Wisconsin	1.1-3%	Arkansas, California, Colorado, Idaho, Illinois, Maine, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, South Carolina, Tennessee, Virginia, Washington
10.1-15%	Florida, Georgia, Louisiana, Ohio, Tennessee, Wyoming	3.1-5%	Alabama, Delaware, Federal, Nebraska, Nevada, South Dakota
15.1-20%	Alabama, California, Massachusetts, Nevada, New York, West Virginia	5.1-7%	Florida, Iowa, Michigan, West Virginia
		7.1-11%	Louisiana, Massachusetts, Pennsylvania

\* = No information for Hawaii, Utah and Wisconsin

\*\*\* = State has no Life without Parole statute

\*\*= 36 of the 45 persons serving a life sentence in Maine are serving life without parole. The remaining nine persons were sentenced to life prior to a law that mandates that all life sentences be imposed without parole.

**Table 2 - Lifers in Prison, 2002-03**

State	Life	% Prison Population	Life without Parole	% Prison Population
Alabama	4,837	17.3	1,334	4.8
Alaska	193	4.5	0	0
Arizona	1,149	3.7	117	0.3
Arkansas	1,094	8.1	408	3
California	28,807	18.1	2,984	1.9
Colorado	1,151	6.2	290	1.6
Connecticut	417	2.3	189	1
Delaware	391	7.2	178	3.3
Florida	8,643	11.2	4,478	5.8
Georgia	6,517	13.6	332	0.7
Hawaii	391	6.9	N/A*	--
Idaho	418	7.2	79	1.4
Illinois	1,291	3	1,291	3
Indiana	233	0.9	66	0.2
Iowa	553	6.6	553	6.6
Kansas	809	8.9	0	0
Kentucky	748	4.6	30	0.1
Louisiana	3,822	10.6	3,822	10.6
Maine	45	2.4	36	1.9
Maryland	2,200	9.4	211	0.9
Massachusetts	1,618	16.9	756	7.9
Michigan	4,572	9.2	2,629	5.3
Minnesota	392	5.6	26	0.3
Mississippi	2,003	8.9	285	1.3
Missouri	2,452	8	712	2.3
Montana	61	1.9	25	0.8
Nebraska	257	6.4	184	4.6
Nevada	1,908	18.6	417	4.1
New Hampshire	149	5.9	55	2.2
New Jersey	928	3.1	11	0
New Mexico	303	5.0	0	0
New York	12,985	19.4	110	0.1
North Carolina	3,307	9.8	479	1.4
North Dakota	32	2.8	10	0.9
Ohio	4,729	10.5	105	0.2
Oklahoma	1,880	8.3	460	2
Oregon	623	5.1	105	0.9
Pennsylvania	3,865	9.7	3,865	9.7
Rhode Island	162	5.7	20	0.7
South Carolina	1,907	8.3	439	1.9
South Dakota	142	4.6	142	4.6
Tennessee	1,918	11	204	1.2
Texas	7,698	6.1	0	0
Utah	N/A	--	N/A	--
Vermont	55	3.1	5	0.3
Virginia	1,894	6.1	425	1.4
Washington	1,017	6.2	478	2.9
West Virginia	556	16	222	6.4
Wisconsin	1,322	6.1	N/A	--
Wyoming	171	10.1	4	0.2
Federal System	5,062	3.4	5,062	3.4
<b>Total</b>	<b>127,677</b>	<b>9.4</b>	<b>33,633</b>	<b>2.5</b>
			<b>Life without Parole as % of all Lifers</b>	<b>26.3</b>

\* Staff in Department of Public Safety unable to provide breakout for those serving life without parole; estimated to be less than 1% of the state prison population.

The 127,677 lifers in prison represent an increase of 83% from the number of lifers nationally in 1992,<sup>13</sup> which in turn had doubled since 1984.<sup>14</sup> During the 1990s the growth of persons serving life without parole has been even more precipitous, an increase of 170%, between 1992 and 2003. Overall, one of every six lifers in 1992 was serving a sentence of life without parole. By 2003, that proportion had increased to one in four.

**Table 3 - Growth of Lifer Prison Population, 1984-2003**

Year	Lifers	Life Without Parole	% of Total Lifers
1984	34,000	N/A	- - -
1992	69,845	12,453	17.8%
2003	127,677	33,633	26.3%

In addition, the number of long-term prisoners is considerably greater than just the total of lifers, and contributes to the population of what can be considered “virtual lifers.” These are persons serving very long sentences, or consecutive sentences, that will often outlast the person’s natural life. One 2000 study estimated that more than one of every four (27.5%) adult prisoners was serving a sentence of 20 years or more.<sup>15</sup> And data from the Department of Justice show that as of 2002, state and federal prisons held 121,000 persons age 50 or over, more than double the figure of a decade earlier.<sup>16</sup>

<sup>13</sup> 1992 figures except for Alaska, Indiana, and Maryland (not available) from Kathleen Maguire, Ann L. Pastore & Timothy J. Flanagan. (Eds.). (1993). *Sourcebook of Criminal Justice Statistics 1992*. U.S. Department of Justice, Bureau of Justice Statistics. Washington, DC: USGPO. Data for Alaska, Indiana and Maryland as of 1990 and adapted from Kathleen Maguire & Timothy J. Flanagan, (Eds.). (1991). *Sourcebook of Criminal Justice Statistics 1990*. U.S. Department of Justice, Bureau of Justice Statistics. Washington, DC: USGPO.

<sup>14</sup> *Corrections Compendium*, Vol. 3, No. 9, 1984. Lincoln, NE: 1984. This count included 47 states, Guam and Puerto Rico.

<sup>15</sup> Camp, C.G. and Camp, G.M. (2000). *The 2000 Corrections Yearbook: Adult Corrections*. Middletown, CT: Criminal Justice Institute (p. 54).

<sup>16</sup> Ron Word, “Elderly Inmates Swell Nation’s Prisons,” *Kansas City Star*, February 27, 2004.

### INCREASING TIME IN PRISON

In addition to the growing numbers of lifers in prison, policy changes of recent years have resulted in lifers spending significantly greater time in prison. As we have seen, this has been the result of several factors:

- Increasing number/proportion of sentences to life *without* parole;
- Gubernatorial policy changes that have limited or eliminated consideration of commutation for lifers;
- Legislative changes such as “truth in sentencing” that have increased the amount of time served before parole consideration.

The impact of these changes can be seen in states such as Georgia, where the Board of Pardons and Paroles reported in 1998 that more life-sentenced inmates had died in prison that year than been paroled. According to Parole Board Chair Walter Ray, “There’s a popular misconception that life in prison doesn’t mean all of one’s natural life. In just the last year, there are 21 Georgia lifers who are no longer around to tell you otherwise. If they could, they’d let you know that parole for a life sentence is a rare commodity.”<sup>17</sup>

Using data on prison populations and releases from the Bureau of Justice Statistics we have developed estimates for the amount of time that lifers will serve in prison.<sup>18</sup> (See Appendix for a description of this methodology.) Our analysis indicates that from 1991 to 1997 there was a 37% increase in time to be served by lifers prior to release. Persons admitted in 1991 could expect to serve an average of 21.2 years, a figure which rose to 29 years by 1997 (most recent figures available). Thus, in contrast to popular imagery which sometimes portrays lifers as serving short prison terms, the average life sentence today results in nearly three decades of incarceration.

**Table 4 - Estimated Time to be Served by Lifers**

<b>Year of Admission</b>	<b>Time to Be Served</b>
1991	21.2 years
1997	29

<sup>17</sup> News release, Georgia State Board of Pardons and Paroles, “More Violent-Crime Lifers Die in Prison Than Are Paroled,” June 1, 1998.

