

3-3-2020

## Second Place Isn't Good Enough: Achieving True Reform Through Expanded Parole Eligibility

Monica L. Bergeron

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>

---

### Repository Citation

Monica L. Bergeron, *Second Place Isn't Good Enough: Achieving True Reform Through Expanded Parole Eligibility*, 80 La. L. Rev. (2020)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol80/iss1/10>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Second Place Isn't Good Enough: Achieving True Reform Through Expanded Parole Eligibility

*Monica L. Bergeron\**

## TABLE OF CONTENTS

Introduction.....	111
I. Rethinking Violent Crime to Achieve True Reform.....	115
A. Efforts to Address Mass Incarceration in the United States Have Ignored Deeper Reforms.....	117
B. Justice Reinvestment Policies Take a Modest Approach to Criminal Justice Reform.....	118
C. Louisiana's Criminal Justice Reform Has Fallen Prey to "The Standard Story".....	120
1. Louisiana's First Steps Toward "Decarceration".....	121
2. Louisiana's 2017 Criminal Justice Reform Bills Left Gaps.....	122
II. "Life Means Life": Excessive Use and Abuse of Life Without Parole in Louisiana.....	124
A. From 10 Years to Life: Understanding the Motivations for Longer Sentences in Louisiana.....	124
1. Bad Timing: Prison Expansion During the Tough-on-Crime Era.....	125
2. Capitalizing on the Situation: Local Actors Learned to Profit off of Prisoners.....	127
B. How Parole Functions in Louisiana.....	128
C. Recent Efforts to Modify the Statute Were Quickly Shot Down.....	132
III. An Inclusive Proposal: Expanding Geriatric Parole Eligibility to Lifers.....	133

---

Copyright 2019, by MONICA L. BERGERON.

\* J.D., 2020. Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to the individuals serving life sentences in Louisiana who continue to hope that Louisiana's criminal justice reform will one day reach them. The author thanks Professor Lancaster for introducing her to the issue and for his thoughtful comments and guidance throughout the process. The author would also like to thank her parents, Jill and Terryl Bergeron, as well as her sister, Heidi Bergeron Gross, for their unending love, support, and encouragement.

A. The Rising Cost of Life Without Parole .....	134
B. An Unjustified Sentence: The Evidence Undermining the Exclusion of Lifers from Act 790 .....	136
1. Incapacitation .....	137
a. Growing Up and Out of Crime: Predicting Criminality with the Age Crime Curve.....	138
b. Recidivism Rates Demonstrate that Incarcerated Individuals Also Age Out of Crime .....	140
c. Louisiana Recidivism Rates Highlight the Low Risk of Expanded Parole Eligibility to Lifers .....	141
2. Deterrence .....	143
a. Misapprehension: Severe Punishments Fail to Deter Crime .....	144
b. The Data Do Not Lie: Severe Sentencing Does Not Increase Public Safety .....	145
3. Rehabilitation .....	146
a. The Non-Unique Experience of Prison as a Turning Point.....	147
b. Recognizing Rehabilitation in Louisiana.....	148
4. Retribution.....	150
a. Measuring Proportionality in Louisiana .....	151
b. Balancing the Victim’s Right to Retribution .....	153
C. Time’s Up: Political Shifts Pave the Way for the Expansion of Act 790 .....	155
1. The “Evolving” Standard of Life Without Parole and Why Louisiana Should Evolve with It .....	156
a. Death is Different No Longer: The Importance of <i>Graham</i> and <i>Miller</i> .....	157
b. Objective Indicia of Consensus Against Mandatory Life Without Parole.....	157
c. The Skewed Proportionality and Failed Utility of Parole Ineligibility for Lifers .....	159
2. Amending Act 790 Can Ameliorate Harm from Louisiana’s Non-Unanimous Jury Verdict Law.....	160
3. The Support for the Proposed Amendment to Act 790 Has Arrived .....	161
Conclusion.....	162

