

SOME FACTS ABOUT LIFE:  
THE LAW, THEORY, AND PRACTICE OF LIFE SENTENCES

by  
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*A diverse band of politicians, justice officials, and academic commentators are lending their voices to the hot topic of correcting the United States' status as the world's leader in mass incarceration. There is limited focus, though, upon the special role that life sentences play in explaining the explosion in prison populations and the dramatic rise in costs that result from providing for the increased needs of aging lifers. This Article highlights various ways in which those serving life sentences occupy unique legal and political statuses. For instance, life sentences are akin to capital punishment in likely resulting in death within prison environs, yet enjoy few of the added procedural rights and intensity of review that capital defendants command. In contrast to term prisoners, lifers cannot expect to reenter civil society and thus represent an exclusionist ideological agenda. The Article reviews whether life penalties remain justified by fundamental theories of punishment in light of new evidence on retributive values, deterrence effects, and recidivism risk. It also situates life sentences within an international moral imperative that reserves life penalties, if permitted at all, for the most heinous offenders, and in any event, demands periodic review of all long-term prison sentences.*

*This Article also provides a novel perspective by presenting an empirical study to further investigate the law and practice of life sentences. Utilizing federal datasets, descriptive statistics, and a multiple regression analysis offers important insights. The study makes an original contribution to the literature by exploring the salience of certain facts and circumstances (including demographic, offense-related, and case-processing variables) in accounting for life sentence outcomes in the federal system. While some of the attributes of life sentenced defendants are consistent with current expectations, others might be surprising. For example, as expected, sentencing guideline recommendations, the presence of mandatory minimums, and greater criminal history predicted life sentences. Results also supported the existence of a trial penalty. On the other hand, lifers in the federal system were not representative of the most violent offenders*

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*or worst recidivists. Life sentences were issued across a variety of violent and nonviolent crimes, and in recent years a substantial percentage presented with minimal criminal histories. Regional disparities in the use of life sentences were also indicated. In concluding, this Article reviews potential remedies to the overreliance upon life penalties in the American justice system.*

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## I. INTRODUCTION

The “mass incarceration” nation exemplified by the United States is ideologically, culturally, and experientially a unique American phenomenon.<sup>1</sup> The staunchly carceral state derives “partly from American moralism and partly from structural characteristics of American government that provide little insulation from emotions generated by moral panics and long-term cycles of tolerance and intolerance.”<sup>2</sup> To many legal, human rights, and justice-policy observers, this penal position is a deplorable example of American “exceptionalism.”<sup>3</sup>

<sup>1</sup> See Nicola Lacey, *American Imprisonment in Comparative Perspective*, DEDALUS, Summer 2010, at 102, 106–08.

<sup>2</sup> Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQ. 419, 419 (1999).

<sup>3</sup> CHRIS CUNNEEN ET AL., PENAL CULTURE AND HYPERINCARCERATION: THE REVIVAL OF THE PRISON 2 (2013); see also William W. Berry III, *Ending Death by*

Courts, policymakers, and researchers have in recent times paid great attention to the rise of mass incarceration and the consequences therefrom.<sup>4</sup> The principal criticisms of the state of mass incarceration have largely oriented toward the increased rate of imprisonment and lengthier prison sentences overall.<sup>5</sup> Former Attorney General Eric Holder evolved into an outspoken critic of the overuse of prison, reflecting near the end of his tenure that “[t]oo many Americans go to too many prisons for far too long, and for no truly good law enforcement reason.”<sup>6</sup>

A unique subset of prisoners that drives up prison numbers and costs consists of the lifers—those serving life terms.<sup>7</sup> The number of prisoners serving sentences of life has steadily increased.<sup>8</sup> In total, America’s lifer population quadrupled from 1984 to 2012,<sup>9</sup> at which time about 160,000 prisoners were serving life sentences.<sup>10</sup> A more recent estimate indicates that one in nine inmates in America’s prisons is serving a life term.<sup>11</sup> Incongruously, the lifer population has expanded during a time period experiencing substantial reductions in crime rates<sup>12</sup> and, just as strikingly, despite empirical evidence disputing any real correlation between extreme prison terms and enhanced public safety.<sup>13</sup>

Still, notwithstanding escalating lifer populations and the reality that life terms are draconian in nature and result, relatively few commentators

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*Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 904 (2010) (“If there is anything that the United States does well in its criminal justice system, it is keeping criminal offenders incarcerated.”).

<sup>4</sup> See Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295–96 (2013).

<sup>5</sup> See Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 426–28 (2013); Adam Gopnik, *The Caging of America*, NEW YORKER, Jan. 30, 2012, at 72, 72–73.

<sup>6</sup> Dan Merica & Evan Perez, *Eric Holder Seeks to Cut Mandatory Minimum Drug Sentences*, CNN (Aug. 12, 2013), <http://cnn.com/2013/08/12/politics/holder-mandatory-minimums/>.

<sup>7</sup> See Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 66, 66–67 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

<sup>8</sup> Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT’G REP. 27, 27 (2010).

<sup>9</sup> Ashley Nellis, *Life Goes On: The Historic Rise of Life Sentences in America*, THE SENTENCING PROJECT 1 (Nov. 20, 2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

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

<sup>11</sup> Marc Mauer, *Changing the Knowledge Base and Public Perception of Long-Term Prisoners*, 14 CRIMINOLOGY & PUB. POL’Y 351, 351 (2015).

<sup>12</sup> See Alfred Blumstein, *Approaches to Reducing both Imprisonment and Crime*, 10 CRIMINOLOGY & PUB. POL’Y 93, 95–96 (2011); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 590 (2012).

<sup>13</sup> Nellis, *supra* note 9, at 1.

focus on life sentences or their distinctly negative byproducts,<sup>14</sup> at least outside the unique context of juveniles sentenced to life.<sup>15</sup> Even the American public seems little concerned over the potential that life sentences may be disproportionate and unnecessary.<sup>16</sup> A critic might assess that America does not appear to truly exemplify the “land of the free” with respect to its holding the world record for the rate at which it incarcerates its people.<sup>17</sup> Lifers certainly do not enjoy the country’s promise of opportunity and second chances considering their freedom to live in civil society has been officially and permanently revoked.

Perhaps the unique status of those imprisoned for their natural lives exists because this group operates on a different dimension. Life sentences lie at the intersection of penalties involving a fixed penal term and those implicating the death penalty. Yet, at the same time, a life sentence is distinct. Unlike the death penalty, a life sentence does not demand the affirmative action of the state to physically kill the individual in advance of his natural lifespan, an action which begets strong moral backlash. In contrast to a term prisoner who can rightly anticipate release, a lifer generally cannot. Lifers seem to simply disappear from public view and, without strong advocacy groups having emerged to extensively lobby for them, policymakers ignore them as well.<sup>18</sup> Nonetheless, lifer populations remain quite visible to corrections officials, who must house them indefinitely, and to governmental coffers, which must absorb the steep costs associated with fulfilling the basic needs of aging lifers.

This Article will take up the gauntlet by highlighting certain issues with America’s large population of lifers in prison and contributing orig-

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<sup>14</sup> Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 27 BRIT. J. CRIMINOLOGY 597, 597–98 (2007); Lila Kazemian & Jeremy Travis, *Imperative for Inclusion of Long Termers and Lifers in Research and Policy*, 14 CRIMINOLOGY & PUB. POL’Y 355, 358 (2015). *But see* Craig S. Lerner, *Who’s Really Sentenced to Life Without Parole?: Searching for “Ugly Disproportionalities” in the American Criminal Justice System*, 2015 WIS. L. REV. 789, 792 (2015).

<sup>15</sup> *See, e.g.*, Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9 (2008). In recent years, Supreme Court decisions have undertaken a reexamination of the constitutionality of life sentences for defendants who were juveniles when they committed their crimes. *See, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>16</sup> Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 356 (2013).

<sup>17</sup> Eli Lehrer, *Responsible Prison Reform*, NAT’L AFF., Summer 2013, at 19, 25 (“[T]here is something deeply hypocritical about a country that claims to prize freedom having the world’s highest incarceration rate.”).

<sup>18</sup> CUNNEEN ET AL., *supra* note 3, at 9 (explaining that by isolating prisoners within the private space of prison, authorities effectively delete them from public view, extinguish any public empathy for their lot, and further marginalize them); Diarmuid Griffin & Ian O’Donnell, *The Life Sentence and Parole*, 52 BRIT. J. CRIMINOLOGY 611, 623 (2012).

inal empirical research. This work offers insights and perspectives from philosophical, legal, and scientific disciplines. Section II outlines America's journey over time in vacillating on the primary philosophies guiding correctional practices. A dramatic shift toward law-and-order policies eventually led to the current mass incarceration nation. The focus will then turn to life sentences. Over the last 30 years, the United States has increasingly relied upon life sentencing, as a consequence of its perceived advantage in representing an alternative to the death penalty, and because of the systemic escalation of sentence lengths overall. Section II attempts to demonstrate that there are two types of penalties that really should be considered as comprising a single category of prisoner—the lifers. These include technical life-without-parole inmates plus those sentenced to prison terms of years so long they likely will outlast their subjects' natural lifespans. This composite lifer group experiences shared commonalities, not the least of which is the presumption of death in prison. America's dependence upon life sentences is then scrutinized from criminological theory and morality perspectives. For instance, according to the relative harm ranking required of retributive and deterrence theories, the extreme nature of a life sentence means that it is likely justified only for the most heinous of crimes, such as intentional murder, and for the worst of career offenders. The use of a life sentence for incapacitation is morally defensible only as a final resort if necessary to protect the public. Considering the scientifically validated age-crime curve (i.e., most criminals age out of reoffending), life sentences are appropriate, if at all, for a select few who present an unreasonably high risk of reoffending. Importantly, the tide may be about to turn again as bipartisan coalitions are lobbying for reforms to reduce the country's prison populace. Whether any remedies will directly involve life sentences and lifers, though, is uncertain.

Section III shifts toward explaining the history of life sentences in the federal context and situates the current role that life sentencing plays in its guidelines-based system. Addressing the federal system seems apt, as it houses the largest prison population in America<sup>19</sup> and often acts as a role model for criminal justice practices across jurisdictions. Section IV then serves to provide an original contribution to legal and scientific literatures. It undertakes various empirical projects to further investigate, explore, and analyze life terms in the federal system by mining a treasure trove of data made available by federal justice officials. A recent study of data from eight states found that the vast majority of their lifers were violent offenders and those with extensive criminal histories, but the author queries whether that result would apply to the federal system.<sup>20</sup> This Arti-

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<sup>19</sup> E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, NCJ 248955, PRISONERS IN 2014 3 tbl.2 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

<sup>20</sup> See Lerner, *supra* note 14, at 860–61.

cle answers the question. The statistical measures provide some surprising insights into the applicability of certain offense-related circumstances, demographic characteristics, and case-processing factors to defendants sentenced to life in the federal system. For example, significant percentages of individuals sentenced to life are nonviolent offenders or have minimal criminal records. Conclusions and suggestions for reform follow. The profile of the life-sentenced population in the federal system questions whether retribution or deterrence theories can support many of their punishments or that their lifetime incapacitation is necessary for public safety. Legal and policy changes to substantially reduce reliance upon life sentences are outlined, such as more generous parole options, systematic reductions in maximum sentences, and mandated sentence revisitation at set periods.

## II. THE HISTORY AND PURPOSES OF LIFE SENTENCES

America's distinction as a country of mass incarceration has drawn both awe and disparagement from global communities.<sup>21</sup> The United States constitutes 4% of the world's total population; the country's prison population disproportionately comprises 22% of the world's prison populace.<sup>22</sup> Authors of a recent book contextualized the state of affairs as America's devolution into a reconstituted country deserving the name "Prison."<sup>23</sup> Perhaps the following survey, which sketches the transformations of the country's sentencing policies and regimes, will help explain America's current carceral imperative. This Section will also critically analyze theoretical justifications for life sentences and position the status of lifers by conducting a comparative-law analysis.

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<sup>21</sup> See, e.g., *An Unlikely Alliance of Left and Right*, ECONOMIST, Aug. 17, 2013, at 23, 23 ("A black man in America is 3.6 times more likely to be incarcerated than a black man in 1993 in South Africa, just before apartheid ended."); David Bauder, *Al Jazeera Takes Video Jab at U.S. Achievements*, AUSTIN AMERICAN-STATESMAN, July 7, 2015, at A3 (noting Al Jazeera YouTube video mocking America's leadership in prisoner counts); Peter Huck, *Tough Times Force Rethink on Prisons*, N.Z. HERALD (Apr. 23, 2011), [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=10721089](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10721089) (describing America's "sprawling penal archipelago of federal, state and county prisons that has sucked up public money for decades"); Lisa Kerr, Opinion, *Our Aboriginal Prison System*, TORONTO STAR, Mar. 12, 2013, at A23 ("No other country matches [the size of the U.S. prison population], not by a long shot."); *US: A Nation of Inmates?*, AL JAZEERA (Feb. 20, 2013), <http://www.aljazeera.com/programmes/insidestoryamericas/2013/02/201322071650496567.html> (calling America a "nation of inmates").

<sup>22</sup> ROY WALMSLEY, INT'L CTR. PRISON STUDIES, WORLD PRISON POPULATION LIST 1, 3 (10th ed., 2013).

<sup>23</sup> See generally MARY D. LOOMAN & JOHN D. CARL, A COUNTRY CALLED PRISON: MASS INCARCERATION AND THE MAKING OF A NEW NATION (2015).

*A. Sentencing Trends*

America's criminal justice penalty regime has undergone several metamorphoses in ideology and design over the years. Variations in penal philosophies, along with their attendant laws and policies, can chiefly explain substantive transitions in sentencing patterns and prison populations.<sup>24</sup>

At the country's beginning, correctional practices were limited to corporal and capital punishments,<sup>25</sup> perhaps because of a lack of infrastructure for housing criminals. In the late 1800s, criminal justice policymakers instituted an incarceration-based system.<sup>26</sup> Imprisonment became the ideal penalty across the country, though rehabilitation was then the primary motivator of correctional practices within prison environs.<sup>27</sup> For many jurisdictions, sentencers enjoyed wide latitude in assigning terms of penal servitude.<sup>28</sup> Eventually, parole-type authorities exercised judgment in determining release dates and conditions of reentry.<sup>29</sup> The rehabilitation model underlying these systems of indeterminate sentencing embraced the ideology that punishments be proportional to the severity of the offense and also individualized to the reformation potential of the particular defendant.<sup>30</sup> Inmates could then be rewarded for good behavior while in prison with early release and their successful reentry efforts fostered through community-based supervision.<sup>31</sup>

As time passed into the 1970s, criminal justice stakeholders intent on reform raised several concerns about the operation of indeterminate sentencing regimes.<sup>32</sup> Dissidents accused discretionary systems of yielding sentences in individual cases that were unfixed and created disparities

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<sup>24</sup> Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 393 (1991).

<sup>25</sup> See Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 156 (2014).

<sup>26</sup> *Id.* at 157.

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

<sup>28</sup> *Id.*

<sup>29</sup> Michael Tonry, *Sentencing in America, 1975-2025*, in CRIME AND JUSTICE IN AMERICA, 1975-2025 141, 147 (Michael Tonry ed., 2013).

<sup>30</sup> NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 71 (2014); see also Michele Pifferi, *Individualization of Punishment and the Rule of Law: Reshaping Legality in the United States and Europe Between the 19th and 20th Century*, 52 AM. J. LEG. HIST. 325, 345-47 (2012); Tonry, *supra* note 29, at 149.

<sup>31</sup> SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990 119, 140 (1993).

<sup>32</sup> NAT'L RES. COUNCIL, *supra* note 30, at 72; see also Ashley Nellis & Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, THE SENTENCING PROJECT 1-2 (Jul. 2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf>.

across cases.<sup>33</sup> Equally important was the purported realization that the rehabilitation model was itself fundamentally flawed.<sup>34</sup> The infamous Martinson report, which purportedly denounced rehabilitative programming as ineffective, was touted with the popularized slogan “Nothing Works” in terms of reducing recidivism.<sup>35</sup> Pointedly, Robert Martinson’s own rejection of this adopted catchphrase—and its inability to properly summarize his conclusions to the contrary—failed to hinder the landslide rejection of rehabilitation as a foundational principle.<sup>36</sup> At the same time, rising crime rates created citizens fearful of their own potential victimization.<sup>37</sup> Critics concluded indeterminate sentences were too lenient, thereby undermining the goal of crime prevention.<sup>38</sup> Together, these anxieties led officials away from the rehabilitation model toward embracing “tough on crime” policies from the 1980s onward.<sup>39</sup>

Law-and-order type crime measures widely approved during the latter part of the twenty-first century spanned several types of policy reforms. Curtailing sentencing and parole discretion often entailed embracing more determinate sentencing systems meant to provide greater structure, certainty, and uniformity.<sup>40</sup> Some jurisdictions adopted sentencing guidelines or replaced parole with definitive good time credit statutes to generate more mechanistic outcomes.<sup>41</sup> The rehabilitative model, then reevaluated as too soft on criminals, succumbed to decidedly more punitive regimes.<sup>42</sup> This disenchantment with any rehabilitative potential of criminal offenders likely fueled the belief nationwide that only

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<sup>33</sup> NAT’L RES. COUNCIL, *supra* note 30, at 72.