<sup>18</sup> U.S. Department of Justice, Bureau of Justice Statistics. *National Corrections Reporting Program, 1997*. [United States] {Computer file}. Conducted by U.S. Department of Commerce, Bureau of the Census. 2nd ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2000 AND U.S. Department of Justice, Bureau of Justice Statistics, and U.S. Department of Justice, Federal Bureau of Prisons. *Survey Of Inmates In State And Federal Correctional Facilities, 1997* {Computer file}. Compiled by U.S. Department of Commerce, Bureau of the Census. ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2000.

## A PORTRAIT OF LIFERS

The overwhelming majority of lifers in prison have been convicted of a violent offense. As seen in Table 5 below, as of 1997, 90% of lifers were incarcerated for a violent offense, including 68.9% for homicide. Thus, judging by the offense of conviction, most lifers fall in the category of the kinds of offenders for whom policymakers and the public assume a long sentence is appropriate and desirable. And among this population are persons whose crimes clearly warrant an extended period of incarceration due to the severity of the crime or because their release presents a potential danger to the public.

**Table 5 – Sentenced Offense of Lifers**

<b>Offense Type</b>	<b>Percent of Population</b>
<i>Homicide/Murder</i>	68.9
<i>Rape/Sexual Assault</i>	8.9
<i>Armed Robbery</i>	7.5
<i>Other Violent</i>	4.8
<i>Drug Offense</i>	4.0
<i>Property</i>	3.9
<i>Other</i>	2.0

But a closer examination of the population of lifers in prison, and the process by which they were sentenced, reveals that the profile of persons serving life sentences is far more complex than is often assumed:

- Lifers include those convicted for violent offenses but for whom many persons would recognize that a life sentence is overly harsh and inappropriate. These include people sentenced as violent offenders but for whom there are serious questions regarding culpability or persons who have not committed violent acts themselves and who pose little threat of injury to others in the future.
- The composition of the lifer population is changing due to the increasing frequency of imposing life sentences for drug crimes and “three strikes” cases that do not involve violent offenses.
- The criminal justice system as presently constituted does not perform well in making the distinction between serious offenders for whom a life sentence is warranted and those for whom a less severe punishment is appropriate and fair. Further, increasingly compelling evidence suggests that, as presently constituted, the criminal justice system’s reliability in determining guilt and the appropriate length of sentencing is far from certain.

Examining some of the categories of persons sentenced to life imprisonment illuminates the complexity of the profile of lifers. Among these categories are the following:

### ***Battered Women***

One study of battered women estimated that there were 800-2,000 women serving prison terms for killing their abusers, although some scholars view these estimates as conservative.<sup>19</sup> A review of women in prison for homicide in Georgia found that more than half had been the victim of domestic abuse, and in nearly two-thirds of the cases in which a woman killed a partner, abuse was claimed to have occurred at the time of the crime.<sup>20</sup> These women must often face the question from law enforcement and legal professionals of, “Why didn’t you just leave?” In addition to an insensitivity to the complexity that many women face in trying to make a decision to leave, this assertion ignores the fact that the risk of additional injury or death at the hands of an abuser often increases after fleeing.<sup>21</sup>

Many battered women have received little help from the legal system, since many criminal justice professionals, including defense attorneys, have never understood or appreciated the significance of abuse. Sociologist Elizabeth Leonard writes that:

“... many lawyers and investigators fail to adjust their approach to better fit the experiences of women. As a result, potentially exculpatory information is not investigated, crucial evidence remains unused, and women are left with no real defense.... Some accused women take the offered plea bargains to protect their children, to spare their families, to avoid the death penalty threatened by prosecutors, or to speed up what they see as the inevitable guilty verdict.”<sup>22</sup>

The law itself works against women who have killed their abusers. The strategy of self-defense, which is the approach likely to be asserted by an abuse victim who has killed, is not written for these circumstances. To assert self-defense, a defendant must show that she was reasonably in fear of her life (or for the life of another) at the time that she killed, and that she had taken every reasonable means to avoid the threat. Both conditions are difficult to prove. The abuser is frequently sleeping or otherwise harmless at the time, and the abuse victim is often physically able to leave rather than commit a violent act.

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<sup>19</sup> Elizabeth Leonard, *Gendered Injustice in the Lives of Convicted Battered Women*, paper presented at University of Limerick, May 28, 2002.

<sup>20</sup> Judith Haley, *A Study of Women Imprisoned for Homicide*, Georgia Department of Corrections, June 1992.

<sup>21</sup> *Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers*, available online at [http://www.umich.edu/~clemency/clemency\\_manual/manual\\_intro.html](http://www.umich.edu/~clemency/clemency_manual/manual_intro.html)

<sup>22</sup> Leonard, op. cit.



***Marie La Pinta***

Marie La Pinta was convicted along with her brother of second degree murder in the killing of her husband. La Pinta had grown up in Sicily, where she witnessed her mother live a life of brutal abuse by her father. She came to the U.S. for an arranged marriage at the age of 19, speaking little English. Her marriage to Anthony La Pinta was marked by serious physical abuse. The current district attorney of Suffolk County, New York, where the killing took place, describes the crime as involving “a history of marital discord within the family of long duration which reached flash point.” He further describes La Pinta as having been a model prisoner who “poses no threat either to herself, the institution, or, by extension, society in general,” and states that her debt for the crime “has been more than expurgated by the length and conditions of her confinement.” Marie La Pinta has applied for gubernatorial clemency and is currently serving a sentence of 25 years to Life in Bedford Hills prison.

Among such women in prison are those who have no prior criminal history, yet are charged with murder or manslaughter and often receive harsh sentences. A study of 42 convicted survivors in California, none of whom had a previous conviction for violence, found that only two women received determinate sentences; the other sentences ranged from 7-to-life to 35-to-life, with six women receiving life without parole.<sup>23</sup>

Current “one size fits all” sentencing structures blur the complexities of cases in which victims of physical and sexual abuse are convicted of murder. Sentencing schemes which do not permit adequate consideration of the range of relevant factors in making sentencing decisions hold the victims of abuse to the same penalties that apply to more culpable offenders.

***Mentally Ill Offenders***

Research conducted by the Bureau of Justice Statistics documents that one of every six people in prison has a history of mental illness.<sup>24</sup> These figures are even more pronounced among the population of lifers, with nearly one in five lifers (18.4%) suffering from a mental illness, totaling an estimated 23,523 life-sentenced prisoners.<sup>25</sup> These numbers are of particular concern considering that correctional facilities are ill-equipped to provide safety and appropriate treatment for mentally ill persons.<sup>26</sup> Prisons are dangerous and debilitating for inmates with mental illnesses, who often are victimized by other prisoners. Moreover, symptoms of mental illness are often misinterpreted by correctional staff as disruptive behavior, which can lead to additional punishment and disciplinary actions that may extend the length of an individual’s sentence.

<sup>23</sup> Ibid.

<sup>24</sup> At midyear 1998, an estimated 283,800 prison and jail inmates were mentally ill; Bureau of Justice Statistics, *Mental Health and Treatment of Inmates and Probationers*, July 1999.

<sup>25</sup> Our analysis of the lifer population, using the 1997 Inmate Survey and employing the criteria used by BJS in its report, *Mental Health and the Treatment of Inmates and Probationers*, *ibid.*, indicated that 18.4% of all lifers (18.8% of lifers in state prison and 9.3% of lifers in federal prison) were estimated to be mentally ill. This proportion was applied to the totals from this report’s survey in order to produce the estimate of 23,523.

<sup>26</sup> For more information on the conditions of mentally ill persons in prison, see *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*, Human Rights Watch, October 2003.

The high incidence of mentally ill lifers reflects troubling aspects of the complex relationship between the criminal justice system and mental illness. That relationship is on one hand adversarial, with the criminal justice system’s interest in accountability, punishment and incapacitation opposing mental health’s emphasis on treatment and restoration. On the other hand, the relationship is necessarily dependent, as criminal law struggles to define the intent, *mens rea*, and the culpability required to establish the appropriate determination of guilt, punishment, and responsibility for persons suffering from a mental illness. Both disciplines struggle to establish the scope of punishment for persons who have committed criminal acts but are incompetent to defend themselves or unable to appreciate the consequences of their behavior.