## INTRODUCTION

Hayward Jones is not the person he was at 23 years old.<sup>1</sup> Jones describes his 23-year-old self as angry, reckless, and without direction.<sup>2</sup> After losing his sister, Jones suffered from severe depression and substance abuse.<sup>3</sup> He lacked vision and purpose and ultimately made a decision that cost him life in prison.<sup>4</sup> After two years behind bars, Jones decided to redefine his life:<sup>5</sup> “I had to rationalize; if I never make it out of prison, what kind of legacy will I leave?”<sup>6</sup> Today, at 45 years old, Jones is fulfilling his goal of helping others as a full-time mentor to prisoners serving non-life sentences.<sup>7</sup> Given his own life experiences, Jones can relate to his mentees’ pain and hardship, and he can help them understand that they can still choose a different life—they do not have to succumb to a cycle of crime, incarceration, and complacency.<sup>8</sup> Jones’s mentorship, and that of other “lifers”<sup>9</sup> at Angola, has proven so effective that a different Louisiana prison, Elayn Hunt Correctional Center, recently asked Jones to pilot its new moral rehabilitation program.<sup>10</sup>

Louisiana law currently denies lifers like Jones the possibility of parole, implying that lifers are incapable of rehabilitation.<sup>11</sup> Jones and other lifers, however, lead state-funded moral rehabilitation programs across Louisiana.<sup>12</sup> The state’s contradictory sentiment toward lifers frustrates both inmates and wardens alike.<sup>13</sup> Warden Perry Stagg, Deputy Warden at Elayn Hunt Correctional Center, has spent years working with Jones and other lifer mentors, and he has witnessed the lifers’ dedication

---

1. Interview with Hayward Jones, Elayn Hunt Corr. Ctr., in Baton Rouge, La. (Jan. 18, 2019).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. The term “lifers,” as used in this Comment, refers to individuals serving life sentences.

10. *Id.*

11. See LA. REV. STAT. § 15:574.4(A)(2) (2018).

12. See *Reentry Programming*, LA. DEP’T PUB. SAFETY & CORRECTIONS, <https://doc.louisiana.gov/reentry-programming> [<https://perma.cc/7MMM-DT7V>] (last visited Oct. 13, 2018); Interview with Jones, *supra* note 1.

13. Interview with Perry Stagg, Deputy Warden, at Elayn Hunt Corr. Ctr., in Baton Rouge, La. (Jan. 18, 2018).

to their mentees.<sup>14</sup> Warden Stagg stressed, “I am a staunch Republican conservative, as are most people that I work with here, and I believe that 99% of us would agree that life without the possibility of parole . . . does not make sense in most cases.”<sup>15</sup> Warden Stagg went on to explain that “these are not bad people, but people who did a bad thing, and at some point in their lives they deserve to tell their story . . . they deserve hope.”<sup>16</sup> If the reality of a life-without-parole sentence is vexing for the correctional officers, it is heartbreaking for the lifers.

For lifers like Jones, the Louisiana Legislature’s actions are exceptionally frustrating. Jones knows the wisdom, experience, and positivity he could bring to his community if released.<sup>17</sup> He also knows that the legislature has no justifiable argument in support of his continued incarceration.<sup>18</sup> Regardless of whatever actions the legislature does or does not take, Jones plans to live each day with integrity, “. . . not because people are watching me, but because integrity is what you do when no one is watching.”<sup>19</sup> Advocates of criminal justice reform, however, think it is time that the Louisiana Legislature took notice.<sup>20</sup>

Over the last 10 years, citizens and politicians across the country have rallied in support of criminal justice reform.<sup>21</sup> In concert with this movement, the Louisiana Legislature finally took steps in 2017 to rid Louisiana of its title as the nation’s greatest incarcerator, adopting the most comprehensive criminal justice reform in the state’s history.<sup>22</sup> Louisiana’s reforms, however, largely excluded changes to sentences associated with violent crimes, such as life without parole, which greatly weakened the

---

14. *Id.*

15. *Id.*

16. *Id.*

17. Interview with Jones, *supra* note 1.

18. *Id.*

19. *Id.*

20. See generally Andrew Callaghan, *Prisoners Look to Life After Incarceration Through Reentry Program*, MAROON (Nov. 10, 2017), <https://loyolamaroon.com/10015548/showcase/prisoners-look-to-life-after-incarceration-through-reentry-program/> [https://perma.cc/8G95-B9EM].

21. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 14–15 (2017).