<sup>34</sup> *See id.* at 321.

<sup>35</sup> MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* 23–24 (2005) (referencing Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, PUB. INT., Spring 1974, at 22, 25); Am. Bar Ass’n Comm’n on Effective Criminal Sanctions, *Report to the House of Delegates on Alternatives to Incarceration and Conviction*, 22 FED. SENT’G REP. 62, 63 (2009).

<sup>36</sup> Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979).

<sup>37</sup> *See* Blumstein, *supra* note 12, at 95.

<sup>38</sup> *See* NAT’L RES. COUNCIL, *supra* note 30, at 72.

<sup>39</sup> Berman, *supra* note 25, at 162; *see also* David Dagan & Steven M. Teles, *Locked In?: Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 266, 268 (2014) (“Faced with rising fear of crime and the shock of urban rioting in the 1960s, candidates and political consultants hardwired law-and-order electioneering into their strategies for office-seeking and partisan combat. The effect was to bully even reluctant legislators into a punitive arms race . . .”); Fan, *supra* note 12, at 587–88 (“Despair over surging crime rates, collapse of faith in government institutions to successfully rehabilitate, and a governance structure highly responsive to flare-ups of passion and Manichean crusading led to the decline of the rehabilitative ideal beginning in the 1970s.”); Tonry, *supra* note 29, at 142–43.

<sup>40</sup> Berman, *supra* note 25, at 161.

<sup>41</sup> *Id.* at 162; Lehrer, *supra* note 17, at 22.

<sup>42</sup> Tonry, *supra* note 29, at 159–60.



strict prison terms could be sufficiently retaliatory while possessing the ability to control crime rates.<sup>43</sup> The concern was no longer limited to suspected criminal-types either. A prominent criminologist warned that otherwise law-abiding citizens were merely opportunists in waiting, needing to be deterred, too: “[M]any people, neither wicked nor innocent, but watchful, dissembling, and calculating of their [opportunities], ponder our reaction to wickedness as a [cue] to what they might profitably do.”<sup>44</sup>

The revised punishment model, which has been popular since the 1980s, emphasizes public-safety concerns. Officials have assumed that compulsory prison terms will deter individuals from antisocial acts in the first instance, and that even lengthier sentences of incarceration would strengthen their disincentive value and serve to incapacitate more serious offenders.<sup>45</sup> Many jurisdictions therefore enacted various penal laws involving mandatory minimum penalties, recidivist premiums (such as three-strikes cliffs or career offender enhancements), “truth-in-sentencing” laws compelling prisoners to serve substantial portions of their prison terms,<sup>46</sup> and life sentences.<sup>47</sup> In part, these increased penalties, particularly life terms, were politically intended to assuage concerns about the prison’s so-called revolving door in which the same criminals repeatedly cycled into and out of the system.<sup>48</sup> Yet these penalties arguably devolved into ideological overreaching by swinging from discipline to sheer vindictiveness.<sup>49</sup>

The “fixes” chosen to alleviate the public’s rising concern about crime were cunningly astute in being quickly rendered, though with little reflection on longer-term solutions to crime control.<sup>50</sup> Together, these new strategies caused rising rates of sentences requiring incarceration and produced longer prison terms,<sup>51</sup> thereby exploding America’s prison populations.<sup>52</sup> The number of federal and state prisoners increased more

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<sup>43</sup> Joshua C. Cochran, Daniel P. Mears & William D. Bales, *Assessing the Effectiveness of Correctional Sanctions*, 30 J. QUANTITATIVE CRIMINOLOGY 317, 319 (2014).

<sup>44</sup> David Dagan & Steven M. Teles, *The Conservative War on Prisons*, WASH. MONTHLY, Nov.–Dec. 2012, at 25, 27 (quoting JAMES Q. WILSON, THINKING ABOUT CRIME 235–36 (1977)).

<sup>45</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 15 (1995).

<sup>46</sup> Cassia Spohn, Commentary, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 CRIMINOLOGY & PUB. POL’Y 535, 537 (2014).

<sup>47</sup> NAT’L RES. COUNCIL, *supra* note 30, at 322; Tonry, *supra* note 29, at 143–44.

<sup>48</sup> Appleton & Grøver, *supra* note 14, at 603.

<sup>49</sup> See Fan, *supra* note 12, at 588.

<sup>50</sup> See Blumstein, *supra* note 12, at 95.

<sup>51</sup> Lehrer, *supra* note 17, at 22.

<sup>52</sup> NAT’L RES. COUNCIL, *supra* note 30, at 70; Ryan S. King, *A Change of Course: Developments in State Sentencing Policy and Their Implications for the Federal System*, 22 FED. SENT’G REP. 48, 48 (2009).

than threefold from 1980 to today, with a recent count at over two and a quarter million persons imprisoned.<sup>53</sup> In retrospect, it appears that law-and-order advocates of the late twentieth century had little insight into the criminal justice monolith they were creating and, more particularly, were naive about setting in motion the transformation of the United States to becoming the world's leader as the prison nation.<sup>54</sup> Critics are now emerging to call politicians to task for maintaining the mass-incarceration status of America.<sup>55</sup>

Still, within this climate of rhetoric denouncing harsh detention policies, lifer populations have remained mostly behind the scenes, despite playing a crucial role in explaining the prison population explosion.<sup>56</sup> Lifers are of particular import as they certainly feed what has been referred to as the prison-industrial complex.<sup>57</sup> They provide the public—and now also private—prison systems with a stable base of long-term clients. Life sentences are, indeed, exceptional penalties, and lifers find themselves in a somewhat quixotic predicament, as the following discussion illustrates.

### B. *Theoretical Perspectives on Lifers*

A background lesson may facilitate a keener understanding of the penal system's strategic use of life sentences by examining posited justifications via various theoretical lenses. An initial theme here is to position life sentences within the scheme of available punishments.

#### 1. *Life Sentence as Death Sentence*

A generic assumption often posits that the death penalty constitutes the most severe sentence possible in American legal justice,<sup>58</sup> with life-without-parole ("LWOP") representing the penultimate penalty.<sup>59</sup> In-

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<sup>53</sup> ECONOMIST, *supra* note 21, at 23.

<sup>54</sup> NAT'L RES. COUNCIL, *supra* note 30, at 71.

<sup>55</sup> See *infra* Section II.C.

<sup>56</sup> Marc Mauer, Ryan S. King & Malcolm C. Young, *The Meaning of "Life": Long Prison Sentences in Context*, THE SENTENCING PROJECT, 1–3 (May 2004), <http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Meaning-of-Life-Long-Prison-Sentences-in-Context.pdf>.

<sup>57</sup> David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 28, 41 (2011).

<sup>58</sup> See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., concurring) (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("death differs from all other forms of criminal punishment, not in degree but in kind"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.")).

<sup>59</sup> See, e.g., Marijke Malsch & Marius Duker, *Introduction to INCAPACITATION: TRENDS AND NEW PERSPECTIVES* 1, 2 (Marijke Malsch & Marius Duker eds., 2012); Appleton & Grøver, *supra* note 14, at 598.

deed, with capital punishment remaining a constitutional option in the country, LWOP sentences remarkably have received bipartisan support. Conservatives advocate them as providing a legal opportunity to incarcerate a criminal forever.<sup>60</sup> Liberals appreciate the availability of LWOP as a purportedly more reasonable alternative to capital punishment, and one that advantageously does not carry the political cost to them being adjudged as soft on crime.<sup>61</sup> Indeed, jurisdictions widely embraced whole life penalties in the 1970s as a direct consequence of the Supreme Court's ruling in *Furman v. Georgia* that the death penalty system functioned at that time in an unconstitutional manner.<sup>62</sup> To fill the void, justice officials were quick to endorse LWOP sentences.<sup>63</sup> Consonant with capital punishment, life sentences authorized "permanent, continual, and complete incapacitation" enduring until death.<sup>64</sup> Moreover, the perceived benefits of the LWOP option and its broad acceptance encouraged numerous states to expand its availability beyond preexisting capital crimes.<sup>65</sup>

Unfortunately, death penalty abolitionists—perhaps unwittingly—legitimated life sentences by insufficiently attending to a life sentence's extreme nature and the likelihood that it, too, would be disproportionately visited upon poor and minority populations.<sup>66</sup> In contrast to the view that life sentences are themselves extraordinary in kind and in degree, proponents often assert that in cases where capital punishment is available, a defendant is portrayed as "lucky" to be offered a plea in which he feels compelled to agree to cede his civil existence and to spend the rest of his lifetime in captivity.<sup>67</sup>

In lieu of the strategic differentiation of life serving as a lesser, and thereby more acceptable penalty, a contrasting standpoint conceptualizes life imprisonment terms as sharing some critical similarities to death sentences. At least in jurisdictions without generous early release provisions,

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<sup>60</sup> See William W. Berry III, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1052–53 (2015); David J. Krajicek, *Mass Incarceration: The Most Important Political Issue of 2016 No One Wants to Talk About*, ALTERNET (June 14, 2015), <http://www.alternet.org/election-2016/mass-incarceration-most-important-political-issue-2016-no-one-wants-talk-about>.

<sup>61</sup> Appleton & Grøver, *supra* note 14, at 605.

<sup>62</sup> *Furman*, 408 U.S. at 239–40; Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 259 n.2 (2011).

<sup>63</sup> Dolovich, *supra* note 62, at 259 n.2.

<sup>64</sup> Henry, *supra* note 7, at 68.

<sup>65</sup> Lerner, *supra* note 14, at 798; Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439, 445–46 (2013).

<sup>66</sup> Marie Gottschalk, *Life Sentences and the Challenges to Mass Incarceration*, 11 J. INST. JUST. & INT'L STUD. 7, 13 (2011).

<sup>67</sup> Nellis, *supra* note 65, at 448.

life sentences are practically akin to “death-in-prison sentences”<sup>68</sup> or necessarily beget “death by incarceration.”<sup>69</sup> A “life term” is a cultural artifact,<sup>70</sup> signifying the recipient’s penal servitude until the end of his natural life. In other words, the State is thereby proactively and physically condemning the individual to die within prison walls.<sup>71</sup> One author posits a life sentence is merely “a semantically disguised sentence of death.”<sup>72</sup> For the foregoing reasons, the availability of a life sentence has been referred to as the “new death penalty”<sup>73</sup> or the “other death penalty.”<sup>74</sup>

Alternatively, commentators have contended that life sentences can be *more* punitive than capital punishment, while receiving far fewer substantive and procedural protections.<sup>75</sup> Professor Berry reasonably notes how a life sentence may be *experienced* by prisoners as extra brutal: “A death sentence has an end date, which for some may be less traumatic than imprisonment until one dies of natural causes. To the extent that living in prison constitutes suffering, life without parole allows for greater suffering, or at least a longer time for suffering.”<sup>76</sup> Compared to capital cases, cases resulting in life sentences are procedurally less likely to necessitate individualized attention to the offender’s own characteristics, receive careful and extensive review, enjoy lengthy appellate processes, or be reversed.<sup>77</sup> Plus, unlike the now-extreme focus on the proportionality of the death penalty to the particular offense and the individual circumstances of the offender, life sentences can be mandatory for specific crimes or qualifying recidivist defendants.<sup>78</sup> There may also exist greater opportunity for erroneous convictions of lifers for another reason. Experts believe there are too many cases of factually innocent defendants pleading guilty to crimes they did not commit when confronted with the

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<sup>68</sup> Henry, *supra* note 7, at 66.

<sup>69</sup> Appleton & Grøver, *supra* note 14, at 605.

<sup>70</sup> See CUNNEEN ET AL., *supra* note 3, at 9.

<sup>71</sup> Krajicek, *supra* note 60.

<sup>72</sup> Alfred C. Villaume, “Life Without Parole” and “Virtual Life Sentences”: *Death Sentences by Any Other Name*, 8 CONTEMP. JUST. REV. 265, 267 (2005); accord Appleton & Grøver, *supra* note 14, at 605–06.

<sup>73</sup> Henry, *supra* note 7, at 67.

<sup>74</sup> Gottschalk, *Sentenced to Life*, *supra* note 16, at 354; Gottschalk, *Life Sentences*, *supra* note 66, at 7.

<sup>75</sup> AM. CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 190–92 (2013), <https://www.aclu.org/report/living-death-life-without-parole-nonviolent-offenses>.

<sup>76</sup> Berry, *supra* note 60, at 1066 (citation omitted); accord *Glossip v. Gross*, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring); Stephen Lurie, *The Death Penalty Is Cruel. But so Is Life Without Parole*, NEW REPUBLIC (June 16, 2015), <http://www.newrepublic.com/article/121943/death-row-crueler-and-more-unusual-penalty-execution>.

<sup>77</sup> Berry, *supra* note 60, at 1066–68; Lurie, *supra* note 76.

<sup>78</sup> Nellis, *supra* note 65, at 452.

option of facing a death sentence or, instead, accepting a deal for life imprisonment.<sup>79</sup>

The discussion thus far involving theoretical and practical parallels to the death penalty generally implicated LWOP sentences. Nonetheless, it is not difficult to imagine similar analogies with respect to any person assigned a prison term likely to exceed the individual's natural lifespan in that he presumably will die in prison before his eligibility for release.<sup>80</sup> These individuals include prisoners with "basketball" score sentences numbering in the dozens, if not hundreds, of years.<sup>81</sup> Basketball-like totals can be surpassed by even more staggering numbers that far exceed most actual basketball game scores. For example, the study of federal sentences provided herein found that since 2008, over 100 defendants were given prison sentences of at least one hundred years.<sup>82</sup>

In terms of a potential ordinal ranking of punishments, the Supreme Court has conjectured that a sentence that does not on its face preclude the possibility of release—even though the term exceeds the person's reasonable lifespan—is the third most severe sentence, behind the death penalty and LWOP.<sup>83</sup> Nonetheless, such ranking may not be so clearly apposite. In many ways, extremely long terms of incarceration *are* life sentences.<sup>84</sup> Defendants receiving sentences that probably exceed their natural lifespans have thusly been nicknamed "virtual lifers."<sup>85</sup> Their punishments become "virtual life sentence[s]"<sup>86</sup> or "effective life sentences."<sup>87</sup> Practically, these extreme terms offer their recipients scant chance of discharge, provide even fewer opportunities for legal challenges than death sentences or LWOP, are thusly generally irrevocable, and death in prison is the likely result, too.<sup>88</sup> Hence, incarceration terms of multiple decades or more can easily embody "de facto" life-without-parole sentences,<sup>89</sup> despite not formally relying upon LWOP laws or nomenclature.<sup>90</sup> Indeed, it

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<sup>79</sup> *Id.* at 450.

<sup>80</sup> Villaume, *supra* note 72, at 276.

<sup>81</sup> Gottschalk, *Life Sentences*, *supra* note 66, at 8.

<sup>82</sup> *See infra* Section IV.B.

<sup>83</sup> Harmelin v. Michigan, 501 U.S. 957, 996 (1991).

<sup>84</sup> David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645, 647 & n.5 (2004).

<sup>85</sup> Gottschalk, *Sentenced to Life*, *supra* note 16, at 354.

<sup>86</sup> Villaume, *supra* note 72, at 267.

<sup>87</sup> Frank O. Bowman, III, *Freeing Morgan Freeman: Expanding Back-End Release Authority in American Prisons*, 4 WAKE FOREST J.L. & POL'Y 9, 47 (2014).

<sup>88</sup> Henry, *supra* note 7, at 71.

<sup>89</sup> AM. CIVIL LIBERTIES UNION, *supra* note 75, at 3; AMANDA SOLTER, SOO-RYUN KWON & DANA MARIE ISAAC, U.S.F. SCH. OF LAW CTR. FOR LAW & GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 21 (2012), <http://cpcjalliance.org/wp-content/uploads/2013/04/Cruel-And-Unusual.pdf>.