Sentencing a mentally ill person to life imprisonment represents a legal decision to punish within a correctional setting instead of providing treatment according to mental health principles. The contemporary manner in which the legal system makes this decision has been driven historically by public reaction to notorious cases in which a defense of insanity has been successfully asserted. In 1843, the British public’s and the Crown’s dissatisfaction with a judge’s finding that Daniel M’Naghten was insane when he attempted to assassinate Prime Minister Robert Peel prompted creation of the “M’Naghten Rule,” which allowed acquittal only for a person unable to distinguish between right and wrong. This rule survived, with modifications, until recently, but increasing interest in psychology and the prospect of treatment for mental illness led to new judicially-created tests to determine legal insanity in the 1950s.<sup>27</sup> Subsequently, the American Law Institute created a Model Penal Code, intended to be a broad-based and more liberal restatement of criminal responsibility. By 1984, the test set forth in the Model Penal Code<sup>28</sup> was law in the majority of states and federal circuits. However, that same year, a jury acquitted John Hinckley by reason of insanity following his attempted assassination of President Ronald Reagan. Public outrage and a backlash resulted in restrictive changes in the law in the federal system and in over half the states. Three states abolished the defense altogether. Popular criticism of the use of competing experts in the Hinckley trial led to additional rules restricting the admission of expert opinion.

Reliance upon punishment and the criminal justice system for persons with mental illness may be counterproductive to public safety. Current research shows an attenuated causal relationship between mental illness and violent crimes. It is true, as many perceive, that people with mental illness are at a higher than average risk of offending, particularly for violent crimes. But the offending is more closely related to the increased susceptibility of mentally ill persons to other factors, such as homelessness, substance abuse, and non-compliance with medication regimens. Thus, research suggests pro-active health care coordinated between mental health and substance abuse services, compliance with medication regimens, and application of risk assessment measures are the best means of assuring maximum public safety.<sup>29</sup>

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<sup>27</sup> The Durham Test provided that a person was not criminally responsible if his or her unlawful act was a “product of mental disease or defect.” *Durham v. United States* 214 D 2d 862 (1954).

<sup>28</sup> The Model Penal Code permitted an acquittal by reason of insanity if a defendant proved a “substantial incapacity” to appreciate the difference between right and wrong, and focused on the defendant’s ability to control his or her actions.

<sup>29</sup> Henderson, Susan, *Mental Illness and the Criminal Justice System*, Mental Health Coordinating Council, May 2003. See also, *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription*, The Sentencing Project 2002, pp. 7-9.

In response to these issues, the Council of State Governments convened a broad advisory board of policymakers and practitioners to develop a comprehensive framework for addressing issues of mental illness in the criminal justice system.<sup>30</sup> The group’s report included a call for law enforcement collaboration with mental health partners to increase the involvement of treatment professionals, train defense attorneys to recognize mental health conditions, and institutionalize screening and identification of mental illness. Strengthening community response through augmenting mental health services plays a significant role in promoting public safety. Given that the offense that triggers a life sentence is unlikely to be a person’s initial contact with the criminal justice system, it is crucial that resources are dedicated to training criminal justice professionals to identify persons in need of intervention by mental health agencies prior to their involvement in more serious offenses.

### *Juveniles*

Over the past decade, increasing numbers of states have adopted laws making it easier to try juveniles in adult court. As a result, crimes committed by young people can now result in much harsher punishments, including life sentences. While there are presently no national data on the number of such lifer cases, they are clearly increasing in many states. A recent report documents that just in the state of Michigan alone, there are at least 146 persons serving life without parole for crimes committed when they were 14-16 years old.<sup>31</sup>

It has always been possible to prosecute in adult court juveniles whose age or criminal acts made them inappropriate for juvenile court and corrections, with their rehabilitative goals and an inflexible mandatory release date, usually at the age of 18 or 21. After the Supreme Court’s decision in *Kent v. United States*<sup>32</sup> in 1966, to do so required a hearing before a judge, with due process protections including standards such as consideration of the maturity of the juvenile.

From the late 1980s through the early 1990s, the murder rate for juveniles increased dramatically. Subsequent research determined that this rise was not a result of an increasingly violent cohort of young people, but instead, easier access to firearms. Despite the fact that juvenile homicide rates began to decline substantially after this rise, policymaker and media attention focused heavily on punishments for these offenders. Legislators responded by rewriting laws to allow, at a prosecutor’s request, or to require, based on charge alone, increased prosecution of children as adults. From 1992 through 1995, 40 states and the District of Columbia passed laws making it easier to try children as adults in criminal court. Many of these laws by-passed judicial review completely, allowing for the “automatic transfer” of children into adult court.<sup>33</sup> In many instances, judges no longer decide whether a child should be tried as an adult or a juvenile; that determination is left to the prosecutor.

Few of the new laws modified the procedural rules, definitions of offenses, or the sentences that exist in adult criminal court. A life sentence mandated for any *adult* defendant who committed a particular crime applied in full force to *juveniles* convicted in adult court for that crime.

<sup>30</sup> Council of State Government, *Criminal Justice/Mental Health Consensus Project*, June 2002.

<sup>31</sup> Jeff Kresnak, “ACLU to study inmates’ cases,” *Detroit Free Press*, April 1, 2004.

<sup>32</sup> *Kent v. United States*, 383 U. S. 541 (1966).

<sup>33</sup> Patrick Griffin, Patricia Torbert & Linda Szymanski *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions* (Office of Juvenile Justice and Delinquency Prevention, 1998)

The case of 12-year-old Lionel Tate in Florida illustrates the risks inherent in charging a juvenile in adult court, a system ill-prepared to address the needs and challenges of juvenile defendants. Tate had received a life term after killing a 6-year-old playmate. His defense asserted a claim that her death was a result of overly vigorous play wrestling. After Tate and his mother rejected a plea offer of three years in prison and went to trial, he was convicted and sentenced to a mandatory life term in prison. Ultimately, his conviction was overturned because a judicial hearing had not been held to assess his mental competency, and in 2004 Tate agreed to a renewed three-year prison term plea, which permitted his immediate release from prison.

The case of Tate and others across the country demonstrate a profound shift in the treatment of juveniles, prompting the judge in a high-profile juvenile case in Michigan to question the shift from the principles of rehabilitation and prevention that characterized the founding of a separate juvenile system in the 19<sup>th</sup> Century to the punishment and retributive-oriented approach of the adult system. In refusing to sentence Nathaniel Abraham, convicted of a shooting that occurred when he was 11 years old, to life, Judge Eugene Arthur Moore voiced a critique of life sentences for juveniles: “Don't ask the Judge to look into a crystal ball today and predict 5 years down the road. Give the Juvenile system a chance to rehabilitate. Don't predict today, at sentencing, whether the child will or will not be rehabilitated, but keep the options open.”<sup>34</sup>

While the objectives of both incapacitation and punishment are appropriate considerations in the sentencing of juveniles who commit serious violent offenses, life sentences assume incorrectly that teenagers are as able as adults to assist in their defense and that they possess the maturity to understand the consequences of their actions in the same manner as adults. Further, life sentences for juveniles ignore the capacity of teenagers to change over time.

### ***“Accountability” Offenses***

Lifers sentenced for violent offenses also include persons sentenced under “accountability” doctrines. Under these provisions, a participant in a crime, such as a store robbery, who serves as a lookout or driver and may not even be aware of the presence of a gun, may be sentenced to prison for life as the result of a murder committed in the course of the robbery. The case of Gladys Wilson, below, illustrates the severe consequences of such prosecutions.