22. *Louisiana’s 2017 Criminal Justice Reforms: The Most Incarcerated State Changes Course*, PEW CHARITABLE TR. (Mar. 1, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/louisianas-2017-criminal-justice-reforms> [https://perma.cc/YW5Y-WBSA]. In June 2017, Governor John Bel Edwards signed 10 bills, referred to as the Justice Reinvestment Initiative (JRI), into law. See discussion *infra* Sections I.B–C.

attempts to “decarcerate” Louisiana.<sup>23</sup> To reform the practices that fueled the state’s mass incarceration, the legislature first needs to reform its use of long sentences.<sup>24</sup>

Louisiana’s practice of locking up offenders and “throwing away the key” is costly, inefficient, and unjust.<sup>25</sup> Louisiana sentences more people to life than any other state in the country and twice as many as the national average.<sup>26</sup> Thirty percent of Louisiana’s prisoners are serving life or “virtual life” sentences.<sup>27</sup> Approximately half of all prisoners who have served over 10 years in Louisiana state prisons were under the age of 25 at the time of their offenses, and now, nearly two-thirds are 45 years old or older.<sup>28</sup> The Louisiana Legislature’s refusal to grant parole eligibility to its many, older lifers is not a research-supported practice.<sup>29</sup> Studies consistently demonstrate that the inclination to engage in criminal activity

---

23. See Julia O’Donoghue, *Louisiana Considers Giving More Old Prisoners a Chance at Parole*, TIMES-PICAYUNE (Apr. 25, 2018), [https://www.nola.com/politics/index.ssf/2018/04/louisiana\\_geriatric\\_parole.html](https://www.nola.com/politics/index.ssf/2018/04/louisiana_geriatric_parole.html) [<https://perma.cc/R4CA-ZDAG>]; LA. JUST. REINVESTMENT TASK FORCE, LA. DEP’T OF PUB. SAFETY & CORRECTIONS, REPORT AND RECOMMENDATIONS 23 (2017) [hereinafter TASK FORCE REPORT AND RECOMMENDATIONS]. “Decarceration” is a colloquial term that criminal justice advocates frequently utilize to refer to the reduction of prison populations. See generally Dennis Schrantz et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENT’G PROJECT (Sept. 5, 2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [<https://perma.cc/7ALY-BB4V>].

24. See generally Ashley Nellis, *Next Step for Louisiana Prison Reform Is to Review Life Sentences*, SENT’G PROJECT 1 (July 7, 2017), <https://www.sentencingproject.org/news/next-step-louisiana-prison-reform-review-life-sentences/> [<https://perma.cc/Q3HM-HBRX>].

25. See generally Marc Mauer, *A Proposal to Reduce Time Served in Federal Prison*, SENT’G PROJECT 1, 2 (2015), <http://www.sentencingproject.org/publications/a-proposal-to-reduce-time-served-in-federal-prison> [<https://perma.cc/F37K-XDHQ>]; Nazgol Ghandnoosh, *Minimizing the Maximum: The Case for Shortening all Prison Sentences*, in SMART DECARCERATION: ACHIEVING CRIMINAL JUSTICE TRANSFORMATION IN THE 21ST CENTURY 145–150 (C. Pettus-Davis & M. Epperson eds., 2017).

26. Nellis, *supra* note 24, at 5.

27. *Id.* “Virtual life” sentences are numerical sentences that are the practical equivalent of life in prison, generally defined as sentences of 50 years or more. *Id.*

28. *Id.*

29. See Mauer, *supra* note 25; Edward Shihadeh et al., *Recidivism in the State of Louisiana: An Analysis of 3- and 5-Year Recidivism Rates Among Long-Serving Offenders* 4 (LSU Dep’t of Sociology, Crime & Policy Evaluation Research Grp. working paper, August, 2013).

peaks in adolescence and declines into adulthood.<sup>30</sup> As most lifers in Louisiana have therefore surpassed the peak of criminality and have “aged out of crime,” the high cost associated with incarcerating older offenders constitutes an inefficient utilization of limited state resources.<sup>31</sup>

Further, the Louisiana Legislature’s continued use of the mandatory life-without-parole sentence only perpetuates the unjust sentencing practices that led to the state’s rise in mass incarceration.<sup>32</sup> Louisiana rose to a state of mass incarceration predominantly because of an increase in excessive sentencing—or the administration of sentences that incarcerate individuals longer than necessary to achieve the desired penological goals.<sup>33</sup> Mandatory life without parole is itself an excessive sentence because it prolongs the incarceration of rehabilitated offenders, fails to deter future criminals, and exaggerates the punitive component of the sentence.<sup>34</sup> Additionally, although the Louisiana Legislature has taken positive steps to end past injustices within its criminal justice system, many individuals continue to suffer the consequences of the state’s prior sentencing practices.<sup>35</sup> In failing to provide parole eligibility to the