<sup>90</sup> Caitlyn Lee Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1101, 1113 (2013); *see also*

is often the case that the availability of parole is, in reality, slim-to-none and/or subject to political whim.<sup>91</sup> From a deterrence perspective, potential offenders probably do not distinguish virtual life from LWOP either.<sup>92</sup>

It is important to question whether life sentences, in offering little or no hope for relief, can be justified on moral, legal, and correctional grounds. Hence, the social construct of a life sentence as a normative and necessary penalty in civil society is considered next through the lens of traditional and modern theories of punishment and sentencing.

## 2. *Punishment Philosophies*

A relatively recent conceptualization of punishment decisions generally falls under the rubric known as the focal concerns perspective. A criminal penalty is crafted to attend to three focal concerns regarding individual blameworthiness, future dangerousness, and potential consequences of the penalty.<sup>93</sup> Sentencing decision-makers thereby assess various pieces of information to make inferences about the defendant's character, recidivism risk, and impacts of the penalty, such as on his health, his family, community, and correctional resources.<sup>94</sup>

Regarding the latter focal concern about the consequences of a punishment, it is now widely acknowledged that lifers suffer most acutely from their physical and social isolation,<sup>95</sup> and their permanent removal from civil society disrupts family ties and often weakens social control structures in communities that can least afford it.<sup>96</sup> The country's momentum toward longer sentences, and life sentences in particular, has

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Dolovich, *supra* note 62, at 296 n.116.

<sup>91</sup> Beth Schwartzapel, *Life Without Parole*, THE MARSHALL PROJECT (July 10, 2015), <https://www.themarshallproject.org/2015/07/10/life-without-parole?ref=hp-1-100>.

<sup>92</sup> Michael M. O'Hear, Editor's Observations, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 5 (2010) ("From the viewpoint of a prospective criminal weighing the potential pains of punishment, the difference between life with and without parole may seem remote and speculative: [e]ither sentence involves many years in prison, and it is hard to predict what parole practices will be in the future and to what extent nonparole release alternatives, such as clemency and compassionate release, will be available. Unless the parole board is perceived to be extremely lenient, life without parole may not seem much more of a threat than life with.").

<sup>93</sup> Jeffery T. Ulmer, James Eisenstein & Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 565–66 (2010).

<sup>94</sup> *Id.*

<sup>95</sup> See Benjamin Fleury-Steiner, *Effects of Life Imprisonment and the Crisis of Prisoner Health*, 14 CRIMINOLOGY & PUB. POL'Y 407, 410 (2015).

<sup>96</sup> NAT'L RES. COUNCIL, *supra* note 30, at 283–91; see also Eric Holder, U.S. Attorney Gen., Remarks at the Annual Meeting of the A.B.A. (Aug. 12, 2013) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>).

meant an aging prisoner population overall.<sup>97</sup> Because of often harsh conditions, prisoners are at higher risk of chronic health conditions and infectious disease and experience accelerated aging effects.<sup>98</sup> The resulting institutional costs to house and medically treat aging prison populations have risen sharply, alarming prison officials and government auditors alike.<sup>99</sup> A recent estimate indicates that prison expenses double as prisoners reach age 55, and only continue to escalate thereafter.<sup>100</sup> These multiple and known consequences direct that life sentences ought to be applied, if at all, to an infinitesimal number of cases.

The use of a life sentence to address the first two focal concerns (culpability and future risk) can be further analyzed by the application of the principal theories of punishment involving retributive and utilitarian designs. The theory of retribution in punishment philosophy is principally concerned with blame and its reciprocal notion of desert.<sup>101</sup> For classical retributivists, a just punishment is measured proportionately: the harshness of a penalty is dictated by the severity of the underlying (i.e. index) offense.<sup>102</sup> Retributive theory is backward-looking, without interest in the prevention of future harm.<sup>103</sup>

A life sentence is justified from a retributive view only if the offender's blameworthiness for the crime committed is morally befitting a penalty destined to end by death in prison.<sup>104</sup> Based on retribution's balancing perspective, Paul Robinson suggests that the extreme nature of life imprisonment means that it reasonably ought to be reserved solely for intentional killings.<sup>105</sup> Otherwise, a jurisdiction utilizing the draconian sentence of life for crimes of lesser culpability and harm loses the benefit

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<sup>97</sup> JUSTICE POLICY INST., HOW TO SAFELY REDUCE PRISON POPULATIONS AND SUPPORT PEOPLE RETURNING TO THEIR COMMUNITIES 4 (2010), [http://www.justicepolicy.org/uploads/justicepolicy/documents/10-06\\_fac\\_forimmediaterelease\\_ps-ac.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/10-06_fac_forimmediaterelease_ps-ac.pdf).

<sup>98</sup> See NATHAN JAMES, CONG. RESEARCH. SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 16 (2013); Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRICS SOC'Y 1150, 1151 (2012).

<sup>99</sup> See JAMES, *supra* note 98, at 16.

<sup>100</sup> Schwartzapfel, *supra* note 91.

<sup>101</sup> Douglas Husak, "Broad" Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 449 (2012). The retributivist perspective is also known as deontological and is associated with Immanuel Kant, the nineteenth-century German philosopher of moral values. Fan, *supra* note 12, at 588.

<sup>102</sup> Husak, *supra* note 101, at 453.

<sup>103</sup> Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 551 (2008).

<sup>104</sup> Berry, *supra* note 60, at 1057.

<sup>105</sup> Paul H. Robinson, *Life Without Parole Under Modern Theories of Punishment*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 138, 145 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

of tying punishment to a normative, ordinal ranking of offense severities.<sup>106</sup> A practice of broadly assigning life sentences to non-homicide crimes, then, tends to invert the retributive quality of just deserts' proportionality.<sup>107</sup> In fact, the country's hyperbolic use of life sentencing is so routinized that the otherwise extreme penalty is no longer considered extraordinary to the American public,<sup>108</sup> and thus has likely already lost its retributive moral status.

In contrast to retribution's backward-leaning paradigm, utilitarian attitudes are prospective in nature.<sup>109</sup> A utilitarian model considers the potential benefits and detriments to society that a penalty may trigger.<sup>110</sup> Utilitarian options include deterrence, incapacitation, and rehabilitation.<sup>111</sup>

Deterrence itself entails three motives. Specific deterrence permits disciplining an individual to dissuade that person from reoffending.<sup>112</sup> General deterrence countenances a penalty as a signaling device to inhibit others from committing a crime.<sup>113</sup> Both specific and general deterrence operate through fear and the human desire to avoid negative consequences.<sup>114</sup> Certainly, the specter of a lifetime in prison is assumed to carry significant deterrent effects to all and for any crime, even if it is disproportionate in severity.<sup>115</sup> Nonetheless, the third variety of deterrence represents a broader, societal mission. Sanctions are meant as expressive communications to reinforce values by acknowledging the harms caused by criminal violations; variations in sanctions serve to situate the severity of different offenses in a hierarchical fashion within society's collective

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<sup>106</sup> *Id.* at 146–47.

<sup>107</sup> *Id.* at 156–57.

<sup>108</sup> See Nellis, *supra* note 65, at 451.

<sup>109</sup> Lee, *supra* note 103, at 551. The utilitarian perspective is alternatively referred to as instrumentalism or consequentialist. Fan, *supra* note 12, at 588–89.

<sup>110</sup> Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 43 (2008).

<sup>111</sup> *Id.* Experts disagree whether deterrence, incapacitation, or rehabilitation concerns may justify a sentence longer than is proportional to the offender's blameworthiness. See, e.g., Robinson, *supra* note 105, at 156–57.

<sup>112</sup> State v. Hearn, 961 So. 2d 211, 214 (Fla. 2007); see also JEREMY BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365, 396 (1843) (“Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act.”).

<sup>113</sup> State v. Baker, 970 So. 2d 948, 955 (La. 2007); see also BENTHAM, *supra* note 112, at 396 (“[General deterrence] serves for an example. The punishment suffered by the offender presents to every one an example of what he himself will have to suffer, if he is guilty of the same offence.”).

<sup>114</sup> Frase, *supra* note 110, at 43.

<sup>115</sup> See Robinson, *supra* note 105, at 139–40.



value regime.<sup>116</sup> A life sentence would comply with this third category of deterrence if a particular crime were measured by societal standards as so heinous that it invited a forfeiture of the right to ever live in civil society.<sup>117</sup> If a life term is used too expansively or arbitrarily, however, then it loses this communicative function. As with the discussion regarding retributive proportionality, it is arguable that the extreme and symbolic nature of a life sentence means it ought to be reserved for the worst of the worst violent offenders.

Incapacitation as a utilitarian device provides the function of preventive detention. At its best, incapacitation allows officials to select those offenders predicted to be at the highest risk of recidivism in order to eliminate their opportunities for relapse.<sup>118</sup> Incapacitation disables a person's ability to commit an offense, despite his continued will to be deviant, and usually operates in some physically restrictive form.<sup>119</sup> As Jeremy Bentham, a classical philosopher of punishment theories, quipped: "[B]ody operating upon body is sufficient to the task."<sup>120</sup> A life term certainly complies with preventive detention goals by permanently and physically isolating the prisoner away from civil society. Yet life sentences are often unnecessary and inefficient for those other than the riskiest of offenders.

For its part, the theory of rehabilitation is its own beast in punishment philosophy. Rehabilitation generally seeks the reformation of the individual.<sup>121</sup> The promise of desistance will favor the individual's return to his community as a prospectively law-abiding citizen.<sup>122</sup> In theory, and likely in practice, rehabilitation is the "flip side" of incapacitation.<sup>123</sup> A claim can be waged that absent proof of rehabilitation a prisoner continues to pose a risk to the public and thus should remain incapacitated.<sup>124</sup> From a political perspective, incapacitation "works" better than rehabilitation in a carceral state: incapacitation is more transparent to the public in terms of making available an official record that the individual is imprisoned, efficient in its immobilization as the benefit to public safety is purportedly achieved as soon as the cell door is closed, and effective in protecting the public by severing opportunities through imprisonment.<sup>125</sup>

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<sup>116</sup> Frase, *supra* note 110, at 43.

<sup>117</sup> Berry, *supra* note 60, at 1057.

<sup>118</sup> See Malsch & Duker, *supra* note 59, at 5 & n.1.

<sup>119</sup> Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1, 3 (2014).

<sup>120</sup> JEREMY BENTHAM, *Panopticon Versus New South Wales: Or, the Panopticon Penitentiary System, and the Penal Colonization System, Compared*, in 4 THE WORKS OF JEREMY BENTHAM 173, 186 (1843).

<sup>121</sup> Bennardo, *supra* note 119, at 2 n.10.

<sup>122</sup> See Pifferi, *supra* note 30, at 337.

<sup>123</sup> MICHAEL TONRY, THINKING ABOUT CRIME 48 (2004).

<sup>124</sup> Malsch & Duker, *supra* note 59, at 5.

<sup>125</sup> See *id.*

The inverse nature of the extreme penalty of life for incapacitation and rehabilitation purposes is obvious. A life term certainly fits the goal of incapacitation to the extreme, while absolutely denying any rehabilitative potential.<sup>126</sup> This means that the prison theoretically, perhaps even in practice, prepares a lifer not for success after release but for death in prison.<sup>127</sup>

Certain critical issues should be briefly mentioned here regarding utilitarian justifications for life sentences. Rehabilitation as a goal can be generally minimized as an apt rationale considering, as just indicated, life imprisonment precludes attention to fostering reform or rewarding evidence of desistance. At the same time, lifetime incapacitation is unnecessary to public safety in all but a few isolated cases. A principal reason is the dramatic evidence consistently supporting an age-crime curve.<sup>128</sup> Most offenses are committed by young boys/men with peaks in their mid-teens for property crimes and late teens for violent offenses, and then a natural desistance tends to occur in young adulthood.<sup>129</sup> Evidence further suggests there is a diminishing return to incapacitation as incarceration rates increase.<sup>130</sup>

Even from a theoretical perspective, Cesare Beccaria and Jeremy Bentham, classical philosophers of criminological theory, conjectured that incapacitation should be reserved for a selected few: the extremely high-risk individuals who deserve permanent segregation from civil society.<sup>131</sup> Accordingly, experts strenuously contend that America's overreliance upon life incapacitation, considering the vast majority of offenders

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<sup>126</sup> *Graham v. Florida*, 560 U.S. 48, 74 (2010); Mark Pettigrew, *Whole of Life Tariffs in the Shadow of Europe: Penological Foundations and Political Popularity*, 54 HOW. J. CRIM. JUST. 292, 299 (2015).

<sup>127</sup> Memorandum from Jørgen Worsaae Rasmussen, European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Eur. Council to Eur. Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Actual/Real Life Sentences*, CPT (2007) 55, at 2, (June 27, 2007), <http://cpt.coe.int/en/working-documents/cpt-2007-55-eng.pdf>.

<sup>128</sup> See Siyu Liu, *Is the Shape of the Age-Crime Curve Invariant by Sex? Evidence from a National Sample with Flexible Non-parametric Modeling*, 31 J. QUANTITATIVE CRIMINOLOGY 93–94 (2015). For empirical support and various theories for desistance trends, see generally Michael Rocque, *The Lost Concept: The (Re)Emerging Link Between Maturation and Desistance from Crime*, 15 CRIMINOLOGY & CRIM. JUST. 340, 341 (2015).

<sup>129</sup> Matt DeLisi, *Age-Crime Curve and Criminal Career Patterns*, in *THE DEVELOPMENT OF CRIMINAL AND ANTISOCIAL BEHAVIOR* 51, 51–52 (Julian Morizot & Lila Kazemian eds., 2015). See generally J.C. Barnes et al., *The Puzzling Relationship Between Age and Criminal Behavior: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY* 397 (Kevin M. Beaver et al. eds., 2015) (examining competing theoretical explanations for the age-crime curve).

<sup>130</sup> Steven Raphael, *How Do We Reduce Incarceration Rates While Maintaining Public Safety?*, 13 CRIMINOLOGY & PUB. POL'Y 579, 585 (2014).

<sup>131</sup> SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* 109 (2007).

naturally desist, is gratuitous, unjust, and an avoidable waste of resources.<sup>132</sup>

Experts have recognized a fundamental error, as well, with America's continued commitment to life sentences as a deterrent.<sup>133</sup> The operation of life terms in the current system simply violates fundamental principles of deterrence theory. Basic criminological theory holds there are three relevant attributes to a criminal penalty's deterrence ability: quickness, sureness, and severity.<sup>134</sup> These do not carry equal weight. As Cesare Beccaria recognized in his influential eighteenth century treatise, *An Essay on Crimes and Punishments*, there is far greater deterrence profit in the swiftness and certainty of a punishment than its severity.<sup>135</sup> In the mind of the potential criminal, a greater causal connection exists between the crime and the inevitable punishment if the individual does believe the penalty will quickly follow the deviant act.<sup>136</sup> Life-term penalties are certainly severe. But, at least in the United States (for rightful procedural reasons), life sentences are *never* quick or certain to follow the commission of even the most heinous of crimes.<sup>137</sup>

Beccaria's predictions are confirmed by much empirical research that the severity of a potential future penalty alone is not a strong deterrent.<sup>138</sup> Studies typically find that the deterrence benefit of severe prison terms, specifically, is quite limited.<sup>139</sup> Plus, as sentence length increases, evidence indicates there is a substantial reduction in its preventive powers.<sup>140</sup> In other words, there is not a consistent and positive relationship between the temporal extension of a possible prison term and its corre-

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<sup>132</sup> See NAT'L RES. COUNCIL, *supra* note 30, at 88 ("There are good reasons to believe that most Americans share the notions that punishments should generally be proportionate to the seriousness of crimes in the retributive sense and not be wasteful or excessive in the consequentialist sense.").

<sup>133</sup> *Id.* at 345. Cf. Pettigrew, *supra* note 126, at 298 (examining the weak deterrence value of life sentences in the United Kingdom).

<sup>134</sup> NAT'L RES. COUNCIL, *supra* note 30, at 132; see CESARRE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 74–78 (4th ed. 1785); see also Gottschalk, *Sentenced to Life*, *supra* note 16, at 359–60.

<sup>135</sup> BECCARIA, *supra* note 134, at 77.

<sup>136</sup> *Id.*

<sup>137</sup> See Appleton & Grøver, *supra* note 14, at 603.

<sup>138</sup> Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, THE SENTENCING PROJECT 4–7 (Nov. 2010), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

<sup>139</sup> NAT'L RES. COUNCIL, *supra* note 30, at 154; Gottschalk, *Sentenced to Life*, *supra* note 16, at 359.