#### ***Gladys Wilson***

Gladys Wilson pled guilty to aiding and abetting an armed robbery in Michigan, in 1978, her first offense. She was a 31-year old mother of an 11-year-old girl and had worked at the same company for ten years. Wilson’s crime had involved driving and then picking up her husband at a grocery store that he planned to rob. She was not aware he would kill someone, for which he is currently serving a mandatory life sentence. Gladys Wilson has earned 67 college credits while in prison, has obtained a paralegal certificate, and has worked as an aide for mentally and physically impaired inmates. In 1986, in anticipation of parole release after serving 10 years, Wilson was moved to a minimum custody prison. Parole board action was delayed until 1992, by which time the “life means life” policy precluded strong consideration of her case. In 2003, despite a letter from the successor sentencing judge urging her release, she was again denied parole consideration. Under current Michigan sentencing guidelines, her offense today would result in a minimum sentence of 9-15 years.

<sup>34</sup> Sentencing Opinion for Nathaniel Abraham, Judge Eugene Arthur Moore, State of Michigan in the 6<sup>th</sup> Circuit Court for the County of Oakland Family Division, File No. 97 63787 FC, January 13, 2000.

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### *Drug Offenders*

While the lifer population overwhelmingly consists of persons convicted of a violent offense, 4%, or about 5,000 lifers, have been convicted of a drug offense. In the federal system alone, approximately 2,000 life sentences are for drug offenses, representing about 39% of all life terms. Some drug offenders have been convicted of high-level offenses, such as drug “kingpins” who have imported substantial quantities of narcotics into the country. But others are serving life terms only because of particularly harsh state laws that would not result in such severe sanctions in neighboring states.

In California, for example, increasing numbers of offenders are being sentenced to life in prison under the “three strikes” law, which requires a sentence of 25-Life for a third strike conviction following two previous qualifying strike offenses. To date, 1,281 persons (17.5%) of the state’s 7,335 three strikes cases have had a life sentence triggered by a drug offense; of these, 53.5% were for drug possession offenses.

In Michigan, more than 200 persons are serving life terms for drug offenses under the state’s “650 Lifer” law. Under this law, anyone convicted of selling 650 grams of cocaine or heroin, even for a first offense, is sentenced to life in prison. As originally adopted in 1978, the law required that the sentence be life without parole, but this was changed by the legislature to life with the possibility of parole in 1998. Despite this, only a handful of persons sentenced under this provision have since been released on parole.

### *Property Offenders*

As is true of drug offenders, many of the estimated 5,000 persons<sup>35</sup> serving life for a property offense have committed a serious offense and/or have a lengthy criminal record. But in this regard as well, the total includes growing numbers sentenced under California’s three strikes law, currently numbering 2,303, or 31%, of all third strikers in the state. These include such cases as an offender sentenced for the theft of three golf clubs and another for videotape theft with a value of \$153. Overall, 57.5% (4,220) of California’s three strikes cases involve a non-violent offense as the third strike.

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<sup>35</sup> This estimate is likely to be quite conservative since it is based on the percentage of property offenders serving life sentences in 1997, well before the effects of California’s “three strikes” law had been fully experienced.

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### THE IMPACT OF DEFICIENCIES IN THE CRIMINAL COURTS

Our analysis has indicated that the lifer population includes persons for whom a term of lifetime incarceration is excessive considering factors such as the severity of the offense and the circumstances of the offender. In addition to individual level factors that bring to light questions regarding the appropriateness of lifetime incarceration, there are also structural considerations, including the reliability and fairness of the judicial decision process. In the American system of justice, there should be no reasonable doubt that defendants convicted and sentenced for the most serious of crimes were in fact guilty of the offense, particularly where the punishment is so severe and the financial cost so great. Unfortunately, the evidence from a wide range of sources raises doubts about both the reliability and the fairness of the judicial system as it decides for whom a life sentence is appropriate.

In recent years, the application of new DNA technology and the work of organizations such as the Innocence Project have resulted in findings that a number of people sentenced to death were innocent of the crime of which they were convicted.<sup>36</sup> In addition, the work of the Innocence Project has led to the exoneration of 38 lifers, and a comprehensive analysis at the University of Michigan suggests that the number of innocent persons in prison for all offenses is likely to number in the thousands.<sup>37</sup>

The documented frequency of erroneous convictions and unfair sentences in capital cases raises serious questions about the reliability of convictions and sentences in lifer cases since the procedural safeguards are greater in capital cases. Attorneys are supposed to be more experienced, fairly demanding standards are supposed to govern their work, and their access to defense investigatory and forensic resources generally more assured. Sentencing is by a jury, which is given guiding standards intended to eliminate arbitrary sentencing, and a death sentence can only be imposed by a unanimous verdict in most states. A direct appeal is automatic and collateral appeals are more frequently applied.

These same protections are not applied to defendants when the sentence may “only” be life in prison. For example, unlike defendants in capital cases, persons sentenced to life have no right to post-conviction counsel in most states. The consequences of this practice can be seen in the case of Walter McMillian, whose jury recommended life without parole after he was convicted of murder in Alabama in 1988. The sentencing judge overrode the jury’s recommendation and imposed a death sentence. Because McMillian was under a sentence of death, he received legal assistance from the Equal Justice Initiative of Alabama, which proved his innocence after several years. Ironically, had the judge accepted the life without parole sentence, McMillian would still be in prison today without access to any legal review.

According to legal experts, bar associations, and the opinions of appellate judges, the criminal court process, particularly for indigent defendants, is routinely failing to fairly and reliably sort out the guilty or determine sentencing issues. While most states have established public defender programs of some sort, and while defense counsel are theoretically available in most jurisdictions, the American Bar Association found that many public defender programs are

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<sup>36</sup> See The Innocence Project, online @ [www.innocenceproject.org](http://www.innocenceproject.org)

<sup>37</sup> Adam Liptak, “Study Suspects Thousands of False Convictions,” *New York Times*, April 19, 2004.

overloaded, rely on inexperienced and underpaid attorneys, and do not provide a vigorous defense. As one national expert summarized a lifetime of observation:

As of 2003, virtually everywhere in this country defense services are deficient, and in some places they are woefully inadequate. The goal in providing lawyers, as *Gideon*<sup>38</sup> said, was to assure fairness in the criminal justice system and to prevent the wrongful convictions of innocent persons.

*Gideon*, as well as the Supreme Court’s other right to counsel decisions, have constituted an enormous unfunded mandate imposed upon the states and local jurisdictions for the past forty years. Moreover we have been in virtually every jurisdiction in a state of crisis, and recently the problem seemingly has gotten worse as state and local governments have wrestled with very difficult budgetary problems. And I have reluctantly concluded that unless there’s a major change in policy and in funding of indigent defense these problems we talk about are likely to continue indefinitely.<sup>39</sup>

The implication of the inadequacy of criminal defense services establishes a constant risk, indeed an ongoing reality, that truly innocent persons are convicted in the criminal justice system.<sup>40</sup> These cases represent systematic failures and “assembly-line” justice that virtually assures erroneous convictions. A recent study examining the indigent defense system in Virginia concluded that substandard defense practice is an “accepted norm,” lawyers for indigent defendants make little use of services such as expert witnesses who are often essential to proper representation, and that appointed defense lawyers are underpaid compared to lawyers providing services for other government functions. In Virginia, the state will only pay a maximum of \$1,096 in defense fees for felonies that may result in a life sentence.<sup>41</sup>

While ABA and state defender standards require a full and adequate defense for all defendants, including sentencing advocacy,<sup>42</sup> in 1984 the high court established in *Strickland v. Washington* a very low standard by which the services of defense counsel would be found constitutionally sound. Essentially, a convicted defendant must show on appeal that, first, trial counsel’s services were deficient as judged by practice standards, and second, that were it not for the deficiency, a jury would almost certainly have returned a favorable verdict.<sup>43</sup> It is often relatively easy to establish the first *Strickland* test; however, it has proven difficult to satisfy the second, for judges on appeal are free to speculate about the potential impact of evidence on a jury. For example, judges often differ among themselves dramatically, so that the history of many cases includes

<sup>38</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>39</sup> Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, at the National Legal Aid and Defender Association conference, November 13, 2003.