---

30. See Maureen G. Mones & Virginia G. Clegg, *Age*, ENCYCLOPEDIA OF CRIMINOLOGY & CRIMINAL JUSTICE (Jay S. Albanese et al. eds., 1st ed., Wiley 2014), <https://search.credoreference.com/content/entry/wileycacj/age/0?institutionId=463> [<https://perma.cc/C6R4-YE66>]; Ghandnoosh, *supra* note 25, at 145–150.

31. See generally Shihadeh et al., *supra* note 29, at 11; Rachael Bedard et al., *Ageing Prisoners: An Introduction to Geriatric Health-care Challenges in Correctional Facilities*, 98 INT’L. REV. RED CROSS 917 (2016); Ghandnoosh, *supra* note 25, at 148–50.

32. See generally Nellis, *supra* note 24; TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57; Cindy Chang, *Louisiana Incarcerated*, TIMES-PICAYUNE (2012), [https://www.nola.com/crime/index.ssf/page/louisiana\\_prison\\_capital.html](https://www.nola.com/crime/index.ssf/page/louisiana_prison_capital.html) [<https://perma.cc/38WJ-3JVW>].

33. NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 326 (Jeremy Travis et al. eds., National Academies Press 2014); see Chang, *supra* note 32. “Penology” is a subdivision of criminology that studies the philosophical underpinnings and practical implications of punishment within the context of the criminal justice system. *Penology*, ENCYCLOPEDIA BRITANNICA (Apr. 1, 2016), <https://www.britannica.com/topic/penology> [<https://perma.cc/WY2V-YDMG>].

34. See discussion *infra* Section III.B; see generally NAT’L RESEARCH COUNCIL, *supra* note 33.

35. See Courtney Harper Turkington, *Louisiana’s Addiction to Mass Incarceration by the Numbers*, 63 LOY. L. REV. 557 (2017); Dan Swenson, *Understanding Louisiana’s Nonunanimous Jury Law Findings*, ADVOCATE (Apr. 1, 2018, 8:00 AM), [https://www.theadvocate.com/new\\_orleans/news/courts/article\\_159e7f5a-3459-11e8-b935-e7a91fc85713.html](https://www.theadvocate.com/new_orleans/news/courts/article_159e7f5a-3459-11e8-b935-e7a91fc85713.html) [<https://perma.cc/YEN5-ALX8>].

individuals sentenced under the now-abandoned practices—such as the non-unanimous jury law and the state’s old habitual offender law—the Louisiana Legislature is only furthering their effects.<sup>36</sup> In order to truly break ties with Louisiana’s practices of unjustified sentencing and mass incarceration, Louisiana must expand its existing geriatric parole statute, Louisiana Revised Statutes § 15.574.4(A)(2), to include parole eligibility for individuals serving life sentences.<sup>37</sup>

Part I of this Comment discusses the national movement to decrease incarceration rates and the importance of lessening sanctions for violent crime. Part I also explains the Louisiana Legislature’s decision to pursue criminal justice reform and demonstrates how the narrowed focus on nonviolent offenders decreases the effectiveness of Louisiana’s current reform efforts. Part II explains how Louisiana became a national outlier through abuse of life-without-parole sentences and how Louisiana’s current parole eligibility statute contributes to the problem of mass incarceration. Part III introduces a proposed amendment to Louisiana’s existing geriatric parole statute and explains why adopting the amendment is in the best interest of Louisiana. Section III.A demonstrates how continuing to deny parole eligibility to lifers yields a high social and fiscal cost for Louisiana. Section III.B illustrates how life without parole fails to satisfy the penological justifications of a prisoner’s sentence—incapacitation, deterrence, retribution, rehabilitation. Section III.C introduces the United States Supreme Court’s recent decisions regarding juvenile life without parole and Louisiana’s recent vote to abolish non-unanimous jury verdicts, both of which have a strong bearing on the Louisiana Legislature’s decision to expand parole eligibility to lifers. The Conclusion to this Comment reiterates why the legislature should adopt the proposed amendment to Louisiana Revised Statutes § 15.574.4(A)(2).