<sup>140</sup> See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIM. & PUB. POL'Y. 13, 14 (2011); Gottschalk, *Sentenced to Life*, *supra* note 16, at 359; Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 167 (2009).

sponding effectiveness in deterring eager deviants.<sup>141</sup> But while there is no linear reciprocal effect between lengthening sentences and a corresponding deterrence value, there is a known cause-and-effect directly between longer terms and the costs thereof. A reporter for *The Economist* magazine sensibly quips that a “50-year sentence does not deter five times as much as a ten-year sentence (though it does cost over five times as much).”<sup>142</sup> The lost deterrence function in lengthening sentences is also likely due, to a significant degree, to the recognition from behavioral law and economics studies that offenders often are not rational thinkers who carefully measure the benefits of their actions against potential distant or long-term legal consequences.<sup>143</sup>

America’s dependence on life sentences as a key component of its carceral imagination appears to be one that, in philosophical terms, puts stock mostly in the functions of retribution and incapacitation. The system nonchalantly repudiates the reformation potential of lifers. The next Section includes a comparative law analysis of life penalties amidst a global moral imperative to provide all prisoners some meaningful opportunity for release to rejoin civil society.

### 3. *Comparative Analysis*

The United States remains a conspicuous outlier in its use of life sentences in the first place, and only exacerbates its position by employing life imprisonment far more often relative even to the few other countries that authorize any life-like penalty.<sup>144</sup> Critics emphasize that America remains unparalleled in the common law world for its escalation of the number of life sentences which culminated from enacting life-without-parole penalties, increasing sentence lengths that multiply the number of virtual lifers, and placing acute restrictions on parole availability for many long-term prisoners.<sup>145</sup>

Instead, a principal human rights approach, in most of the world (common law and otherwise), maintains that governments have moral and legal obligations to permit all prisoners some viable path to reenter

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<sup>141</sup> See Cochran et al., *supra* note 43, at 342 (finding more severe penalties positively associated with recidivism); NAT’L RES. COUNCIL, *supra* note 30, at 134–40 (summarizing studies showing a modest link, at best, between lengthening of sentences and deterrence).

<sup>142</sup> *Jailhouse Nation: How to Make America’s Penal System Less Punitive and More Effective*, ECONOMIST (June 20, 2015), <http://www.economist.com/news/leaders/21654619-how-make-americas-penal-system-less-punitive-and-more-effective-jailhouse-nation>.

<sup>143</sup> See Thomas S. Ulen, *Skepticism About Deterrence*, 46 LOY. U. CHI. L.J. 381, 396 (2014); Gottschalk, *Sentenced to Life*, *supra* note 16, at 359; see also BENTHAM, *supra* note 112, at 421 (suggesting extended imprisonment loses specific deterrence value as the subject becomes acclimated to his situation).

<sup>144</sup> Mauer et al., *supra* note 56, at 28.

<sup>145</sup> Griffin & O’Donnell, *supra* note 18, at 614.

civil society.<sup>146</sup> Thus, several multinational organizations require some right of review and opportunity for release.<sup>147</sup> For example, the International Criminal Court requires that the fitness of any sentence be reexamined in each case after 25 years of incarceration, even for the gravest of offenses against humanity, such as war crimes and genocide.<sup>148</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners does not entirely preclude life terms, but it emphasizes rehabilitation as the primary goal of incarceration for all prisoners.<sup>149</sup>

Consistent with the human rights concern with providing prisoners reasonable paths to reentry, in the vast majority of countries, life sentences either do not legally exist or carry with them some meaningful right of correction at a later date. Researchers indicate that eighty percent of countries do not recognize the validity of penalties without some right of release on its face.<sup>150</sup> Even those countries that technically permit a lifetime sentence typically require some form of later consideration for potential release after a specified period of imprisonment.<sup>151</sup>

A potential explanation for the striking disconnect between the United States and the rest of the world may be linked to a preference for finality as compared to the justness of post-incarceration review. Legal scholars favoring finality argue that there is value in honoring “the government’s interest in certainty and repose following a final conviction and sentence.”<sup>152</sup> In contrast to the ideals of finality advocates, adherence to traditional punishment philosophies proposes that, as time passes, a sentence may well become one that is unreasonable and unnecessary in the individual case, or otherwise no longer properly represents society’s evolved values and norms.<sup>153</sup> Calls for greater opportunities for review are

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<sup>146</sup> AM. CIVIL LIBERTIES UNION, *supra* note 75, at 200–02.

<sup>147</sup> For example, the Council of Europe. Henry, *supra* note 7, at 78.

<sup>148</sup> SOLTER ET AL., *supra* note 89, at 23.

<sup>149</sup> G.A. Res. 70/175, annex, Standard Minimum Rules for the Treatment of Prisoners, at 27/33 to 28/33 (Dec. 17, 2015) (“The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so.”).

<sup>150</sup> SOLTER ET AL., *supra* note 89, at 8. For a comprehensive review of the legal aspects related to life and release review for prisoners in each European country, see *id.* at 25–26. See also *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 338–39.

<sup>151</sup> SOLTER ET AL., *supra* note 89, at 21. Some exceptions are the Netherlands, Sweden, and the United Kingdom. *Id.* at 25 & n.144.

<sup>152</sup> Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL’Y 179, 184 n.17 (2014).

<sup>153</sup> See Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT’G REP. 194, 194 (2009) (supporting penalty reviews); Margaret Colgate Love & Cecelia Klingele, *First Thoughts About “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 868–69 (2011) (same). A finality proponent concedes a resentencing might promote

particularly salient for critics of the rise in lengthy prison terms.<sup>154</sup> The European Court on Human Rights has well summarized the position that any advantages a rule of finality may provide might easily be overshadowed by concerns regarding proportionality and justness.<sup>155</sup> This court averred that “[i]t is axiomatic that a prisoner cannot be detained unless there [exist] legitimate penological grounds for that detention.”<sup>156</sup> The human rights court further recognized that any justification for continued commitment after a long period may dissipate for many lifers:

[Relevant penological] grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.<sup>157</sup>

Indeed, a life sentence is simply a one-off judgment that the offender at that time appears to deserve total renunciation as a person and death-in-prison.<sup>158</sup> This single decision does not account for the chance that society’s normative perception of the severity of his offense may evolve in a lifetime or that the individual so sentenced may actually be reformed.

Overall, then, America’s current predilection for finality in penalty schemes is antithetical to the moral standpoint of the vast majority of justice systems in the world.<sup>159</sup> Instead, the rest of the world remains interested in the third focal concern respecting the undesirable consequences of life sentences to prisoners as human beings and to societal interests, which are summarized next.

The discussion so far has reviewed the historical trend toward more punitive sanctions, the development of a law-and-order system in which life sentences are one of its key bedrocks, and a contrary human rights perspective that prefers opportunities for prisoners to gain their release.

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certainty as “the passage of time may provide better information about the offender’s dangerousness and rehabilitation.” Scott, *supra* note 152, at 181.

<sup>154</sup> Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL’Y 121, 136–37 (2014).

<sup>155</sup> See *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 346–47 (2013).

<sup>156</sup> *Id.* at 346.

<sup>157</sup> *Id.*

<sup>158</sup> Berry, *supra* note 60, at 1069.

<sup>159</sup> See Ryan, *supra* note 154, at 141 (suggesting acceptance of policies permitting sentence review could be couched in terms of society’s embracing an enlightenment view, preferring respect for just and proportional sentences, instead of operating primarily from fear and vengeance).

Some informed observers contend there is no public or political will to engage in discourse to modify policies with respect to lifers specifically.<sup>160</sup> Still, some signs exist that fundamental change, perchance including lifers, is possible.

### C. *Time Ripe for Change?*

Recent evidence suggests the country's extremely punitive stance promoting imprisonment is receding, even among staunch conservatives, for moral and financial reasons.<sup>161</sup> Joint conservative and liberal coalitions are demanding immediate change in federal and state justice systems to reduce prison populations by decreasing prison sentences, releasing older inmates, and permitting more prisoners opportunities to petition for sentencing relief.<sup>162</sup> An interesting assortment of politicians and policy foundations has emerged calling for prison reductions, including the liberal philanthropist George Soros, Republican presidential candidates Ted Cruz,<sup>163</sup> Jeb Bush, Rick Perry, and Rand Paul,<sup>164</sup> religious conservative Pat Nolan of the Prison Fellowship, conservative Texas Public Policy Foundation, religious conservative Family Research Council, and liberal American Civil Liberties Union.<sup>165</sup>

Thus, we might be at the initial stage of another reform period in American criminal justice which reverses course to counteract some of the negative consequences of the carceral state.<sup>166</sup> The Great Recession certainly appears to be a strong motivator for correction, considering laws and policies which prefer long-term incarceration are extremely costly for governments to maintain.<sup>167</sup> Another reason that reform may at this point be acceptable from a political standpoint is that crime prevention is no longer a hot topic of debate in the public sphere or the main-

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<sup>160</sup> E.g. Berry, *supra* note 60, at 1058–59; Gottschalk, *Life Sentences*, *supra* note 66, at 9.

<sup>161</sup> Peter Baker, *2016 Candidates are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html>; Greg Sargent, *Where Are Republicans on Sentencing Reform?*, WASH. POST: THE PLUM LINE (Sept. 11, 2013), <http://www.washingtonpost.com/blogs/plum-line/wp/2013/09/11/where-are-republicans-on-sentencing-reform/>.

<sup>162</sup> COAL. FOR PUB. SAFETY, FAIR SENTENCING AND FAIR CHANCES CAMPAIGN 1–3 (2015), <http://www.coalitionforpublicsafety.org/fair-sentencing-and-fair-chances-campaign/> (follow “See the report” hyperlink).

<sup>163</sup> Tim Dickinson, *Crime, Politics and Justice*, ROLLING STONE, June 24, 2015, at 34, 34.

<sup>164</sup> Bill Keller, *Prison Revolt*, NEW YORKER, June 29, 2015, at 22, 23.

<sup>165</sup> Dagan & Teles, *supra* note 44, at 26–28.

<sup>166</sup> See Cole, *supra* note 57, at 29; Marc Mauer & David Cole, Opinion, *How to Lock Up Fewer People*, N.Y. TIMES (May 24, 2015), <http://www.nytimes.com/2015/05/24/opinion/sunday/how-to-lock-up-fewer-people.html>.

<sup>167</sup> See Gottschalk, *Life Sentences*, *supra* note 66, at 7.

stay of election rhetoric.<sup>168</sup> The imprisonment bubble may have burst,<sup>169</sup> though it may be too early to make such an exceptionally transformative prediction.<sup>170</sup> The tide is turning a bit, though, as federal and state governments are largely refraining from adding penalties at the furious pace previously accomplished; at the same time, officials in several jurisdictions have sought to proactively study potential alternatives to prison and to alter sentencing policies to reduce incarceration rates.<sup>171</sup>

A progressive might be inspired by the appearance of some nascent signals that the mindset preferring finality of sentences over the values of second reviews may be upended. A recent Deputy Attorney General of the United States appears to concur with the human rights approach of revisiting long-term sentences in an era of changed values. In a speech before a state bar association, James Cole recognized that many federal prisoners, particularly non-violent drug offenders, are serving life equivalent sentences assigned under law-and-order policies now judged in the new climate as draconian in nature and unnecessary for public safety.<sup>172</sup>

An expert panel of the American Law Institute recently issued a potential framework for what second-look sentencing review may look like. The newly revised sentencing provisions in the Model Penal Code (“MPC”) expressly envision a standard of review for all long periods of incarceration. The provisions recommend that a jurisdiction formulate procedures to permit prisoners to apply for modification of sentence after serving 15 years in prison,<sup>173</sup> with such right recurring at 10 year intervals of continued imprisonment.<sup>174</sup> The MPC standards provide that the

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<sup>168</sup> Eli Lehrer, *The Party of Prison Reform: Conservatives Lead the Way*, WEEKLY STD., Mar. 18, 2013, at 17, 18; see also Anthony Romero & Mark V. Holden, *A New Beginning for Criminal Justice Reform*, POLITICO MAG. (July 7, 2015), <http://www.politico.com/magazine/story/2015/07/a-new-beginning-for-criminal-justice-reform-119822.html> (“The U.S. criminal justice system is in a state of crisis—and Congress is finally moving to address it.”).

<sup>169</sup> Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 49S (2011).

<sup>170</sup> Jonathan Simon, *Ending Mass Incarceration Is a Moral Imperative*, 26 FED. SENT’G REP. 271, 271 (2014) (accepting mass incarceration as a political and social catastrophe, while fearing that recent economic improvements and continued fear of victimization may stall reforms).

<sup>171</sup> Cole, *supra* note 57, at 29–32.

<sup>172</sup> James Cole, *Remarks by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting*, 26 FED. SENT’G REP. 230, 231 (2014) (“For our criminal justice system to be effective, it needs to not only be fair; but it also must be perceived as being fair. These older, stringent punishments, that are out of line with sentences imposed under today’s laws, erode people’s confidence in our criminal justice system.”).

<sup>173</sup> MODEL PENAL CODE: SENTENCING § 305.6.1 (AM. LAW INST., Tentative Draft No. 3, 2014) (approved at the May 19, 2014 Annual Meeting, subject to discussion at the Meeting and editorial prerogative).

<sup>174</sup> *Id.* § 305.6.2.



reviewer consider then present circumstances and weigh the purposes of sentencing as they apply at that time in determining whether a modified sentence would then be justified instead.<sup>175</sup> Further, the revised MPC suggests that any rights and processes for sentence modification a jurisdiction would promulgate should have retroactive application.<sup>176</sup> Hence, the new MPC provisions are more in line with international notions of human rights and justice than the current American penal imagination's fascination with irreducible life sentences.

To be sure, political barriers to significant structural change remain.<sup>177</sup> Senate Judiciary Chairman Chuck Grassley, for instance, remains a staunch supporter of the old law-and-order regime.<sup>178</sup> In 2015, a national group of prosecutors lambasted suggested reductions in prison terms, warning it would cause a spike in crime, and instead stridently called for building more prisons.<sup>179</sup> Plus, even if adaptations are made in various areas of criminal justice policy to reduce the level of mass incarceration, the invisibility of lifer populations, and the life sentence's appeal in acting as the alternative to the death penalty, may mean that life sentences will remain untouched by any reforms.<sup>180</sup> For example, the Department of Justice's recent proposal, titled *Smart on Crime*, provides a critique of the massive federal prison system and suggests certain sentencing and release policy changes to reduce the numbers, but makes no distinct mention or provisions for life sentences or existing lifers.<sup>181</sup>

Nonetheless, a fresh investigation to expose the facts and circumstances that trigger life sentences may provide useful intelligence for potential reforms. This Article takes advantage of an opportunity to explore in greater detail the actual employment of life sentences in an important jurisdiction. It will do so in the context of the federal sentencing system. Due in large part to what critics claim is the usurpation of criminal law by federal authorities, the federal criminal justice system is now a monolithic institution that is at the forefront of sentencing and imprisonment policies in the country.<sup>182</sup> Indeed, the Federal Bureau of Prisons leads in

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<sup>175</sup> *Id.* § 305.6.4.

<sup>176</sup> *Id.* § 305.6.10.

<sup>177</sup> Tierney Sneed, *Mass Incarceration Didn't Lower Crime, but Can Congress Be Convinced?*, U.S. NEWS & WORLD REP., (Feb. 12, 2015), <http://www.usnews.com/news/articles/2015/02/12/mass-incarceration-didnt-lower-crime-but-can-congress-be-convinced>.

<sup>178</sup> Dickinson, *supra* note 163, at 34.

<sup>179</sup> Steven Nelson, *Prosecutors Rally Against Sentencing Reform, Say Build More Prisons*, U.S. NEWS & WORLD REP. (July 17, 2015), <http://www.usnews.com/news/articles/2015/07/17/prosecutors-rally-against-sentencing-reform-say-build-more-prisons>.

<sup>180</sup> Gottschalk, *Life Sentences*, *supra* note 66, at 7; Krajicek, *supra* note 60.

<sup>181</sup> See U.S. DEP'T OF JUSTICE, *SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY* (2013).

<sup>182</sup> See Romero & Holden, *supra* note 168.

prison populations, housing a larger number of sentenced prisoners than any state prison system.<sup>183</sup>

### III. LIFE SENTENCES IN THE FEDERAL JUSTICE SYSTEM

The trajectory of changing goals and rules in the federal sentencing system closely tracks the course previously discussed for the United States generally. Still, the federal system has experienced its own journey and some of its attributes are unique to it. Congress instituted a major overhaul of federal criminal justice practices in the 1980s by creating a guidelines-based system.<sup>184</sup> Notably, the administrative commission established to provide oversight for the system initiated a more punitive regime from the very beginning.<sup>185</sup> Since then, the agency has adopted practices that mainly work to increase recommended prison terms.<sup>186</sup> As relevant herein, federal law and the guidelines act in concert to expressly authorize and proactively advocate life sentence options for numerous types of offenses and recidivist offenders. The commentary in this Section charts the evolution of federal sentencing over the last century, summarizes the basic operating rules underlying the federal guidelines' regime, and conceptualizes the role of life sentences within this model.