<sup>40</sup> *Ibid.* For additional examples of wrongful convictions, see the Department of Justice study documenting 28 such cases. Edward Connors, Thomas Lundregan, Neal Miller, and Tom McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, June 1996, Washington, DC: U.S. Department of Justice.

<sup>41</sup> “Justice Denied in Virginia,” *Washington Post*, February 10, 2004.

<sup>42</sup> American Bar Association, *Standards for Criminal Justice*, 3<sup>rd</sup> Edition. Standard 4-8.1 Sentencing; Standard 18-5.17 Sentencing hearing. State Standards are compiled in “Compendium of Standards for Indigent Defense Systems,” (Dec 2000) available on line from the National Criminal Justice Reference Service.

<sup>43</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)

vigorous disagreement among judges who have heard the case in different courts, one side expressing certainty that the impact of counsel could not have made a difference, the other certain that it played a crucial role.

*Strickland's* legacy is that inadequate attorney representation is seldom reviewed and almost never reversed. This systemic failure in the judicial process directly impacts the quality of the decisions courts make to impose life and other lengthy sentences. As noted, among those who are categorized as violent offenders are battered women who killed their partners, children, and mentally ill persons. For each of these, the skill of the defense team, its collective knowledge about abuse, adolescent development and behavior, or mental health, and its ability to present that information to a prosecutor, a judge, and a jury are essential to a fairly adjudicated decision and sentence. At present, the judicial system is often inadequate to sustain confidence in the accuracy or fairness of a verdict and sentence, and this unreliability is exacerbated in cases in which issues are complex and nuanced.

### **Johnnie Brown**

Johnnie Brown was found guilty of armed robbery and sentenced to 30 years in Illinois in 1991. At the trial, Brown testified that he believed that the victim was going to attack him, and as he became alarmed for his safety, he grabbed the victim and demanded to know why he was being followed. According to Brown, it was only at the end of this confrontation that Brown asked for money from the victim, a take of fifty cents and an adult bookstore token. Brown had a long and well-documented history of mental illness, including treatment and hospitalizations; however, the court was never informed of his psychiatric background. Despite the fact that Brown's illness led to inappropriate behavior and outbursts in court and greatly complicated his ability to communicate with his public defender and participate in his own defense, his attorney never followed up with a psychiatric examination before sentencing and never obtained relevant medical records. During his trial, there was no reference to the fact that at the time of the offense Brown was a diagnosed schizophrenic who had stopped necessary medications.

The US Court of Appeals for the Seventh Circuit reversed Brown's conviction because of his trial lawyers' "half-hearted," "lackadaisical," and "less than lawyerlike" efforts, which were compounded by the failure of court psychiatrists and the probation department to obtain Brown's history or to speak to his family. The result was that the sentencing judge was "less than well informed of critical information." To reach this appeal, Brown had to fight through a succession of state court and then federal court proceedings. Brown's case was the subject of *eight* different decisions by the trial court hearing post-conviction matters; each of these courts purportedly applying virtually the same legal standards as did the Seventh Circuit, and each *denying* Brown's request for relief. It was only through the defense work of the Bluhm Legal Clinic of the Northwestern University School of Law that Brown's case was able to be carried to the Seventh Circuit, a fortunate resource for Brown that is not available to the majority of offenders.



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## RECIDIVISM AND PUBLIC SAFETY CONCERNS

### *Overview and Previous Research*

For lifers, as with all offenders, the rationale for imposing a prison term may involve several goals of sentencing. A first is clearly punishment, reflecting the seriousness of the offense. The determination of how much punishment is imposed for an offense is subject to a broad range of considerations – the degree of culpability of the offender, historical norms, community attitudes, and other factors. In general, “get tough” policies of recent decades have dramatically increased the severity of punishments imposed on all offenders, in terms of increasing both the number of prison sentences and the length of time to be served in prison.

A second major consideration in imposing a life sentence relates to the goal of incapacitation; essentially, providing public safety through incarceration. In this regard, the question for public policy regards the extent to which long-term incarceration provides crime control benefits. More specifically, to the extent that prison terms have increased in recent years, what are the additional benefits, and costs, of these policies?

In the past a number of studies have examined the recidivism rate of released lifers, particularly those imprisoned for homicide. Generally, these have found that lifers have very low rates of recidivism, including for violent crimes. For example, in Michigan, 175 persons convicted of murder were paroled between 1937 and 1961; none committed another homicide and only four were returned to prison for other offenses. In Canada, between 1920 and 1967, 119 persons originally sentenced to death for murder had their sentences commuted to life and were eventually released on parole; one was convicted of another homicide. From 1959 to 1967, an additional 32 persons were released and by 1967 only one had been convicted of a new offense (not a murder).<sup>44</sup>

### *Estimating Lifer Recidivism*

These previous studies are instructive, but rely on data that is now several decades old. While there have been no recent analyses of lifers and recidivism, we can examine recidivism data from the Bureau of Justice Statistics to develop estimates of the magnitude of these dynamics.<sup>45</sup> Using these data, we can determine the following:

#### *Low rates of rearrest for released lifers*

As seen in Table 6 below, lifers are rearrested at much lower rates than for the overall prison population. In particular:

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<sup>44</sup> Sheppard, Colin. “Towards a Better Understanding of the Violent Offender,” *Canadian Journal of Criminology and Corrections*, 1971, 13(1): 60-67.

<sup>45</sup> U.S Department of Justice, Bureau of Justice Statistics. *Recidivism of Prisoners Released in 1994: [UNITED STATES] {Computer File}*. 3<sup>rd</sup> ICPSR version. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, and Regional Justice Information Services Commission [producers], 2002. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2003.

- Lifers are less than one-third as likely as all released offenders to be rearrested within three years of release from prison.
- Four of every five lifers are not rearrested. Of the lifers released in 1994, 20.6% were rearrested, compared to an overall rearrest rate of 67.5%.<sup>46</sup> (Note that these data all refer to rearrest rates, and that not all arrests result in a conviction on a new offense.)

**Table 6 – Rearrest Rates (%) of Prisoners Released in 1994<sup>47</sup>**

Release Status/Offense	Rearrest Offense				
	All Offenses	Violent	Property	Drug	Public Order
<b>All</b>	67.5	21.6	31.9	30.3	28.3
<b>Lifers</b>	20.6	18	19.9	2.9	8.3
<b>Violent</b>	61.7	27.5	25.5	22.6	27.4
<b>Property</b>	73.8	21.9	46.3	27.2	29.2
<b>Drug</b>	66.7	18.4	24	41.2	27.7
<b>Public Order</b>	62.2	18.5	22.9	22.1	31.2

*Lifers not more likely to be rearrested for a violent offense*

Lifers – 90% of whom are incarcerated for a violent offense – are no more likely to be rearrested for a violent offense (18%) than property (21.9%) or drug offenders (18.4%). Even for murder, lifers are only marginally more likely to be rearrested than property or drug offenders (1.1% vs. 0.8% and 0.7%). Overall, released lifers are slightly more likely to be charged with a property offense (19.9%) than a violent offense (18%).<sup>48</sup>

These trends illustrate the importance and potential benefit of sound risk-based analysis for release, and provide parole officials an opportunity to assess the public safety risks for individual lifer releases and to plan reentry and supervision plans to respond appropriately. This is a more effective policy than the current system which often blindly locks up persons for long periods of incarceration, releases people without protocol in place for risk assessment or reentry planning for the transition back into society, and, therefore, poses significant potential negative consequences for public safety.