## I. RETHINKING VIOLENT CRIME TO ACHIEVE TRUE REFORM

Across the country, state efforts to address mass incarceration largely involve mitigating penalties for nonviolent crime while leaving harsh

---

36. See generally *id.*; TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57. Under Louisiana’s habitual offender statute, individuals sentenced to a second or third felony conviction, or a fourth or subsequent nonviolent offense, were sentenced to life without parole. Turkington, *supra* note 35. Prior to 2018, Louisiana was the only state that allowed murder convictions with two dissenting jurors. Swenson, *supra* note 35.

37. See generally Nellis, *supra* note 24; TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57.



punishments for violent crime unchanged.<sup>38</sup> Where states' reform efforts purport to tackle longer sentences, they often exclude violent offenders, which vastly weakens the states' abilities to decrease incarceration rates.<sup>39</sup> For example, Oklahoma legislators introduced "The Parole of Aging Prisoners Act" in 2017 to reduce prison populations by expanding parole eligibility to inmates over 50 who had served 10 years or one-third of their sentences.<sup>40</sup> Because the bill excluded individuals convicted of 22 different violent crimes, however, only one-quarter of Oklahoma prisoners 50 years or older would ultimately be eligible under the new law.<sup>41</sup> Measures to exclude violent offenders from criminal justice reform legislation, like those taken in Oklahoma, are common because policymakers fear losing a "tough on crime" image.<sup>42</sup> If state legislators are serious about bringing impactful criminal justice reform and tangible public safety benefits to their communities, sentences for violent crimes should be the focus of reform legislation rather than the exception.<sup>43</sup>

Sentencing policies in the United States operate on the theory of proportionality, or the idea that a more severe crime deserves a more severe punishment.<sup>44</sup> Extreme punishments increase sentences for all offense levels because they serve as the "anchor point" against which to scale lesser penalties.<sup>45</sup> The administration of how and to whom states award the most severe penalties, such as life without parole, has lasting consequences for the criminal justice system as a whole.<sup>46</sup> As violent criminal offenders generally serve the longest sentences, legislative reforms that exclude violent offenders substantially impair the ability to affect incarceration rates.<sup>47</sup>

---

38. PFAFF, *supra* note 21, at 5–6.

39. Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, SENT'G PROJECT 6 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf> [<https://perma.cc/NXG6-7H6B>].

40. *Aging Prisoners Parole*, OKLA. PARDON & PAROLE BD., [https://www.ok.gov/ppb/Paroles\\_and\\_Revocations/Aging\\_Prisoners\\_Parole/index.html](https://www.ok.gov/ppb/Paroles_and_Revocations/Aging_Prisoners_Parole/index.html) [<https://perma.cc/7UP9-AJ9K>] (last visited Oct. 17, 2019).

41. *Id.* By the time the Oklahoma Legislature passed the bill in 2018, it had raised the parole eligibility age to 60 and categorically excluded all violent crimes, further mitigating the legislation's impact on prison populations. *Id.*

42. Nellis, *supra* note 39.

43. *Id.*

44. Mauer, *supra* note 25, at 2.

45. *Id.*

46. *Id.*

47. Ghandnoosh, *supra* note 25, at 138.

Louisiana has the highest percentage of individuals serving life or virtual life sentences in the country.<sup>48</sup> Recalculating Louisiana's overuse of the harshest penalties is therefore imperative if the state seeks to achieve true reform.<sup>49</sup> Unfortunately, like many states across the country, Louisiana continues to leave its harshest penalties untouched by reform legislation.<sup>50</sup> In order to make mass incarceration a thing of the past, both nationally and in Louisiana, long sentences need to be the focal point of reform legislation rather than the exception.<sup>51</sup>

*A. Efforts to Address Mass Incarceration in the United States Have Ignored Deeper Reforms*

The United States' history of mass incarceration has long stained its banner as "the land of the free."<sup>52</sup> Even though the United States only contains 5% of the world's population, the United States imprisons 25% of the world's prisoners.<sup>53</sup> The rise in American incarceration first began in the 1970s as a response to a national increase in violent crime.<sup>54</sup> The national increase in crime gave rise to tough-on-crime policies that supported enhanced criminal penalties and limited release options.<sup>55</sup> Although crime levels finally tapered throughout the 1990s, increasingly punitive policies remained popular, and incarceration rates continued to climb.<sup>56</sup> By 2008, the number of incarcerated Americans was seven times higher than that in 1972, ultimately peaking at 2.3 million people.<sup>57</sup>

Criminal justice reform did not truly gain popularity until the fiscal crisis of 2008.<sup>58</sup> With crime rates at a 40-year low and a recession tightening state budgets, state governments finally felt compelled to

---

48. Nellis, *supra* note 24.

49. See TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57.

50. See generally *id.*

51. See Mauer, *supra* note 25. A "long sentence" for purposes of this Comment is a sentence of 10 years or more. See generally TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57.