#### A. Background

In the federal justice system, sentencing traditionally represented an indeterminate structure that awarded federal district judges broad discretion to determine criminal penalties in individual cases.<sup>187</sup> Federal judges were, as a general rule, merely constrained by statutory maximum penalties.<sup>188</sup> Congress established an independent parole agency in 1910 to govern back-end release decisions.<sup>189</sup> District judges at that point still retained dominion over the type (e.g., fine, probation, prison) and length of the sentence issued; parole officials largely controlled if and when prisoners would be released early.<sup>190</sup> In making their relative decisions, district judges and parole authorities were attuned to the severity of the offense as well as to the individual circumstances of the offender.<sup>191</sup> For

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<sup>183</sup> CARSON, *supra* note 19, at 3 tbl.2.

<sup>184</sup> Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1322–23 (2005).

<sup>185</sup> *Id.* at 1328.

<sup>186</sup> *Id.* at 1328–29.

<sup>187</sup> Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

<sup>188</sup> Karle & Sager, *supra* note 24, at 396.

<sup>189</sup> Act of June 25, 1910, ch. 387, § 2, 36 Stat. 819 (codified as amended at 18 U.S.C. § 4205(a) (1982) (repealed 1984)).

<sup>190</sup> Stith & Koh, *supra* note 187, at 225–26.

<sup>191</sup> *See id.* at 229.

much of the twentieth century, even lifers were parole-eligible. Commencing in 1930, federal inmates sentenced to life terms qualified for parole consideration after serving 15 years, which was reduced to 10 years in 1976.<sup>192</sup> But once the federal system experienced its own law-and-order reformation, as the discussion next reviews, parole was prospectively abolished for lifers (and all others).

The federal government's indeterminate system, with its attending attributes of judicial discretion and possibility of parole, including for life sentences, was sustained in the mid-twentieth century because its correctional philosophy cultivated individual reformation.<sup>193</sup> A rehabilitation-based model befittingly necessitates an assessment of the individual offender, his experiences and capabilities, and a prediction of recidivism risk.<sup>194</sup> By the late 1970s, however, the law-and-order movement was spreading across the country. Critics vociferously objected to the rehabilitative ideology, targeting the federal system with their editorials, as well.<sup>195</sup> Complainants alleged that the federal correctional system's indeterminate structure led to unacceptable outcomes, such as too lenient sentences for certain offenses, disparities in sentences among similarly-situated offenders, regional differences, discrimination against minority defendants, and uncertainty in parole decisions.<sup>196</sup>

More specifically, the country in the 1970s was also at the beginning of its infamous "war on drugs," with federal officials taking the lead in investigating, prosecuting, and imprisoning scores of drug offenders, players both small and large.<sup>197</sup> Political pundits denounced practices that allowed drug offenders to rule neighborhoods and frighten law-abiding citizens, claiming that only the threat of severe prison sanctions could deter drug abuse.<sup>198</sup> Together, these negative reviews eventually resonated with policymakers, and legislative sentencing reforms were born in the age of a political tough-on-crime agenda.<sup>199</sup>

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<sup>192</sup> PETER B. HOFFMAN, U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 21–22 (2003).

<sup>193</sup> Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 304 (2000) ("[T]he system assumed that judges, expert in the law and the social sciences and seasoned by the experience of sentencing many defendants, would choose penalties that maximized the rehabilitative chances of offenders."); Stith & Koh, *supra* note 187, at 227.

<sup>194</sup> Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 LAW & CONTEMP. PROBS. 161, 164–65, 172 (2013).

<sup>195</sup> Karle & Sager, *supra* note 24, at 393–95.

<sup>196</sup> *Id.* at 395–96; Stith & Koh, *supra* note 187, at 227.

<sup>197</sup> Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 331–32 (2005).

<sup>198</sup> See Ed Bowman, *The Search for Meaning: The Federal Prison System and Cultural Creation in the 1980s*, 11 J. INST. JUST. & INT'L STUD. 45, 54 (2011).

<sup>199</sup> *Id.* at 54–55.

Congress enacted three types of reform legislation over the ensuing years. The legislature delved into the practice of assigning mandatory minimum sentences to various offenses or types of recidivist offenders.<sup>200</sup> A more dramatic and across-the-board reform specified a mandatory system of guidelines that was meant to standardize sentencing outcomes principally by restraining judicial discretion.<sup>201</sup> The Sentencing Reform Act of 1984 created a guidelines system to be engineered under the auspices of a newly formed United States Sentencing Commission (the “Commission” or “Sentencing Commission”).<sup>202</sup> Simultaneously, Congress prospectively abolished parole.<sup>203</sup> In its place, a truth-in-sentencing law provided that federal prisoners would be eligible for early release with a maximum 15% credit for good time.<sup>204</sup> The one exception to the good time allowance: defendants sentenced to life.<sup>205</sup> The modern federal LWOP was thereby born.

In effect, while the correctional model of rehabilitation as a principal purpose of sentencing has never been entirely abdicated (officially, at least) in the federal justice system,<sup>206</sup> the mood of Congress and the country to discount the rehabilitative model took hold. The transition has been described as a seismic shift away from individualized justice toward aggregated sentencing.<sup>207</sup> The guidelines system, as it was created and implemented, has resolutely served that shift.

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<sup>200</sup> Stith & Koh, *supra* note 187, at 259; Robert Heglin, Note, *A Flurry of Recidivist Legislation Means: “Three Strikes and You’re Out,”* 20 J. LEGIS. 213, 216 (1994).

<sup>201</sup> I have previously used the nickname “McSentencing” to describe the resulting guidelines system that the Sentencing Commission created as representing the McDonaldization of federal sentencing. That is, the guidelines commodify federal sentences by producing uniform outcomes through discrete quantifications of harm while reducing individualized and humanized assessments of culpability and risk. *See generally* Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199 (2014).

<sup>202</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211–239, 98 Stat. 1837, 1987-2040 (codified as amended in scattered sections of 18 and 28 U.S.C.). For a critical review of the trials and tribulations of the legislation and the United States Sentencing Commission’s implementation and continuation of its tasks, *see generally* Michael Tonry, *Federal Sentencing “Reform” Since 1984: The Awful as Enemy of the Good*, 44 CRIME & JUST. 99 (2015).

<sup>203</sup> Sentencing Reform Act § 212(a)(2) (codified as amended at 18 U.S.C. § 3624 (2012)).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Federal law allows a judge to craft a sentence for rehabilitation purposes to “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2)(D) (2012).

<sup>207</sup> Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991).

### B. Overview of Guidelines Sentencing

Despite Congress's intent, the United States Supreme Court rendered the guidelines advisory in nature. In the seminal case of *United States v. Booker*, issued in 2005, the Court found that the federal determinative sentencing system operated in an unconstitutional manner.<sup>208</sup> Bestowing advisory status was the Supreme Court's remedial fix for the constitutional violation.<sup>209</sup> The *Booker* fix did not, however, return to the judiciary the wide discretion that existed pre-guidelines. In a series of cases since then, the Supreme Court has reaffirmed that federal judges are significantly circumscribed by the Commission's guidelines and policies.<sup>210</sup>

The guidelines yield a recommended range of months for a prison term through a series of steps. In summary, these include a variety of calculations that determine the severity of the crime, the culpability of the offender, and the ranking of the offender's criminal history.<sup>211</sup> For example, a murder will begin with a higher severity ranking than a simple assault.<sup>212</sup> Reductions can be achieved through such commonly applied factors as acceptance of responsibility and substantial assistance.<sup>213</sup> Increases in guideline recommendations can be based on such characteristics as the defendant's aggravating role in the criminal activity or the presence of a weapon.<sup>214</sup> Still, because of the *Booker* remedy, a judge may vary from the guideline range if she concludes that a different sentence is more reasonable considering the offense or offender.<sup>215</sup>

### C. Life Sentencing in the Guidelines

The initial Sentencing Commission was known to be extremely punitive in its formulation of sentencing policies.<sup>216</sup> The Commission not only began with increasing sentence lengths, it has continued over the years to extend recommended sentences almost across the board. Professor

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<sup>208</sup> 543 U.S. 220, 226–27 (2005). The Court ruled that the mandatory sentencing system violated defendants' Sixth Amendment rights to a jury trial by requiring judges, rather than juries, to make determinations of fact that would enhance the punishment for defendants' crimes. *Id.*

<sup>209</sup> *Id.* at 246.

<sup>210</sup> *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013) (detailing post-*Booker* rulings).

<sup>211</sup> U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2014) [hereinafter SENTENCING GUIDELINES].

<sup>212</sup> *Id.* §§ 2A1.1, 2A2.3.

<sup>213</sup> *Id.* §§ 3E1.1, 5K1.1

<sup>214</sup> *Id.* § 3B1.1; *e.g.*, *id.* § 2A2.4(b)(1)(B).

<sup>215</sup> *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

<sup>216</sup> *Adelman*, *supra* note 4, at 302 (indicating the initial commissioners embraced severity as the "rule of law").

Frank Bowman observes that, overall, the guidelines have been subject to a “one-way upward ratchet, in which sentences are raised easily and often and lowered only rarely and with difficulty.”<sup>217</sup> It is no surprise, then, that *de jure* and *de facto* life sentences are available as recommended sentences.<sup>218</sup>

The existence of lengthy guideline-recommended ranges and the frequency of the life recommendation are in part reflective of statutory minimums and maximums. The Commission believes its recommendations to be circumscribed by the application of mandatory minimum statutes, while afforded some upward flexibility when statutes expressly allow life as a permissible maximum.<sup>219</sup> As a general policy, when a relevant statute establishes a mandatory minimum, the Commission ensures that the recommended guideline range is positioned above that minimum.<sup>220</sup> The gap between the minimum and the lowest end of the range allows some room for a formal downward adjustment to incentivize defendants to plead guilty or otherwise provide substantial assistance to investigators.<sup>221</sup>

Federal law contains almost 200 mandatory minimum statutes.<sup>222</sup> Of these, federal criminal law provides for mandatory life (here, meaning LWOP) sentences for about 40 separate crimes. Most mandatory life offenses involve homicides—either first degree murder,<sup>223</sup> killings less than first degree murder,<sup>224</sup> or when death results from some designated dangerous activity.<sup>225</sup> Mandatory life sentences also apply to crimes not involving death, such as kidnapping<sup>226</sup> or being a drug kingpin.<sup>227</sup> Federal law currently maintains almost 20 separate recidivist statutes requiring LWOP, usually entailing offenses related to drugs,<sup>228</sup> violence,<sup>229</sup> or fire-

<sup>217</sup> Bowman, *supra* note 184, at 1315.

<sup>218</sup> See, e.g., GLENN R. SCHMITT & HYUN J. KONFRST, U.S. SENTENCING COMM’N, LIFE SENTENCES IN THE FEDERAL SYSTEM 10–11 (Feb. 2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf); SENTENCING GUIDELINES, *supra* note 211, § 2A1.1 cmt. 2.

<sup>219</sup> U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 53 (2011) [hereinafter MANDATORY MINIMUM PENALTIES].

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 54.

<sup>222</sup> U.S. SENTENCING COMM’N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2013).

<sup>223</sup> 18 U.S.C. § 1111(b) (2012); see also, e.g., 18 U.S.C. §§ 115(b)(3), 351(a), 930(c), 1114, 1116(a), 1119(b), 1121(a)(1), 1503(b)(1), 1512(a)(3)(A) (2012).

<sup>224</sup> E.g., 18 U.S.C. §§ 1118(a), § 3559(f)(1), § 3591(a)(2)(B)–(D) (2012).

<sup>225</sup> E.g., 18 U.S.C. §§ 175c(c)(3), 2332g(c)(3) (2012); 49 U.S.C. §§ 46502(a)(2)(B), 46502(b)(1)(B) (2012).

<sup>226</sup> 18 U.S.C. § 1201(a) (2012).

<sup>227</sup> 21 U.S.C. § 848(b) (2012).

<sup>228</sup> 18 U.S.C. § 3559(c)(1) (2012); 21 U.S.C. §§ 841(b)(1)(A)–(C), 849(c), 861(c),

arms.<sup>230</sup> In addition, various of the mandatory minimum penalties carry terms of 25, 30, or 35 years, generally involving drugs, child sexual exploitation, or violent or drug recidivists.<sup>231</sup> A variety of mandatory minimum laws on the books are, therefore, relevant to the existence of virtual life terms in federal sentencing.

In sum, an expectation that federal district judges are actually issuing life sentences across many types of offenses and for a variety of offenders is fueled by the existence of these numerous mandatory minimums with long terms or expressly requiring life imprisonment, the Commission's forthright anchoring of mandatory minimums into guideline calculations, upward adjustments to account for high statutory maximums, and the Commission's formal adoption of long terms and life sentences into its sentencing table. The next Section presents an empirical study that further investigates and explains life-sentence practices in the federal system.

#### IV. SOME FACTS ABOUT LIFE

The United States Sentencing Commission makes publicly available many of its datasets containing information about sentencing decisions, including a host of rich and educational data measures. The data are in a form that permits analyses using standard statistical software.<sup>232</sup> Leading federal sentencing experts have rightly noted and applauded the Commission's efforts here.

One role that the Sentencing Commission has played and played very well in the post-*Booker* era is as an effective and clear distributor of federal sentencing information. We know an incredible amount about how the advisory federal sentencing system functions, both substantively and procedurally, because the Commission has prioritized and committed itself to data collection and dissemination . . . . [T]he Commission deserves great praise for its hard work in this area.<sup>233</sup>

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960(b)(1)–(3) (2012).

<sup>229</sup> 18 U.S.C. §§ 924(c)(1)(C)(ii), 2241(c), 3559(c)(1) (2012).

<sup>230</sup> 18 U.S.C. § 924(c)(1)(C)(ii).

<sup>231</sup> See CHARLES DOYLE, CONG. RES. SERV., RL32040, FEDERAL MANDATORY MINIMUM SENTENCING STATUTES 101–06, 114 (2013); MANDATORY MINIMUM PENALTIES, *supra* note 220, at app. A tbl. A-1.

<sup>232</sup> SPSS v.22 was the statistical software used for the calculations herein. The author thanks Paul Hofer for providing a refined version of the Commission's datasets that formed the initial basis for the database eventually constructed for the analyses herein.

<sup>233</sup> Steven L. Chanenson & Douglas A. Berman, *Sentencing's Wild Ride Continues*, 26 FED. SENT'G REP. 283, 284–85 (2014).

This Section contains various empirical perspectives that appear relevant to more fully explore certain issues and controversies represented in this Article. In addition, this empirical study provides further context to understand which facts and circumstances appear highly relevant in accounting for the use of life sentences in the federal system. The discussion will connect the statistical outcomes to the focal concerns' aspects of sentencing and provide an analysis as to whether federal life sentencing practices appear to be justified by the retributive and utilitarian ideologies reviewed in Section II.

The statistics provided herein utilize the Sentencing Commission's datasets over many years. Most of the analyses below mine the databases for fiscal years 2008–2014 to depict recent practices and to purposely account for the greater discretion district judges have enjoyed after the significant remedy rendered courtesy of the *Booker* decision. A few of the descriptive graphs, though, are intended to show long-term trends without regard to *Booker*-led changes and, thereby, broaden the coverage to fiscal years 1999–2014. The sample data yield a variety of descriptive measures. After summarizing the descriptive results, this empirical Section of the Article presents a multiple logistic regression analysis to test the effect of various explanatory factors on the imposition of a life sentence.

Except where otherwise clearly stated, the empirical analyses offered below use the term “life sentence” to mean a single category that combines LWOP with term prison sentences of at least 470 months. The choice of 470 months as the dividing line to demarcate the category was a methodological choice as it amounts to about 40 years, a term that seems to sufficiently fit within what has been conceptualized as “virtual life” sentences. A term of imprisonment of 40 years or more likely exceeds the natural lifespans of most individuals entering federal prison. Further, the United States Sentencing Commission uses the 470 month threshold as its statistical marker for life sentences as it is “a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.”<sup>234</sup> As the next Part will definitively show, the vast majority of the term sentences that fell into this definition far exceeded 470 months anyway.