<sup>46</sup> Since the size of the sample of lifers released from prison in 1994 is small, this analysis is not intended to be immediately generalizable to the entire population of released lifers; rather, this information should be considered a sample of released lifers from 15 states, recognizing standard error issues inherent in working with small sample sizes.

<sup>47</sup> The data on lifers is taken from analysis by The Sentencing Project. All other data is from Table 10 in Langan, P.A. & Levin, D.J. (2002). *Recidivism of Prisoners Released in 1994*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics. Numbers do not add to totals due to multiple arrest charges for some offenders.

<sup>48</sup> It should be noted that there is significant overlap in the rearrest offense figures; many persons released from prison in 1994 were rearrested for more than one charge. Of the 1,228 released lifers in our analysis, 253 (20.6%) were rearrested, accounting for over 600 offenses, or nearly 2.5 offenses per person. Thus, four of every five released lifers were not rearrested, but those who were averaged nearly 2.5 charges per person. Among the lifer population, it is likely that many of these multiple offenses arose out of the same event (e.g., a person arrested for both drug selling and possession of a weapon) since lifers arrested for even a single offense are likely to have their parole revoked and be sent back to prison.

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### *Implications for Public Policy*

These data on recidivism have several implications for public policy in regard to lifer imprisonment:

#### *Fiscal Cost of Lifer Imprisonment*

The fiscal cost of maintaining a large lifer population is significant and growing. A conservative annual cost of incarceration is \$20,000. At this rate the annual national cost for life imprisonment is an estimated \$2.5 billion. However, this figure understates the actual costs of life imprisonment. Since the cost of imprisonment rises significantly as the level of security increases, life imprisonment, often in maximum-security facilities, results in considerably higher costs. Moreover, life sentencing creates a geriatric prison population with far more expensive costs for health care and other services. The cost of maintaining an aging prisoner is estimated to be as much as \$69,000 a year.

As a result of these dynamics, we can estimate that an average life sentence imposed by a judge costs taxpayers about \$1 million. Assuming that a typical lifer is sentenced at the age of 30 and will live until 70, we can estimate conservatively that incarceration costs of \$20,000 a year from age 30 to age 60 will total \$600,000. From age 60 to 70, costs are conservatively at least \$40,000 a year, yielding a total lifetime cost of \$1 million.

In Texas alone, approximately 5% (6,364) of the prison population is 55 years and older, and estimates are that by 2008, there will be over 10,000 persons in state institutions over the age of 55.<sup>49</sup> In the federal system, elderly prisoners are the fastest growing population, with nearly 12% of federal inmates over the age of 50.<sup>50</sup> This is due, in large part, to longer prison sentences generally, and specifically, to an increase in the use of life sentences. In Texas, where there are slightly under 8,000 persons serving life sentences, the growth of the aging population is a significant financial burden, and any policy responses are affected by legislative constraints on the early release of certain types of offenders.

For example, two convicted elderly sex offenders, a population for whom early releases are forbidden, cost the state \$1 million per month for treatment of heart and lung ailments. Both are in “near vegetative states” and pose no risk to public safety; however, the prison system is prohibited from releasing them to a nursing-home facility where their care would be far less expensive. Texas has budgeted nearly \$300 million for health care for prisoners in 2005; however, cuts to the budget and staff due to the financial crisis come at an inopportune time, as elderly prisoners continue to accumulate in prisons across the country as a result of life sentences.

Lifers who are eventually released will obviously result in lower costs of incarceration, but even at an average of 29 years documented in this report, these costs will approach \$600,000 or more. As a matter of public policy, therefore, the issue becomes whether to invest up to \$1 million in

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<sup>49</sup> John Moritz, “With Sick Inmates Costing Millions, State Sees Crisis,” *The Houston Chronicle*, March 27, 2004.

<sup>50</sup> Vanessa Blum, “Gray Area,” *Legal Times*, March 29, 2004.

public funds to imprison an offender for life, or to impose a substantial sentence, but less than life, at lower cost.

### *Length of prison term's impact on recidivism*

The relatively low rate of recidivism for lifers in comparison to other offenders is no doubt due in significant part to the length of time they have spent in prison. In general, older offenders have lower rates of recidivism than younger offenders. From a public safety perspective, the policy issue concerns how to maximize the efficiency of the criminal justice system. To take an extreme example, locking up all shoplifters for life would reduce any recidivism on their part, but would obviously represent an inefficient use of public resources.

In a review of the limited studies that have been conducted to assess the effect of time served on recidivism, researchers at the Washington State Institute for Public Policy concluded that an individualized assessment of these dynamics was suggested by the experience to date:

... the effects of ... the length of time served on recidivism are perhaps offender-specific.... For some offenders, incarceration and longer confinement increase the risk of recidivism. For other offenders, recidivism rates will either be unaffected or reduced by longer terms of incarceration. It is possible that for some types of offenders, there is an optimum length of sentence which minimizes recidivism.<sup>51</sup>

To the extent that lifers are considered for release, policymakers need to assess relative rates of recidivism and costs for varying periods of incarceration. For example, releasing lifers on average after 20 years would save substantial funds but might increase recidivism, whereas incarcerating lifers for 40 years would be very costly but might result in less recidivism. In any of these scenarios, the challenge is to view corrections spending in broad terms. That is, to the extent that shorter prison terms yield cost savings, how can those funds be invested in public safety approaches, and what are the relative benefits that would be achieved? And conversely, if longer prison terms result in higher costs, from where will those funds be drawn and what will that impact be?

### *Reducing recidivism*

With more than 600,000 persons coming out of prison each year, including about 3,000 lifers, recidivism is clearly a key concern for crime policy. As is true for all offenders, a focus on reducing recidivism for lifers involves a variety of strategies – programming in prison, risk assessment, and transitional services upon release.

Growing interest in recent years in the reentry of prisoners to the community has focused attention on factors that contribute to reducing recidivism among released prisoners. Generally, scholars have concluded that some rehabilitation programs in prison are effective in reducing recidivism. These include academic and vocational skills training, cognitive skills programs focusing on goal-setting and problem-solving, and drug treatment. A 2001 study by the

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<sup>51</sup> Lin Song and Roxanne Lieb, “Recidivism: The Effect of Incarceration and Length of Time Served,” Washington State Institute for Public Policy, September 1993.

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Washington State Institute for Public Policy found that a number of these programs lowered recidivism by 5-10%, and some by as much as 20-30%. A fiscal analysis of interventions both within and outside the criminal justice system demonstrated crime reduction savings of as much as \$7 for every dollar spent.<sup>52</sup> Such findings suggest that preparing lifers for release through targeted programming can result in significant public safety benefits.

Research has also documented ways in which the post-prison environment affects recidivism. Paul Gendreau and colleagues have used meta-analysis techniques to assess the various factors related to recidivism.<sup>53</sup> They categorize these as either *static* or *dynamic* factors. The former are factors that cannot be changed, such as adult criminal history, race, age, and family rearing practices. Dynamic factors are circumstances for which interventions can be developed, including such ones as companions, substance abuse, and social achievement. Many of these factors have a statistically significant, though modest, impact on recidivism, but the researchers find that as a group, the dynamic factors are more predictive. This finding suggests that targeted interventions with released prisoners can be effective in reducing future criminal activity.

This analysis does not suggest that all lifers necessarily be released after serving a certain number of years. Such decisions ultimately are the responsibility of a parole board or governor, depending on state policies. But given the very substantial fiscal costs of housing aging prisoners, it does imply that increasingly longer incarceration of lifers is not necessarily the most efficient use of public safety funds. This is particularly the case in regard to the increasing frequency of life without parole sentences. The recommendations section of this report provides a series of policy and practice strategies that can be employed to provide appropriate consideration of sentencing and release issues that address public safety concerns.

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<sup>52</sup> Steve Aos, Polly Phipps, Robert Barnoski, and Roxanne Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime*, Washington State Institute for Public Policy, May 2001.