52. PFAFF, *supra* note 21, at 1.

53. NAT'L RESEARCH COUNCIL, *supra* note 33, at 2.

54. *Id.* The peak of the nation's crime wave hit in 1991, with the violent crime rate at 400% of its 1960 level. PFAFF, *supra* note 21, at 3.

55. Ghandnoosh, *supra* note 25, at 138; TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 14.

56. NAT'L RESEARCH COUNCIL, *supra* note 33, at 27.

57. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 14 (2017).

58. PFAFF, *supra* note 21, at 4.

pursue criminal justice reform.<sup>59</sup> In 2007, Texas became the first of many states to initiate reform through “justice reinvestment” policy<sup>60</sup>—an approach to criminal justice reform that utilizes locality-specific responses to high incarceration rates in a manner that promotes the most efficient allocation of state resources.<sup>61</sup> As of 2015, state implementation of justice reinvestment policies had altered the country’s incarceration landscape: 44 states had reduced crime rates; 35 states had reduced imprisonment rates; and 31 states had done both.<sup>62</sup>

### *B. Justice Reinvestment Policies Take a Modest Approach to Criminal Justice Reform*

Despite the optimistic trajectory and growing bipartisan support for criminal justice reform, drastic changes to America’s incarceration rate remain unlikely.<sup>63</sup> As politicians fear political backlash for appearing “soft on crime,” justice reinvestment legislation generally omits reforms to sentences for violent crime, even though violent offenders account for almost two-thirds of national prison growth since 1990.<sup>64</sup>

Today, individuals serving time for violent crime make up over half of all state prisoners and represent most of the state prisoners serving long sentences.<sup>65</sup> In fact, violent offenders have such a profound impact on the country’s criminal justice system that, even if American prisons were to release “half of all people convicted of property and public-order crimes, 100% of those in for drug possession, and 75% of those in for drug trafficking, our prison population would [only] drop from 1.3 million to

---

59. *Id.*

60. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 2. Today, over two-thirds of the states across the country have adopted a justice reinvestment policy. *Id.*

61. *Id.* at 14.

62. *Id.*

63. PFAFF, *supra* note 21, at 5–6. In *Locked In*, John F. Pfaff blames what he calls “The Standard Story” for mitigating the impact of current criminal reform efforts. Pfaff finds that The Standard Story, or the narrative that surrounds and fuels reform efforts, focuses on shocking stories, such as the War on Drugs and prison privatization, but gives too little attention to the less-shocking but more influential causes of prison growth. Shocking stories attract attention to the number of nonviolent offenders in prison but leave little attention for prisoners serving long sentences for violent crime. *Id.*

64. *Id.* at 5, 11.

65. *Id.*

950,000.”<sup>66</sup> A 35,000 prisoner decrease might seem significant, but it would only bring incarceration rates back to where they were in 1994—still three times greater than when the spike in incarceration began.<sup>67</sup> Focusing reform on sentences for nonviolent crime alone, therefore, results in only modest decreases to overall incarceration rates.<sup>68</sup> Pervasive policies that focus on mitigating sentences for violent offenders are necessary if states seek true reform.<sup>69</sup>

As long sentences play a principal role in creating a state of mass incarceration, one would expect sentences for violent crime to comprise a critical portion of reform legislation.<sup>70</sup> Although justice reinvestment proposals frequently cite the negligible public benefit and high cost of sentences exceeding 20 years,<sup>71</sup> proposals to lessen sentences for violent crimes rarely become legislation because legislators fear garnering political unpopularity among constituents and becoming easy targets for political opponents.<sup>72</sup> Nevertheless, meaningful reductions in the U.S. prison population will remain elusive unless states “rethink how they punish people convicted of violent crimes, where ‘rethink’ means ‘think about how to punish less.’”<sup>73</sup> Current approaches to punishing violent crime ignore the significant quantity of research demonstrating that offenders age out of crime and that violent offenders are the least likely to re-offend if released.<sup>74</sup> Incorporating research about violent behavior into states’ sentencing structures is critical if states are to achieve true reform—and no state is in greater need of true reform than Louisiana.<sup>75</sup>

---

66. *Id.* at 185. Examples of public order offenses include loitering and disturbing the peace. Dale E. Bennett, *Public Law: Criminal Law*, 34 LA. L. REV. 332, 332 (1974). Examples of common property offenses include auto theft, burglary, and fraud. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Era of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 341 at n. 19 (2009).