For a quick overview, the data allow a summary profile of the typical life-sentenced defendant in the federal system. He is a minority male, a U.S. citizen with at least a high school education, who committed a drug or firearms offense that carried a mandatory minimum sentence, and had a low criminal history score. Further, possibly because he faced a

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<sup>234</sup> U.S. SENTENCING COMM'N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, app. A (2016), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Appendix\\_A.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Appendix_A.pdf) (from description of variable “Length of Imprisonment”).



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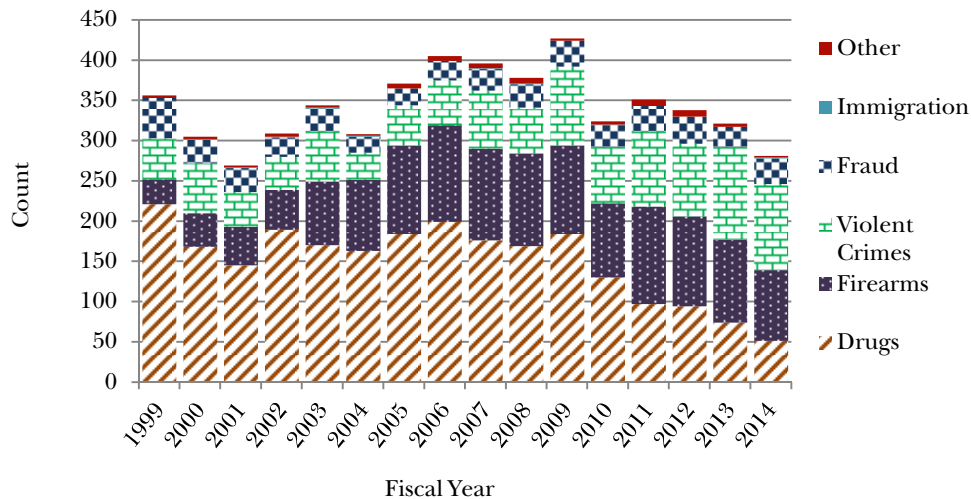
guideline-recommended sentence of life in prison, he did not plead guilty and was thus found guilty at trial and thereafter sentenced to life.

#### A. Federal Life Sentences over Time

An appropriate beginning may be to examine simple statistics. The initial focus will be on the numbers of individuals sentenced to life terms in the federal system over time. The trend analysis provided graphically in Table 1 yields annual counts over a broad timeline reflecting fiscal years 1999–2014. The table also visually divides annual life sentence totals by general crime type.

During the 16-year span in Table 1, life sentences were assigned to almost 5,500 federal defendants. Clearly, the number and proportion of life sentences have varied each year by type of offense (drugs, firearms, violent, fraud, immigration, other), as reflected in Table 1.<sup>235</sup> Overall, the lowest count of total life sentences occurred in fiscal 2001 (n=269), with the highest in fiscal 2009 (n=427). As Table 1 further demonstrates, the use of life sentences has receded after its high in 2009, dropping almost 35% by 2014.

Table 1. Trend in Federal Life Sentences by Offense Type



Regarding offense type, Table 1 indicates that the majority of life terms were for drug offenses at the beginning of the trend analysis, though the proportion declined substantially over time. In fiscal 1999, drug offenses accounted for 62% of life terms. By fiscal 2014, drug of-

<sup>235</sup> In Table 1, white collar and property offenses are combined into the category Fraud, while sexual offenses are included in Violent Crimes.

fenses fell to 18% of life penalties. Notably, the significant reduction in the number of life sentences for the five-year period from 2009 to 2014 previously mentioned is mostly accounted for by a reduction in life sentences for drug offenders. Such a dramatic change potentially reflects altered societal values in that the law-and-order stance underscoring the war on drugs has, in a lifetime, shifted. For example, in the Fair Sentencing Act of 2010, Congress significantly reduced sentences for crack cocaine offenders.<sup>236</sup> Neither the Department of Justice<sup>237</sup> nor the public appears any longer to generally view drug offenders as the heinous and dangerous criminals they were once thought to represent.<sup>238</sup> In an act of support for the idea of revisiting punishment severity based on changed societal values over finality of sentences, President Obama has commuted over 500 federal penalties, mostly for nonviolent drug offenders, citing “outdated and unduly harsh sentencing laws” in the past.<sup>239</sup>

In terms of other types of crimes, in contrast to drug offenders, as a proportion and by count, life sentences became more prevalent over time for both firearms and violent crimes. Together, these two types accounted for the majority of life terms for fiscal years 2011–2014. It is noted that other evidence from the Commission suggests that a small percentage of defendants in the firearms category were also violent offenders.<sup>240</sup> Fraud offenses (combining white collar and property crimes) remained a smaller—but still meaningful—portion of cases throughout, accounting for up to 15% in any year. The category of immigration offenses itself is not visually apparent in Table 1 because in every year, the number of life sentences issued for immigration crimes amounted to either 0 or 1. A small residual of “Other” represents primary offenses not included within the other groups.

Overall, Table 1 clearly shows shifts in the use of life sentences over time, though without a consistent linear trend in terms of gross annual counts. Yet, there are clear shifts by offense type, most notably the percentage reduction in life for drug offenders since 2009.

These results contradict several of the punishment theories that would otherwise justify life sentences for the most heinous offenses. The presence of numerous nonviolent offenders within the life-sentenced

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<sup>236</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.).

<sup>237</sup> See U.S. DEP’T OF JUSTICE, *supra* note 181, at 3; Cole, *supra* note 172, at 231.

<sup>238</sup> See, e.g., Peter Baker, *Bill Clinton Concedes His Crime Law Jailed Too Many for Too Long*, N.Y. TIMES (July 15, 2015), <http://www.nytimes.com/2015/07/16/us/politics/bill-clinton-concedes-his-crime-law-jailed-too-many-for-too-long.html>.

<sup>239</sup> Neil Eggleston, *President Obama Commutes the Sentences of 214 Additional People*, WHITE HOUSE: BLOG, (Aug. 3, 2016, 1:35 PM), <https://www.whitehouse.gov/blog/2016/08/03/president-obama-commutes-sentences-214-additional-people>.

<sup>240</sup> See U.S. SENTENCING COMM’N, QUICK FACTS: SECTION 924(C) FIREARMS OFFENSES (2015), <http://www.ussc.gov/research-and-publications/quick-facts/section-924c-firearms>.

group appears at odds with retributive proportionality or necessity of perpetual incapacitation. The implications of such observations will be considered further after discussing additional empirical results.

*B. Descriptive Statistics in Federal Life Sentences*

Table 2 (overleaf) provides a host of descriptive information on sentences issued in federal courts during fiscal years 2008–2014 ( $n=568,041$ ). Overall, during this more limited seven-year period, 2,420 received life sentences: 1,463 were pure life-without-parole, while 957 represented virtual lifers (i.e., greater than 470 months). A variety of variables of interest are listed in the left column of Table 2 and organized under categorical headings concerning offense-related factors, demographic characteristics, and case-processing variables. The descriptive statistics in the middle column apply to the entire dataset. The numbers in the right hand column are relevant to the subcategory of life sentences. Including the two statistical columns allows one to readily compare and contrast the attributes of the life-sentenced population—that is of main interest herein—to the total population.

Table 2. Selected Descriptive Statistics of Federal Life Sentences (2008–2014)<sup>241</sup>

<u>Variables</u>	<u>All Cases</u> n = 568,041	<u>Life Sentences</u> n = 2,420
<b>Offense-Related</b>		
Final Offense Level	17.75 (mean)	38.86 (mean)
Criminal History Placement of Sentence	2.41 (mean)	3.60 (mean)
Above Range	2%	4%
Within Range	54%	81%
Gov't-Sponsored Below Range	27%	3%
Other Below Range	18%	13%
Guideline Minimum ≥ 470 Months	1%	83%
Any Mandatory Minimum	25%	90%
<b>General Offense Type</b>		
Drugs	31%	33%
Immigration	32%	—
Firearms	10%	31%
Violent Crimes	2%	9%
Sex Crimes	3%	17%
White Collar	15%	8%
Property	2%	1%
Other	6%	2%
Acceptance of Responsibility	95%	31%
Substantial Assistance	12%	1%
Weapon Enhancement	8%	50%
Career Offender Enhancement	3%	21%
Armed Career Criminal Status	1%	4%
Aggravating Role	4%	29%
<b>Demographic</b>		
Male	87%	98%
<b>Race</b>		
White	27%	30%
Black	21%	46%
Hispanic	48%	20%
Other	4%	4%
U.S. Citizen	55%	87%
<b>Education</b>		
Less than High School	50%	37%
High School	29%	42%
Some College	15%	17%
College Graduate	6%	5%
Age	36 (mean)	37 (mean)

<sup>241</sup> Percentages for non-dichotomous variables may not add up to 100% due to rounding (.5 and above rounded up).

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<u>Variables</u>	<u>All Cases</u>	<u>Life Sentences</u>
Case Processing		
D.C. Circuit	1%	1%
1st Circuit	3%	3%
2nd Circuit	6%	7%
3rd Circuit	4%	4%
4th Circuit	8%	16%
5th Circuit	23%	12%
6th Circuit	7%	10%
7th Circuit	4%	9%
8th Circuit	6%	9%
9th Circuit	23%	8%
10th Circuit	8%	4%
11th Circuit	9%	15%
In Custody	70%	98%
Conviction		
Plea	97%	36%
Trial	3%	64%

### 1. Demographic Characteristics

Males predominate as federal defendants (87%), with the disparity even greater for life sentences (98%). In separate analyses, for women sentenced to life, 30% were for drug offenses, 26% for sex crimes, and 22% for violence. Whites were relatively equivalent between groups. Whites represented 27% and 30% of all and life sentences, respectively.<sup>242</sup> Black and Hispanic offenders swapped relative status. Blacks accounted for 21% of all federal inmates sentenced but comprised 46% of life sentences. Life sentences for Hispanic offenders amounted to 48% of the total cases, dropping to 20% of life-sentenced defendants.<sup>243</sup> One reason for the differences is likely due to the significant percentage of immigration offenses overall in the federal system for the time period studied (almost one-third) and that almost all immigration offenders are Hispanic. Meanwhile, less than 1% of lifers were immigration offenders. These low numbers thus suppress the opportunity for Hispanics to have a disproportionate role among the life-sentenced group.

U.S. citizens comprised slightly more than half of the total defendant population sentenced, but disproportionately represented nearly nine out of ten in the life-sentenced subgroup. This might also partly be explained by the extremely small role that immigration crimes play in life sentencing. From an educational-attainment perspective, it was striking that life-sentenced individuals were somewhat more educated as larger

<sup>242</sup> The residual "Other" category constituted 4% of each.

<sup>243</sup> Before one concludes from these simple statistics that there is evidence of racial disparities, the logistic model that follows shows no statistically significant race/ethnic difference when controlling for other multiple predictor variables. See *infra* Section IV.C.

percentages of them had high school degrees and some college credit than the sentenced population as a whole.

There was a small mean age difference, with all defendants having an average age of 36 years and the life population of 37 years. Separate analyses show that the age range for the life-sentenced group was 17- to 84-years-old; one-third of them were over age 40. Additional, separate analyses appear to support the conceptualization that offenders facing sentences of 470 months fairly exemplify virtual lifers. Term sentences issued in the life-sentenced group ranged from the aforementioned 470 months (almost 40 years) up to an extreme of 11,520 months (960 years) in one case.<sup>244</sup> Of those sentenced to life, as it is operationalized herein, only 18% were sentenced to terms less than 50 years. Thus, almost 2,000 prisoners (eight out of ten life sentences) received prison terms exceeding 50 years (or were pure LWOP).<sup>245</sup> Altogether, 12% were assigned terms between 50 and 70 years. On the other end of the spectrum, six out of ten were of the true life-without-parole variety. Another class represented basketball-like scores, with 183 defendants sentenced during 2008–2014 being assigned terms of 80 years or more. Indeed, of these, 97 offenders received prison terms between 100 and 200 years, 16 were sentenced to 200 to 300 years, and another 18 individuals were issued penalties of 300 years or more. Thus, these numbers appear to confirm the operationalization of the variable of life sentence in this study to define it at the benchmark of 470 months (about 40 years) considering few of them have any realistic hope of release. With an average age of 37 years at sentencing and having to serve at least 85% of a term of 38 years at a minimum, these defendants sentenced over 40 years will on average be 75 years old when first eligible for release, if still alive. Surviving to that age is highly questionable. For a host of reasons, prisoners are at greater risk of infectious disease, chronic illness, and accelerated aging and thus die earlier in prison than they would outside.<sup>246</sup> One study, for instance, found that every year in prison led to a substantial increase in the odds of death: it concluded that five years in prison reduced life expectancy by ten years.<sup>247</sup> In other words, those federal defendants within the life-sentenced subgroup have no current opportunity for a revisitation of their sentences and thus will most probably die in prison.

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<sup>244</sup> The longest sentence was given to a child pornography producer with dozens of charges. The next two extremes were for what appear to be codefendants sentenced on multiple weapons charges.

<sup>245</sup> Specifically, n=1,979.

<sup>246</sup> See KIDEUK KIM & BRYCE PETERSON, URBAN INST., AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM 4 (2014); see also JAMES, *supra* note 98, at 16; Nellis & King, *supra* note 32, at 38.

<sup>247</sup> Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUB. HEALTH 523, 526 (2013).

Certainly, the life-sentenced group, considering their ages and prison terms of at least three-dozen years, will contribute to the aging prisoner group within the Federal Bureau of Prisons (“BOP”).<sup>248</sup> The prison system’s ability to properly care for its inmates implicates a focal concern that sentencing decisions should include a reflection upon the consequences of sentencing on institutional resources. A timely report by the Justice’s Office of the Inspector General specifically investigated the graying of the BOP and its negative ramifications, concluding that older prisoners are far more costly to sustain, there exists a lack of sufficient infrastructure and staff to adequately care for elderly inmates, and programs are generally unsuitable for them.<sup>249</sup> In addition, considering the age-crime curve where the vast majority of offenders who are at least middle-aged are unlikely to offend again,<sup>250</sup> it may not appear their sentences are parsimonious. The same Inspector General report expressly highlighted studies showing older prisoners are at greatly reduced risk of recidivism upon reentry and, therefore, proactively suggested providing more opportunities for early release as a result.<sup>251</sup>

## 2. *Offense-Related Factors*

Table 2 also contains a variety of factors that are legally cognizable in federal sentencing decisions by federal law or the Sentencing Guidelines. For general offense types across the fiscal 2008–2014 period combined, the majority of offenders (six out of ten) in the entire sentenced population represented drug or immigration crimes as their primary offenses (almost evenly split). Only a handful of immigration defendants, though, received life sentences. Instead, nearly two-thirds of life-sentenced individuals were for drug or firearms offenses (relatively equal in numbers).<sup>252</sup> Cases falling within the category of firearms offenses were generally either based on being a felon in possession of a firearm or carrying a weapon while committing a crime of violence or a drug trafficking crime.<sup>253</sup> A higher proportion of white collar defendants were in the

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<sup>248</sup> Abigail Flynn, *Federal Prison Reform: Who Is Too Old for Incarceration*, URBAN INST. (July 24, 2015), <http://www.urban.org/urban-wire/federal-prison-reform-who-too-old-incarceration> (noting prisoners aged 50 and over are the fastest growing group in the BOP).

<sup>249</sup> U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS* i–iii (2015).

<sup>250</sup> *See id.* at iii.

<sup>251</sup> *Id.* at 37–41.

<sup>252</sup> For the drug offenders, a separate analysis indicates that 69% involved powder or crack cocaine, 19% methamphetamine, 4% heroin, and 3% marijuana, with the remainder representing other drugs. Note that the proportion of drug offenders in this analysis, with its combining data from fiscal years 2008–2014, masks the downward trend in life-sentenced drug offenders over time that were observed in Table 1.

<sup>253</sup> *See* 18 U.S.C. §§ 922(g), 924(c) (2012).

general population (15%) than in the life-sentenced group (8%). In contrast, a smaller proportion of sex offenders were represented in the total population (3%) than in the life-sentenced subgroup (17%).