<sup>53</sup> See discussion of these findings in Joan Petersilia, *When Prisoners Come Home*, Oxford University Press, 2003. pp. 150-153.

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## LIFERS IN INTERNATIONAL CONTEXT

As is true of most criminal justice policy in the U.S., lifer sentencing is generally far more excessive than in most industrialized nations. While there are limited comparative data, general international norms are moving away from large-scale use of life imprisonment.

A comparative study of the U.S., England and Wales, and Germany by law professor Dirk van Zyl Smit found that the U.S. employed life sentences more frequently, and with more restrictions, than the two other nations.<sup>54</sup> Examining prison data for 1999, the author found that 10.7% of U.S. prisoners were serving life sentences, in comparison to 8.4% in England and Wales, and 3.1% in Germany. (These figures only report on absolute numbers, and do not account for differences in crime rates.)

Among European nations, there are mixed trends in recent years. While the French Parliament recently enacted a law providing for life without parole, Norway and Portugal have abolished life imprisonment entirely. In Slovenia, the maximum term of imprisonment is twenty years, and a German Constitutional Court decision has held that life imprisonment must generally include the possibility of release.<sup>55</sup>

While the European Court of Human Rights has not opposed the use of life sentences for adults, it has held that discretionary life terms imposed by a judge must include the possibility of release from prison.<sup>56</sup> And for juveniles, the United Nations' Convention on the Rights of the Child (1989) expressly opposes life sentences for anyone less than 18 years of age.<sup>57</sup>

A key distinction among industrialized nations often lies in regard to the use of sentences to life without parole. As we have seen, one quarter of the U.S. lifer population is now serving such a sentence. Even in European nations, which permit such a sentence, it is generally used only rarely. In England, for example, all but 23 of the 4,206 life prisoners had a minimum term set after which they would be parole eligible.

One factor that likely provides part of the explanation for the greater use of life imprisonment in the U.S. is the application of the death penalty in the justice system, in contrast to virtually all other industrialized nations. Since sentencing systems are generally established on a proportional basis – more serious crimes are punished more severely – the presence of the death penalty in the sentencing structure serves to exert upward pressure on the severity of the penalties imposed for all offenses.

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<sup>54</sup> van Zyl Smit, Dirk, *Taking Life Imprisonment Seriously*, Kluwer Law International, 2002.

<sup>55</sup> Albrecht, Hans-Jorg, “Post-Adjudication Decisions in Comparative Perspective,” in Michael Tonry and Richard Frase, editors, *Sentencing and Sanctions in Western Countries*, Oxford University Press, 2001, p. 303.

<sup>56</sup> Kurki, Leena, “International Standards for Sentencing and Punishment,” in Tonry and Frase, p. 355.

<sup>57</sup> “Life Imprisonment,” *ibid.*, p.6.

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## RECOMMENDATIONS

As this report has documented, the use of life sentences, and life without parole, has increased dramatically over the past two decades. At the same time, the use of discretionary release mechanisms has been substantially curtailed. The consequences of unnecessary or wrongful life sentences are great, highlighting the importance of making appropriate decisions to incarcerate for life from both a humanitarian and fiscal perspective. In calling attention to these developments in a 2003 address to the American Bar Association, Supreme Court Justice Anthony Kennedy noted that pardons have now become infrequent and the pardon process has been “drained of its moral force.” Kennedy called upon the ABA to advocate to “reinvigorate the pardon process at the state and federal levels.”

Life sentencing policies should incorporate a range of perspectives. These include the varied goals of sentencing in such cases, the harm to and needs of victims, public safety objectives, and the impact on costs and management of corrections facilities. The following represent key policy changes that can address these issues.<sup>58</sup>

### *Defense Representation and Sentencing*

- *Provide adequate defense representation*

In recent years documentation of inadequate defense representation in capital cases has become widespread. In Illinois and other states, this has contributed to innocent persons being sentenced to death, while in 2003 the Supreme Court ruled in the *Wiggins* case that defense failure to prepare mitigation evidence where such evidence exists and would likely have had an impact constituted ineffective assistance of counsel. Problematic as these cases are, they suggest that representation in lifer cases may be even more challenging, given that the levels of legal representation and defense resources are generally lower than in capital cases. In order to reduce the risk of error and to allow for full consideration of the appropriate sentence in serious cases, states should provide adequate funding to assure adherence to standards of representation promulgated by the American Bar Association and other professional bodies.

Such standards include sufficient funding for uniform statewide representation, investigation, experts, and sentencing specialists. Caseloads must be reasonable so as to permit the rendering of quality representation, “vertical representation” should be mandated to insure continuous representation of the client through all trial stages, and counsel should be assigned with appropriate training and experience to match the complexity of the case.<sup>59</sup> Moreover, a full pre-sentence report should be required by both a court service as well as the defense, which will include a recent investigation into the defendant’s history. Finally, standards recommended by the American Bar Association for indigent defense representation and for the conduct of the pre-trial, trial, and sentencing stage should be followed in practice. In order to permit redress of a wrongful or dubious conviction or sentence, state legislatures and/or high courts acting in their

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<sup>58</sup> Recommendations in this section have benefited greatly from those contained in Joan Petersilia, *When Prisoners Come Home*, Oxford University Press, 2003.

<sup>59</sup> American Bar Association, *The Ten Principles of a Public Defense Delivery System*, February 2002.

supervisory roles should also reconsider *Strickland*'s restrictive limitations imposed on meaningful review of defense counsel's adequacy in any particular case.

- *Restore appropriate discretion to sentencing judges*

The most significant change in sentencing policy over the past several decades has been the limiting of judicial discretion. With the imposition of mandatory sentencing, “three strikes” policies and similar measures, judges in many jurisdictions are now greatly restricted in the sentences they can impose for many offenders. For lifers, the issue is generally not a question of whether the offender should be sentenced to prison, since virtually all persons convicted of these serious offenses would be imprisoned under any sentencing scheme. But the mandatory nature of many penalties often unduly restricts the ability of judges to sentence based on the individual circumstances of the offender and the offense. Restoring judicial discretion in such cases would permit judges to evaluate the appropriate mix of sentencing objectives to be achieved in each case while avoiding overly restrictive practices that do not contribute to public safety. In addition, factors that permit a judge to sentence below a mandatory minimum or guideline sentence should be expanded to include whether the defendant has a history of abuse at the hands of the victim, a mental disability or illness, or was a juvenile at the time of the offense.

### ***Prison Programming and Release***

- *Restore professionalism to parole boards*

In 1967, the President's Crime Commission recommended that parole boards be staffed by corrections professionals, as opposed to political appointees. Despite this, politically appointed boards are the norm in almost all states, with two-thirds of states maintaining no standards for professional qualifications for service. One exception is the state of Ohio, in which parole board members are persons with strong backgrounds in criminal justice who are appointed by the commissioner of corrections and serve in civil service capacities. The politicization of parole, as noted earlier in the case of California, renders the prospect of a rational and empirical consideration of each individual's application for parole unlikely, with future electoral concerns more likely to guide decisions. Instead, parole board members should have strong backgrounds in corrections or social services so as to best assess risk and release decisionmaking.

- *Adopt risk-based policies for release*

Persons sentenced to life represent a broad range of offenses and individual characteristics, which in turn suggest varying prospects for public safety upon release from prison. While parole guidelines were widely used in the 1970s and 1980s to promote a greater degree of equity in release consideration, they have largely fallen into disuse as parole boards have lost much of their discretionary power. Guidelines that incorporate risk assessments for lifers can be used as a tool by professionals on parole boards to develop release decisions that restore accountability and public safety as primary goals of the system.

The state of Texas adopted parole guidelines in 2001 that score inmates on a risk system based on factors that include the severity of the offense, prior incarcerations, prison disciplinary record,



and age. By using such a system, state parole officials have available a guideline that builds public safety prospects into the release decision.