67. PFAFF, *supra* note 21, at 185.

68. Ghandnoosh, *supra* note 25, at 138–41. Using 2012’s annual decarceration rate of 1.8%, the highest rate as of 2013, it would take until 2101 to decrease the prison population to where it was in 1980. *Id.* at 139.

69. *See generally id.*

70. Nellis, *supra* note 39, at 18.

71. *See, e.g.*, TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 23; PFAFF, *supra* note 21, at 185.

72. PFAFF, *supra* note 21, at 185–87.

73. *Id.* at 185.

74. *Id.* at 186–87.

75. *Id.*

*C. Louisiana's Criminal Justice Reform Has Fallen Prey to "The Standard Story"*

Until 2018, Louisiana spent 15 years as the prison capital of the world, incarcerating a higher percentage of its people than any other state or country.<sup>76</sup> By 2012, Louisiana's prison population reached all-time highs, with approximately 40,000 people behind bars.<sup>77</sup> Even after a 9% decrease from 2012 to 2015, the Louisiana prison population in 2017 was five times higher than it was in the late 1970s, and it was growing 30 times faster than the state's resident population.<sup>78</sup> Mass incarceration was also taking its toll on the Louisiana budget.<sup>79</sup> In 2016, Louisiana spent \$700 million on corrections but also witnessed its 28th straight year with the highest murder rate in the country, highlighting the insignificant effect that high incarceration rates were having on crime.<sup>80</sup> Louisiana continued on its mass incarceration trajectory until 2017, when the legislature finally made the commitment to mend Louisiana's broken criminal justice system.<sup>81</sup>

---

76. Cindy Chang, *Louisiana is the World's Prison Capital*, TIMES-PICAYUNE (May 13, 2012, 3:00 P.M.), [https://www.nola.com/crime/index.ssf/2012/05/louisiana\\_is\\_the\\_worlds\\_prison.html](https://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html) [<https://perma.cc/YFQ5-FW4R>]. As the highest incarcerator in America until 2018, Louisiana was also the highest incarcerator in the world—locking up its citizens at a rate 5 times higher than Iran and 13 times higher than China. *Id.*

77. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 2. With approximately 40,000 behind bars, 1 of every 86 adults in Louisiana was serving time. Chang, *supra* note 76.

78. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 2. National data on imprisonment for 2014 revealed that Louisiana's imprisonment rate was 816 people incarcerated for every 100,000 residents—a rate double the national average and significantly higher than the second and third highest incarcerating states. *Id.*

79. *See generally id.*; LA. DEP'T OF PUB. SAFETY & CORRECTIONS, LOUISIANA'S JUSTICE REINVESTMENT REFORMS FIRST ANNUAL PERFORMANCE REPORT 5 (2018), [http://gov.louisiana.gov/assets/docs/JRI/LA\\_JRI\\_Annual\\_Report\\_FINAL.PDF](http://gov.louisiana.gov/assets/docs/JRI/LA_JRI_Annual_Report_FINAL.PDF) [<https://perma.cc/P45U-8KYE>] [hereinafter JRI PERFORMANCE REPORT].

80. JRI PERFORMANCE REPORT, *supra* note 79, at 5; Emily Lane, *Louisiana's Murder Rate Again Leads the U.S.: See how Other States Compare*, TIMES-PICAYUNE (Sept. 28, 2017, 11:37 PM), [https://www.nola.com/crime/index.ssf/2017/09/louisiana\\_murder\\_rate\\_fbi\\_crim.html](https://www.nola.com/crime/index.ssf/2017/09/louisiana_murder_rate_fbi_crim.html) [<https://perma.cc/ZEK3-JMCK>].