The two principal drivers of guideline-based systems are the severity of the offending behavior and criminal history score. Here, the final offense level (which represents the guideline-based measure of offense severity) for all cases carried a mean of 18, whereas the final offense level for the life-sentenced subgroup was more than twice that at 39. Average criminal history score was also substantially different, showing a mean of 2.4 for the whole population, and a higher 3.6 mean for the life-sentenced group (Criminal History categories I–VI were translated to 1–6, respectively, to attain these means.) Thus, as would be expected, the average severity rating of the offending behavior and criminal history (pursuant to guideline computations) are dramatically higher in the life-sentenced group. In separate analyses, the offense severity scores remained relatively constant considering the guidelines provide a possible range from 1 to 43 levels. Each year the final offense level for the entire group averaged between 17 and 19 levels, while the life-sentenced subgroup averaged between 38 and 40 levels each year. There was little variability in the criminal history score for the entire population over the time frame (2008–2014), ranging between an average of 2.36 and 2.47 where the possible range in the guidelines is 1–6 (i.e., categories I–VI). Conversely, there was greater variability in criminal history scores for the life-sentenced subgroup over time, from an annual mean of 3.09 to 3.95, a difference of almost an entire category. Additional analyses parse criminal history fluctuations in the life-sentenced group using the criminal history categories in order to further analyze any potential trends.

Table 3 thus contains a graphical rendering of the proportions of criminal history categories (formally I to VI in the guidelines) for just the life-sentenced group over time for the longer period of fiscal years 1999–2014.

Table 3. Trend in Criminal History Categories for Life Sentences

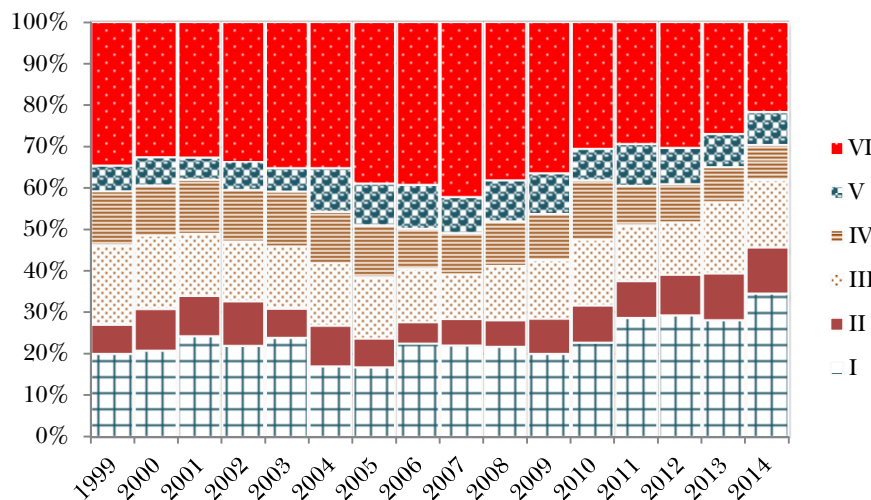




Table 3 represents that the severity of the criminal history score for the life-sentenced population has gradually depreciated in recent years. From fiscal 1999–2014, the percentage of life sentences within the lowest criminal history categories (I and II combined) increased by almost 70% while those within the top two (V and VI) dropped by 28%. In the last four years combined (2011–2014), about one-third of life-sentenced defendants were at Criminal History I. This trend is surprising. It is noted that the application of life sentences to offenders with lower criminal history scores on average over time was not offset by rising offense severity, at least as measured by final offense level. Recall that separate analyses showed a relatively consistent offense-severity scoring for the full population and for the life-sentenced subgroup. This result conflicts with the focal concern regarding consequences to prison resources. Considering that the Bureau of Prisons has been operating above capacity during the period covered,<sup>254</sup> the fact that more defendants with minimal criminal history records are being sentenced to life in recent years can merely exacerbate the prison population situation, without evident public safety returns. This trend challenges the rationale for life imprisonment on the need for incapacitation grounds as more of the lifers are not clear recidivists and their crimes not rated as more severe.

In any event, Table 2 contains more information on how legal factors that influence sentencing decisions may differentially explain life sentences. Guideline recommendations for sentencing appear significantly more influential with life sentences. Compared to sentenced defendants as a whole, the penalty for the life-sentenced group was far more likely to have fallen within their guidelines' range (54% and 81%, respectively)<sup>255</sup> and much less likely to have received a government-sponsored downward departure from the guideline recommended sentence (27% and 3%). Mandatory minimum penalties were available in 25% of all cases, while their presence was ubiquitous for the life-sentenced population at a rate of 90%. Together, these data points show that mandatory minimums and guideline-recommended ranges—separately and likely together as mandatory minimums are known to directly impact relevant guideline ranges—have a strong impact on directing life sentences.

Mandatory life sentences specifically drove many true life-without-parole penalties. In separate analyses not shown in Table 2, of those sentenced to life, a mandatory LWOP sentence applied in 18% of cases for

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<sup>254</sup> Memorandum from Michael E. Horowitz, Inspector Gen., to Attorney Gen. & Deputy Attorney Gen. (Nov. 10, 2014), <https://oig.justice.gov/challenges/2014.htm>).

<sup>255</sup> The high rate of guideline compliance for the life-sentenced subset is comparable to the 83% rate at which the minimum recommended guideline range was at least 470 months for those actually sentenced to life. Comparatively, the minimum guideline sentence was at least 470 months in just 1% of all cases.

drug-related minimums, 3% for gun-related minimums, and 1% for child pornography. A mandatory minimum sentence of LWOP applied to less than 1% of cases for each of firearm and child sex trafficking minimums, while 11% of LWOP minimum cases for other reasons (listed in the original datasets as Other Mandatory Minimum). The presence of the various nonviolent, mandatory life minimums may help explain the existence of numerous nonviolent defendants in the life-sentenced group that was previously mentioned.

Differences in guideline-approved factors for aggravating or mitigating punishment were observed and in the directions expected. Compared to overall statistics for the entire dataset, life-sentenced individuals were far less likely to have received the advantages of acceptance of responsibility (95% and 31%, respectively) or substantial assistance (12% and 1%) mitigation. In contrast, compared to the entire defendant population, lifers were much more likely to have received enhanced penalties for guidelines related to career offender (3% and 21%, respectively), armed career criminal (1% and 4%), aggravated role in the offense (4% and 29%), or weapons (8% and 50%). The finding that half of the life-sentenced population earned a weapon enhancement is not too surprising considering the large percentages therein of primary offenses involving firearms, drugs, violence, and sex crimes.

So far, the data provided raises questions about whether life-sentencing practices comply with certain philosophical theories of punishment. Table 2, together with the trend analysis in Table 1, suggests that life sentencing in the federal system is frequently not compliant with the theory of retribution or the broader, communicative function of deterrence. Commentators often assume that life penalties are generally reserved for those who have committed the most atrocious acts<sup>256</sup> or who have committed dangerous, violent acts deserving permanent exclusion.<sup>257</sup> It is estimated that two-thirds of lifers in state prisons committed homicide.<sup>258</sup> The experience at the federal level, though, is not likewise oriented. A life sentence in federal practice is not reserved for intentional murders, or even for homicides. Regarding retributive and utilitarian theories in general, then, the federal system violates any normative, ordinal ranking of crimes as life sentences are spread across dissimilar offenses and criminal histories. A lifer in federal prison may have committed a violent offense or a firearms offense, both suggesting a potential threat to the physical well-being of other humans. But a lifer could also have committed a drug offense, fraud, a property offense, or any odd type within the amorphous grouping of "Other." Actually, a separate data

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<sup>256</sup> Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 318–19 (2009).

<sup>257</sup> O'Hear, *supra* note 92, at 5.

<sup>258</sup> Bowman, *supra* note 87, at 46–47.

analysis indicated life sentences cross many primary offense guidelines, meaning they represent various and disparate types of illegal acts. The extra data run showed that life sentences are present in primary offenses that include robbery, theft, extortion, money laundering, civil rights, child pornography distribution, and obstruction of justice. One may wonder, then, whether many of these life terms can be justified by retributive ends, deterrence, or are circumspectly needed for incapacitation purposes. The practice likewise seems to conflict with a statutory dictate that federal prison space should be “reserved for those violent and serious criminal offenders who pose the most dangerous threat to society . . . .”<sup>259</sup>

### 3. *Case-Processing Variables*

Table 2 additionally contains three variables that were categorized as case processing. They are just briefly noted here. One factor was the court of appeals. The Fourth, Eleventh, and Fifth Circuits yielded the highest percentages of life-sentenced defendants (16%, 15%, and 12%, respectively). Defendants who received life sentences were far more likely to have gone to trial. For fiscal years 2008–2014, almost two-thirds of life-sentenced defendants went to trial, compared to 3% of all others. Reciprocally, while 97% of federal defendants plead guilty, only 36% of defendants eventually sentenced to a life equivalent penalty plead guilty. Finally, a higher percentage of life-sentenced defendants were in custody at the time of sentencing. Indeed, almost all life-sentenced defendants were in custody, at 98%. Some discussion concerning disparities within these case-processing variables will be left after the rendering of the regression analysis that follows.

### C. *Logistic Regression Analysis*

As the focal concerns perspective theorizes, sentencing decision-makers rely upon available sources of information to make inferences about defendants, their level of culpability considering the severity of harms caused, and future predictions of recidivism risk. Thus, if we wish to better understand the reasons for sentences issued in actual cases, we likely need to study a variety of potentially explanatory factors that affect the resulting sentence. A sentencing researcher’s process often is (as it was for this study) one that requires a broad reading of works in the area that suggest why certain factors may theoretically impact sentencing decisions. In addition, a review of the available literature allows the researcher to determine which factors have been found to be of import in sufficiently relevant studies of sentencing data. And, then, there is some trial and error involved, particularly when the study is reliant upon third-party

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<sup>259</sup> Joint Resolution of Oct. 12, 1984, Pub. L. No. 98-473, § 239, 98 Stat. 2039.

data. Comparing model statistics, the researcher can choose the one that has a better fit in predicting sentencing outcomes.

In the end, this study employed a multiple logistic regression model. Regression analysis is a statistical process for exploring the relationship between variables of interest.<sup>260</sup> At its simplest, a regression can test the relationship between an independent (also known as predictor or explanatory) variable and the dependent (also referred to as outcome or response) variable of interest.<sup>261</sup> Rarely in the social sciences will only a single, independent factor influence the outcome at issue.<sup>262</sup> Thus, sophisticated regression models allow a researcher to test the relationship between a host of independent variables and the chosen dependent variable. Using a regression model, one can further study the effect of each independent variable on the dependent variable, while controlling for (i.e., holding constant) the effect of other explanatory variables.<sup>263</sup> More specifically, a logistic model is the most appropriate regression design when the dependent variable is binary or dichotomous.<sup>264</sup> Here, the dependent variable is whether the court issued a sentence that constituted a life sentence (operationalized as life-without-parole or a term of at least 470 months) (yes=1; no=0).

The independent variables in the final regression model include a host of legally relevant factors. The guideline minimum means the recommended minimum prison sentence after guideline computations, which represents the combined effect of the final offense level and criminal history through the guideline grid.<sup>265</sup> Also included in the model are predictors comprised of whether a mandatory minimum applied (yes=1; no=0), or a reward for substantial assistance assigned (yes=1; no=0). Dummy variables<sup>266</sup> were created to depict the ordinal categories for

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<sup>260</sup> MICHAEL G. MAXFIELD & EARL BABBIE, *RESEARCH METHODS FOR CRIMINAL JUSTICE AND CRIMINOLOGY* 354–57 (2d ed. 1998).

<sup>261</sup> RONET BACHMAN & RAYMOND PATERNOSTER, *STATISTICAL METHODS FOR CRIMINOLOGY AND CRIMINAL JUSTICE* 489 (1997).

<sup>262</sup> *Id.*

<sup>263</sup> Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 *FED. SENT'G REP.* 311, 318 (2013).

<sup>264</sup> DAVID W. HOSMER & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* 1 (2d ed. 2000).

<sup>265</sup> The guideline minimum was capped at 470 months, as the positive skew is extreme. See Michael T. Light, Michael Massoglia, & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 *AM. SOC. REV.* 825, 832 (2014). Plus, the Commission codes a LWOP minimum sentence as 9996 in this data variable, which obviously holds no scaling reference in a variable that is otherwise expressed in months. The guideline minimum does not need to be logged as it would in ordinary least-squares regression. In contrast, a logistic regression model does not require any distributional assumption that would necessitate log transformations. *Id.* at supp. 2.

<sup>266</sup> Dummy variables are often employed with dichotomous variables (such as

criminal history (ranging from I–VI), with category I being the reference category.<sup>267</sup> A series of dummy variables represent the general offense type with drugs as the reference category, and the others being immigration, firearms, violent offense, sex offense, white collar, property, and other.

A number of extra-legal variables also survived in the final model. These included whether the conviction occurred after trial (trial=1; plea=0) and custody status at sentencing (in custody=1; not in custody=0). A series of dummy variables were created to separate the twelve courts of appeals within which the case was sentenced; the Eleventh Circuit acts as the reference category. A few demographic variables were entered, including gender (female=1; male=0) and citizenship (U.S. citizen=1; noncitizen=0). Dummy variables categorize for race with white as the reference category and the other categories representing black, Hispanic, and other (e.g., Asian, Native American, and Pacific Islander). Finally, dummy variables were entered for education level with less than a high school education as the reference group. The other educational groups were high-school graduate, some college, and college graduate.

The final logistic regression analysis included 492,076 cases and is presented in Table 4.<sup>268</sup> The columns represent, from left to right, a list of the independent variables of interest, their corresponding coefficients (along with indicators of statistical significance), standard errors, and odds ratios. Odds ratios are used, as they generally provide more interpretable representations of their complementary coefficients. An odds ratio of 1.00 would indicate no association between the particular predictor and the dependent variable. An odds ratio greater than 1 indicates a positive (increasing) association with the condition of interest—here, receiving a life sentence. Correspondingly, an odds ratio less than 1 signals a negative (suppressing) association with a life sentence.

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women=1 and men=0) or when using a categorical variable with multiple groupings. The procedure allows the researcher to compare groups in the relevant categories by choosing a reference group. For example, race could be a categorical variable involving whites, blacks, and Hispanics, with the researcher setting up whites as the reference category. With such a posited construction, the resulting regression statistics allows the researcher to compare the impact on the dependent variable for whites versus blacks and whites versus Hispanics.

<sup>267</sup> Criminal history is represented twice in the independent variables, once on its own and again as a component of the guideline minimum. Doing so is justified because the criminal history category has a significant predictive value in addition to the guideline minimum. See Jeffery T. Ulmer & Michael Light, *The 2012 U.S.S.C. Booker Report's Characterization of the Penn State Studies: Setting the Record Straight*, 25 FED. SENT'G REP. 290, 290–91 (2013).

<sup>268</sup> Cases with missing data in any of the dependent or independent variables are automatically excluded in a regression analysis (n=75,965).

Table 4. Logistic Regression Model Predicting Life Sentences

<u>Variable</u>	<u><math>\beta</math></u>	<u>S.E.</u>	<u>Odds Ratio</u>
Guideline Minimum (capped at 470)	.028***	.001	1.029
Criminal History (I as reference)			
II	.314*	.132	1.369
III	.511***	.116	1.667
IV	.638***	.136	1.892
V	1.121***	.144	3.068
VI	.555***	.103	1.742
Substantial Assistance	-4.393***	.236	.012
Mandatory Minimum	.817***	.141	2.263
Trial	.821***	.072	2.272
Custody	1.157***	.218	3.180
Offense (Drugs as reference)			
Immigration	.418***	.859	1.518
Firearms	.283***	.086	1.327
Violent Offense	1.715***	.181	5.559
Sex Crime	.380**	.115	1.462
White Collar	.444***	.167	1.558
Property	3.382	.552	29.421
Other	.370	.335	1.448
Federal Circuit (11th Circuit as reference)			
D.C. Circuit	-.421***	.321	.656
1st Circuit	-.292***	.212	.747
2nd Circuit	-.844*	.152	.430
3rd Circuit	-1.068***	.171	.344
4th Circuit	-.150*	.124	.861
5th Circuit	-.031	.134	.969
6th Circuit	-.362	.142	.697
7th Circuit	-.113	.143	.894
8th Circuit	-.168	.143	.845
9th Circuit	-.656	.149	.519
10th Circuit	-.391	.186	.677
Female	-.612**	.210	.542
Race (White as reference)			
Black	-.063	.096	.939
Hispanic	-.220	.114	.802
Other	.089	.184	1.093
Education (< High School as reference)			
High School	.012***	.080	1.012
Some College	-.082	.103	.921
College Graduate	-.531	.159	.588
Citizenship	.064	.119	1.066
Constant	-15.097***	.368	

n=492,076

-2 log likelihood=6195.065

Nagelkerke  $R^2$ =.794

Model chi-square=23119.380\*\*\*

\*p&lt;.05; \*\*p&lt;.01; \*\*\*p&lt;.001

This logistic regression model is statistically significant at the  $p < .001$  level. The Pseudo  $R^2$  (here, Nagelkerke  $R^2$ ) is a goodness-of-fit measure indicating how much a life-sentence outcome is explained by all the various factors contained in the model (such as criminal history, offense, gender). The relevant statistic indicates that the model accounts for about 80% of the variance in life-sentence outcomes. As for classifications, the model accurately predicted over 99% of non-life sentences and 78% of life sentences. In sum, the model is quite effective in predicting life and non-life sentences.