Risk assessment instruments such as the Level of Service Inventory-Revised (LSI-R) are being used by a number of states to identify offender needs and risks. The tool incorporates an assessment of both static and dynamic factors of prisoners and parolees, including criminal history, employment, and financial resources. While originally developed as a mechanism for use by parole agents in the community, Washington state and others now use it to assess both inmate needs in prison and service needs upon release.

- *Restore prison programming to prepare inmates for release*

The growing interest in prisoner reentry has focused attention on the importance of providing programming in prison that can better prepare inmates, including lifers, for release to the community. In recent years, though, as the prison population has steadily increased, programming and services within prisons have actually declined. Between 1991 and 1997, for example, the proportion of state prison inmates nearing release who had participated in vocational programs fell from 31% to 27%, along with a decline from 43% to 35% in education programs.<sup>60</sup> Since research has demonstrated that participation in such programming can reduce recidivism, public safety considerations suggest that restoration of program services would lead to better preparation for release. This approach echoes the remarks by Supreme Court Justice Anthony Kennedy in a 2003 address to the American Bar Association, in which he notes we must “acknowledge that the more that two million inmates in the United States are human beings whose minds and spirits we must try to reach.”

- *Expand release consideration for elderly, ill prisoners*

The increasing use of life sentences will result in larger numbers of elderly and infirm prisoners. Incarcerating such offenders serves no public safety objective and is very costly for corrections systems. States should adopt policies that provide for careful review of such cases so that societal interests in balancing competing objectives of punishment, public safety, compassion, and cost control can best be achieved. While some states consider ways in which they can release elderly and ill prisoners without risking public safety, strict legislative provisions in the federal system make early release an unlikely option. The federal government should consider adopting legislation to permit persons over the age of 60 who have served one-third of their term to apply for early release.<sup>61</sup>

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<sup>60</sup> James P. Lynch and William J. Sabol, *Prisoner Reentry in Perspective*, Urban Institute, September 2001.

<sup>61</sup> Blum, op.cit.

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### *Policy Changes*

- *Eliminate life without parole in all but exceptional cases*

Imposing a sentence of life without parole makes an assumption that an offender will never be considered for release, no matter how old or changed in behavior. Experience suggests that many persons sentenced to life in fact change substantially while in prison, both by expressing genuine remorse for their actions and engaging in programming and changed attitudes. In states that employ the death penalty, a sentence of life without parole is often viewed as a lesser alternative, but the scale of such sentences -- 33,633 such persons in prison today -- suggests that these penalties are being imposed in a far broader range of cases. While policymakers may wish to maintain the option of life without parole, its imposition should only be considered in cases where either the circumstances of the offense or public safety considerations mandate its use.

- *Exempt juveniles from life sentencing*

As the recent case of 12-year-old Lionel Tate has demonstrated, life sentences are particularly inappropriate for juveniles. The Tate case demonstrates that juveniles should not be subject to life prison terms because they do not have the maturity of an adult in aiding in their defense. In addition, as noted by Judge Moore in the case of Nathaniel Abraham, life sentences represent an entire rejection of the longstanding traditions of our treatment of juvenile offenders, which is that rehabilitation should be considered as a primary objective when sentencing children.

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## CONCLUSION

### *Victor Hassine*

Born in Egypt and reared in New Jersey, Victor Hassine was convicted as an accomplice to murder just months after graduating from law school in 1980, and sentenced to life without parole in Pennsylvania. Despite suffering permanent physical disability as a result of prison violence, Hassine has become a noted writer and creative artist. He is the author of *Life Without Parole*, a text used in many universities, has written a play that has been performed in prison, and was named by Pen America as one of the nation’s outstanding inmate authors. While in prison, Victor Hassine also co-founded the nation’s first accredited prison synagogue and three faith-based post-release transition homes.

This report has documented the vast increase in the use of life sentences in the United States in recent decades, resulting in one of every eleven persons in prison now sentenced in this manner. These developments raise questions of public safety, use of tax dollars, and the efficacy of criminal justice policies.

As we have documented, many lifers have been convicted of serious crimes and present an immediate threat to public safety, but many others are housed in prison long after they are dangerous due to overly restrictive parole and commutation policies. Additional numbers of lifers would probably not have received such severe sentences had they had access to adequate defense representation or had judges not been overly constrained by sentencing policies requiring such prison terms.

The findings of this report do not suggest that long-term imprisonment is necessarily inappropriate in any individual case, either for reasons of punishment or public safety. Nor do they suggest that persons who have been victimized in many such cases have not suffered greatly. But they do compel us to question whether the broad-scale imposition of such penalties has resulted in the use of life imprisonment in ways that too often represent both ineffective and inhumane public policy. As legislative bodies begin to reconsider the appropriate balance of resources to produce public safety, the issue of long-term imprisonment should become an important aspect of that discussion.

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**APPENDIX – ESTIMATING TIME TO BE SERVED IN PRISON**

There are several methods available by which to develop estimates of time to be served in prison. Each provides a different type of measurement for analyzing sentencing and release practices.

Estimates based on *exit cohorts* are analyses of the average amount of time served by persons leaving prison in a given year. These figures generally underestimate prison time served for a particular type of offense category since persons serving shorter sentences are overrepresented in the cohort. Further, as noted by Sabol and Lynch, time served by persons exiting prison may also differ from expected time to be served for recently admitted prisoners due to changes in policy and practice.<sup>62</sup>

A second method is the *expected time to be served/time served* estimate, which is calculated through inmate self-reports on how much time they have left to serve on their sentence. This can be done with a cohort of prisoners upon admission, asking them about their sentence length. In addition, it may be asked of the stock population in prison, in which prisoners report how much time they have served and how much time they expect to serve until release. This approach overcomes the bias in using the *exit cohort* method, but self-report estimates are fraught with concerns of reliability. Even if an inmate does accurately recall the amount of time expected to be served from a certain point in time, prison release practices change over time, often causing this method to yield estimates that differ significantly from actual practice.

The methodology chosen for this report is the *stock/flow* analysis used by the U.S. Office of Juvenile Justice and Delinquency Prevention in its projections of juvenile detention populations. As developed by Butts and Adams, this method involves a computation of time served based on a ratio between persons currently in prison and those being released.<sup>63</sup> Although the stock/flow method is subject to creating biased estimates if admissions or release patterns change significantly over time, in the case of this project this approach is the least biased estimator and the best indicator of length of stay over time. Since admissions have been increasing and releases decreasing, both steadily and without any sudden deviations, the emergence of biased estimates from this approach is not a serious concern.

Estimates for the stock population have been taken from the 1997 Survey of Inmates in State and Federal Correctional Facilities for all persons in state prison serving a life sentence. Estimates for the flow, or released, lifers for that year are estimated using data from the 1997 National Corrections Reporting Program.

$$z = y / x_{\text{release}}$$

In the above equation, **z** represents the years a person entering prison with a life sentence can expect to serve prior to release. Expected time to serve is a function of the stock population (**y**),

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<sup>62</sup> Sabol, W.J. & Lynch, J.P. (2002). *Sentencing and Time Served in the District of Columbia Prior to “Truth-in-Sentencing.”* Washington, DC: U.S. Department of Justice. NCJ 191860.

<sup>63</sup> Butts, J. & Adams, W. (2001). *Anticipating Space Needs in Juvenile Detention and Correctional Facilities.* Washington, DC: Office of Juvenile Justice and Delinquency Prevention. NCJ 185234.

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which includes admissions, in a given year divided by the flow ( $x_{\text{release}}$ ), or releases, during that year. The underlying principle of the stock/flow ratio is that in a state of equilibrium, with steady entries and exits from prison, the length of time to be served is a function of the stock population at time  $t$  and the releases (flow) during that same period. The size of the “exit door” dictates at what rate lifers accumulate in prison.