Model factors that are directly *and* legally relevant to a life sentence in the federal system were all statistically significant and in the directions expected. The effect of the guideline-minimum sentence is distinct in interpretation in this model as it is calculated by the number of months. Here, for every additional month in the minimum guideline recommendation, the odds of a life sentence increased by 3%. The odds of a life sentence based on criminal history were greater at each level of the ordinal category, from II to VI as compared to the reference category of I, the lowest level. Hence, the resilience of guidelines' recommendations and criminal history as quite strong predictors of life sentences, now in a multiple regression model with controls, is supported.

More legal variables were statistically significant. The presence of any mandatory minimum penalty was significant and increased the odds of a life sentence by a factor of two. This result further illustrates the significant role that mandatory minimums can play with extreme sentencing outcomes such as life terms. Those who were rewarded for providing authorities with substantial assistance in their investigations were significantly less likely to receive a life sentence compared to those not so rewarded. This extreme result is plausibly triggered by the extremely few number of cases in which life-sentenced defendants benefited from providing assistance.

The independent impact of offense type yielded a few curious results. Compared to drug offenses as the reference group, all other offense types were at higher odds of a life sentence. Curiously, the odds of property offenders (excluding white collar crimes in this regression analysis, which are accounted for separately) were 29 times that of drug offenses to receive a life sentence. The odds of a life sentence for violent offenders were five times more than for drug crimes. The increased odds of a life sentence (again, compared to drug offenders), for firearms, sex crimes, and white collar were salient but more modest. Immigration and the residual category of other crimes were also at higher odds of a life sentence, though, unlike the other offense categories, these last two were not statistically significant. The lack of statistical significance for immigra-

tion crimes is expected because of the extremely small number of life-sentenced immigration offenders.<sup>269</sup>

The result that drug offenses were at reduced risk of life sentences appears somewhat contrary to another study (using the same offense categories as here) indicating that drug offenders received longer sentences.<sup>270</sup> However, the dependent variables in those studies are not the same as the study presented in this Article, which is unique in operationalizing the sentencing outcome variable as over 470 months. It could be that the effect of drug offending on sentence length weakens and then dissipates once the penalty reaches an extreme of 40 years. Further, the years of analysis among the studies varied such that the inclusion of the years 2011–2014 in this study likely reduced the role of life sentences for drug offenders considering their share of life terms dropped significantly in that time period compared to prior years, as was previously shown.

The model also accounted for extralegal, case-processing characteristics. In terms of geography, differences in life sentences were observed in the circuit courts of appeal. Compared to the reference category of the Eleventh Circuit, defendants in each of the other ten circuits were at reduced risk of a life sentence, ranging from a reduction in odds from 3% to 66%. Five of them were statistically significant: Second, Third, Sixth, Ninth, and Tenth Circuits. Hence, individuals within these five circuits were at substantially lower likelihood of receiving life sentences than their similarly situated counterparts (considering the covariates controlled for in the model) in the Eleventh Circuit. While the comparison group is the Eleventh Circuit, the variations in odds ratios amongst the eleven other circuits suggest substantial inter-circuit variation, indicating disparities by region. Still, the intentional inclusion of circuit-level variations here is not meant to imply that the existence of disparities equals discrimination or that regional variances are inherently immoral. Like other guideline-based systems operating in large areas, the federal sentencing system continues to battle issues with competing goals of, on the one hand, uniformity across cases, judges, and geographies, and, on the other hand, allowing for discretion to meet local needs and differences in value judgments about proper punishments.<sup>271</sup> It is beyond the scope of this Article, though, to be able to account for these circuit differences

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<sup>269</sup> The absence of statistical significance for “other” is not concerning since it is an amorphous category of dissimilar offenses and yields little comparative importance.

<sup>270</sup> Travis W. Franklin, *Sentencing Outcomes in U.S. District Courts: Can Offenders’ Educational Attainment Guard Against Prevalent Criminal Stereotypes?*, 62 *CRIME & DELINQ.* (forthcoming 2016) (manuscript at 15 tbl.2, 16), <http://cad.sagepub.com/content/early/2015/02/12/0011128715570627.full.pdf>.

<sup>271</sup> See Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 *STAN. L. REV.* 137, 138 (2005); Ulmer et al., *supra* note 93, at 565.



other than to note that further research may be in order to explore circuit variations in life sentencing and the potential reasons therefore.

The so-called extralegal characteristic known as the “trial penalty”<sup>272</sup> was again evident in that, for those who chose trial rather than a plea, the odds of receiving a life sentence doubled. As the descriptive statistics indicated, a majority of life-sentenced defendants chose trial over a plea, a decision that few offenders ever make. While the prospect of facing a life sentence seemed not to deter the offenders from committing the crime, it seemed to deter them from pleading guilty. The focal concern of consequences of a possible sentence should be given greater attention. The prospect of lengthy sentences (here measured at about 40 years and above) appears to produce court-processing burdens in triggering the need to conduct criminal trials. Considering the value that many players in the criminal justice system place on the resources saved by relying on a predominantly plea-based system,<sup>273</sup> the high trial rate for the lifer group is more than a minor threat to efficient court function. A relevant measure in the descriptive statistics indicated that over 80% of life-sentenced individuals faced a guideline-minimum sentence of at least 470 months. Thus, it makes sense that defendants already at risk of a lifetime sentence might gamble by taking their chances at the adjudication phase, even though that choice would most likely mean losing an opportunity for the (relatively small in their cases) acceptance of responsibility mitigation.<sup>274</sup>

Defendants in custody at the time of sentencing likewise faced more than twice the odds of receiving a life sentence compared to those who were not detained, with statistical significance. The effect plausibly is due to risk-based judgments in pretrial release decisions where those defendants perceived at higher risk of recidivism are also considered to present a greater need for pretrial detention.<sup>275</sup> A similar assumption that pretrial status is indicative of risk prediction may also flow into the sentence decision. The 98% rate at which the life-sentenced defendants were in custody at sentencing further supports the role that the focal concern of future risk underlies sentencing decisions.

Finally, the model contained a few demographic characteristics.<sup>276</sup> Gender was salient as the odds of a female receiving a life sentence was

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<sup>272</sup> See Ulmer et al., *supra* note 93, at 564–65.

<sup>273</sup> See generally Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014).

<sup>274</sup> See Ulmer et al., *supra* note 93, at 580–81 (suggesting loss of acceptance-of-responsibility reduction for seeking trial).

<sup>275</sup> James C. Oleson et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 62 CRIME & DELINQ. (forthcoming) (manuscript at 5), <http://cad.sagepub.com/content/early/2014/09/25/0011128714551406.full.pdf>. Previous studies similarly have found that pretrial detention was predictive of a longer sentence in the federal system. *Id.* at 13 & tbl.3; Ulmer et al., *supra* note 93, at 577.

<sup>276</sup> It is noted that a variable for age was removed before the final model as it

half that of their male counterparts. This result is compatible with prior research showing that, controlling for various factors, women in the federal system receive shorter sentences.<sup>277</sup> The role of race produced interesting results. White was the reference category, such that compared to whites, the subgroups of blacks and Hispanics were at lesser risk of receiving life sentences (lesser odds of 6% and 20%, respectively). However, neither was statistically significant. In the other direction, the category of “Other” increased the odds of a life sentence by a small percentage compared to whites, though it was not a statistically significant difference either. Research to date is radically inconsistent in regression models on whether racial and ethnic differences continue to exist in federal sentencing.<sup>278</sup> The regression model shown here found no statistically significant differences in race, at least as related specifically to life sentencing.

As for educational level, the odds of a life sentence for college graduates were significantly reduced compared to those without a high school diploma, a statistically significant result. Researchers elsewhere have similarly shown that higher educational levels, though constituting an extralegal factor, were associated with reduced sentences in the federal system.<sup>279</sup> In the focal concerns model, college achievement may be used to infer reduced risk potential.<sup>280</sup> Finally, there was no negative effect of not being a U.S. citizen. Actually, defendants carrying U.S. citizenship faced slightly greater odds of receiving life sentences, though the result was not statistically significant. Prior research has been inconsistent as to the effect of citizenship on federal sentencing length.<sup>281</sup>

Overall, the logistic regression analysis helps to further explain some of the results previously witnessed with the descriptive statistics. The concluding Section provides further thoughts and illustrates potential corrections to issues raised herein.

## V. CONCLUSIONS

A purpose of this Article is to emphasize that lifers remain in a unique and precarious position within America’s criminal justice system. Life-sentenced prisoners are akin to those on death row to the extent

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yielded no statistical or practical value in predicting life sentences. This is consistent with the mean age of both groups being fairly similar.

<sup>277</sup> Oleson et al., *supra* note 275, at 13 tbl.3; Ulmer, et al., *supra* note 93, at 577.

<sup>278</sup> See discussion and sources cited in Light et al., *supra* note 265, at 827; Cassia Spohn, *The Effects of the Offender’s Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75, 75–76 (2013); see also U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *United States v. Booker* ON FEDERAL SENTENCING pt. E (2012); Ben Feldmeyer & Jeffery T. Ulmer, *Racial/Ethnic Threat and Federal Sentencing*, 48 J. RES. CRIME & DELINQ. 238, 239 (2011).

<sup>279</sup> See Ulmer et al., *supra* note 93, at 576–77 tbl.2.

<sup>280</sup> Franklin, *supra* note 270, at 7.

<sup>281</sup> Light et al., *supra* note 265, at 827, 835.

both groups presumably will die in the hands of the State. However, much less attention is given to lifers and they receive far fewer substantive and procedural rights than capital defendants. Lifers strikingly differ as well from other inmates who face the realistic hope of release. From retributive- and utilitarian-theory perspectives, the extreme nature of a life penalty is justified—if at all—only for a select few of the most heinous and dangerous offenders. Notably, America’s penchant for life sentences appears to be a relic of its past law-and-order days and conflicts with the international human rights position to treat all prisoners with dignity and provide avenues for second chances.

This Article took advantage of datasets made available by federal sentencing authorities to provide empirical insights to actual life sentencing practices. Measures regarding offense severity, criminal history, terms recommended by guidelines, and mandatory minimums all carry great weight in explaining life sentences and, indeed, are more influential for the life-sentenced group than for federal sentences in general.

Several of the results may be surprising. Unlike the experience of the states in general,<sup>282</sup> many defendants sentenced to life in the federal system were not violent offenders and the data question whether their offending behavior was serious enough to justify dying in prison, at least judged by current values. The evidence from the study herein—that the criminal history scores for lifers has significantly reduced since 2009 without being offset by any increase in offense-severity measures—further challenges the continued use of life sentences under retributive or utilitarian theories. The assignment of life sentences for nonviolent offenders covering a broad range of offenses, many of whom have minimal criminal history, loses the normative value of ranking punishments which would otherwise dictate that a life sentence should, instead, be selectively used for the most violent offenders and career recidivists.

As to demographic characteristics, gender is salient as women are far less likely to be sentenced to life. Minorities and U.S. citizens are disproportionately sentenced to life; however, the differences are not statistically significant in the regression model with controls. Thus, this study does not support discriminatory outcomes based on race and nationality for life sentences.<sup>283</sup>

The nontrivial existence of basketball-score sentences of 100 years or more was confirmed. This result shows that sentencing can at times be so extreme that it suggests the importance of the symbolic purpose of sentencing one to presumptively die in prison. Finally, in an outcome that may or may not seem remarkable, some disparities among federal circuit courts of appeal were found in life sentencing practices, even

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<sup>282</sup> See generally Lerner, *supra* note 14.

<sup>283</sup> Of course, this dataset does not account for potential discriminatory actions at other decision points in the system made by federal investigators, prosecutors, or probation officers.

while controlling for other explanatory variables in a model with high predictive value.

The results strongly intimate that life sentences are meted out inconsistently and too often by the United States. One might reasonably enquire, then: What can be done? Some have specifically suggested that American law strictly limit,<sup>284</sup> or eliminate altogether, life-without-parole penalties in the first place.<sup>285</sup> Besides these tailored changes, relatively few critics of the American justice system have specifically addressed life sentences and the unique situation of lifers themselves. Still, scholars and policy analysts have made helpful suggestions on revisions to prevailing laws and policies to reduce the country's overreliance upon lengthy sentences and to curtail prison populations.<sup>286</sup> These reforms would presumably affect life sentences, too. Others propose placing upper limits on sentence length,<sup>287</sup> an option which would place the United States more in line with its international counterparts.

Whereas long sentences in the federal system itself are a reflection of mandatory minimums and guidelines' lengthy sentence calculations, some commentators call for repealing, or at least substantially modifying, federal mandatory minimum laws across the board.<sup>288</sup> It is suggested, too, that the United States Sentencing Commission systematically slash sentencing ranges.<sup>289</sup> The data herein concerning life sentences support these suggestions, considering mandatory minimums and guideline-based minimums played a significant role in explaining life sentences in both the descriptive measures and regression model.

Several credible blueprints for change would operate more at the back-end to provide long-term prisoners in all jurisdictions greater opportunities for relief. The American legal system should finally embrace the international human rights position of providing sentence review after the defendant serves some set period, plus revisitation at regular intervals thereafter.<sup>290</sup> The right of review should apply to any remaining life-sentenced prisoners, as well. The new Model Penal Code could be a blueprint. Jurisdictions currently without parole-like release options could easily (from a practical perspective) reverse their rules to implement rights to early parole.<sup>291</sup> Inasmuch as it is also recognized that many

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<sup>284</sup> SOLTER ET AL., *supra* note 89, at 71.

<sup>285</sup> Nellis, *supra* note 9, at 19; Nellis & King, *supra* note 32, at 40; Tonry, *supra* note 29, at 187.

<sup>286</sup> *E.g.*, Nellis & King, *supra* note 32, at 40–42.

<sup>287</sup> Clear & Austin, *supra* note 256, at 319.

<sup>288</sup> JAMES, *supra* note 98, at 35–36; SOLTER ET AL., *supra* note 89, at 71; Adelman, *supra* note 4, at 311; Tonry, *supra* note 29, at 187.

<sup>289</sup> Adelman, *supra* note 4, at 311–12.

<sup>290</sup> Tonry, *supra* note 29, at 187.

<sup>291</sup> *Id.*; JAMES, *supra* note 98, at 44–46. For its part, the federal system currently operates a post-sentence supervised release program such that it already has in place

states currently with parole authorities suffer political swings in actually granting parole, a preferred modification is to staff parole boards with experienced and educated correctional experts—rather than political appointees.<sup>292</sup> Additional alternatives include significantly expanding the availability of good-time credits<sup>293</sup> and otherwise increasing opportunities for defendants to achieve sentence reductions by showing they are at low risk of recidivism.<sup>294</sup> These alternatives should be available to virtual lifers, as well. To the extent that many of these reforms would require breaking through the legislative quagmire—a precarious adventure even in this changed climate of bipartisan demands to reduce mass incarceration—an alternative is to work on the executive branch angle by improving roads to clemency and encouraging the President and governors to grant commutation in many more cases.<sup>295</sup>

Hopefully, a time of reflection and rationality will prevail to reform the reforms and to bring sanity back to sentencing law and practices. The country needs united efforts to scale back the mass incarceration nation. It might take an extra dose of optimism, but one may also aspire that changes reach to curtailing the uses and abuses of life sentences. The age-crime curve, consistently supported by scientific studies, strongly suggests that lifetime incapacitation is almost never—if ever—justified on public-safety grounds. At the very least, adopting reasonable periods of review for all prisoners is more consistent with human rights standards and personal dignity.

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an organizational structure to manage released prisoners in their communities. *See* JAMES, *supra* note 98, at 46.

<sup>292</sup> Nellis, *supra* note 9, at 20; Nellis & King, *supra* note 32, at 42.

<sup>293</sup> JAMES, *supra* note 98, at 44; NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., *THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS* 6 (2012); Fan, *supra* note 12, at 624.

<sup>294</sup> JAMES, *supra* note 98, at 44–45.

<sup>295</sup> Cole, *supra* note 172, at 232 (noting commutation awarded to a few federal lifers, suggesting a qualified candidate is “one who has a clean record in prison, does not present a threat to public safety, and who is facing a life or near-life sentence that is excessive under current law”); Nellis, *supra* note 9, at 19.