81. *See generally* Hamida Labi, *Louisiana Locks up More of its Citizens Than any Other State in the Nation, but Reform Is Coming*, ACLU (June 23, 2017, 3:30 PM), <https://www.aclu.org/blog/smart-justice/louisiana-locks-more-its-citizens-any-other-state-nation-reform-coming?redirect=blog/speak-freely/louisiana-lock>

*1. Louisiana's First Steps Toward "Decarceration"*

On June 15, 2017, Governor John Bel Edwards made history when he signed 10 bills, known as "The Justice Reinvestment" legislation ("JRI"), into law, marking the beginning of Louisiana's decarceration trajectory.<sup>82</sup> With the Louisiana Legislature's recognition of the high costs and low utility of mass incarceration, the JRI legislation received bipartisan support and became the most comprehensive criminal justice reform in state history.<sup>83</sup> Over the course of 10 years, the legislature projects that the package will reduce incarceration by 10% and save Louisiana \$262 million.<sup>84</sup> The JRI legislation requires the state to reinvest 70% of all money saved through the reforms into local public safety initiatives.<sup>85</sup>

The JRI legislation is largely a product of the Justice Reinvestment Task Force's ("Task Force") collaborative research.<sup>86</sup> In 2015, the Louisiana Legislature created the Task Force with the specific directive to identify and analyze the vehicles driving prison growth in Louisiana and to create a strategy for comprehensive reforms.<sup>87</sup> The Task Force spent over a year meeting with experts and holding public forums to determine the leading causes of Louisiana's mass incarceration.<sup>88</sup> In its final report

---

s-more-its-citizens-any-other-state-nation-reform-coming [https://perma.cc/3HP C-HHQT].

82. *Id.*

83. *Louisiana's 2017 Criminal Justice Reforms*, *supra* note 22.

84. *Id.*

85. LA. DEP'T OF PUB. SAFETY & CORRECTIONS, LOUISIANA'S JUSTICE REINVESTMENT REFORMS: PRACTITIONER'S GUIDE 38 (Aug. 1, 2017) [hereinafter JRI PRACTITIONER'S GUIDE]. Act 489 of the JRI legislation requires that 70% of the surplus budget from the reforms be reinvested into: (1) parishes, judicial districts, and nonprofits to expand evidence-backed prison alternatives; (2) victims' services, treatment, transitional housing, and victim-focused training for justice system professionals; (3) community supervision, recidivism reduction programming, and in-prison programming; and (4) juvenile justice initiatives and programs. *Id.*; see H.B. 489, 2017 Reg. Sess. (La. 2017).

86. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 2. The Louisiana Legislature created the Task Force in 2015 through House Concurrent Resolution 82. H.R. Con. 82, Reg. Sess. (La. 2015).

87. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 2. The 15-member Task Force was comprised of Senators, State Representatives, the Chief Justice of the Louisiana Supreme Court, State District Judges, representatives from the Department of Corrections and Public Defenders, and representatives and leaders of various nonprofits and criminal justice organizations. *Id.*

88. *Id.* at 7.

to the Louisiana Legislature, the Task Force proposed a series of policy recommendations that encompassed five priorities: (1) ensuring clarity and consistency in sentencing; (2) prioritizing prison beds for those who pose a serious threat to public safety; (3) strengthening community supervision; (4) removing barriers to successful reentry; and (5) reinvesting a substantial portion of the savings.<sup>89</sup> The legislature incorporated most of the Task Force's recommendations into the 10-bill JRI package enacted in 2017.<sup>90</sup>

## 2. Louisiana's 2017 Criminal Justice Reform Bills Left Gaps

By 2018, only one year after the enactment of the 2017 criminal justice reform package, Louisiana's incarceration rate fell below Oklahoma's, giving Louisiana the second highest incarceration rates in the country.<sup>91</sup> In addition to shedding its first place title, Louisiana also saved \$12.2 million, of which \$8.54 million was reinvested into communities and public safety efforts.<sup>92</sup> The recent successes of the program, however, merely represent "200 steps . . . [i]n the journey of 1,000 miles."<sup>93</sup> Although the one-year anniversary of the reforms marked a step in the right direction, significant gaps in the legislation remain.<sup>94</sup>

---

89. *Id.*

90. Grace Toohey, *Louisiana Sees Large Drop in Prison Population a Year After Historic Criminal Justice Reforms*, ADVOCATE (June 28, 2018), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_a5c01e10-7ad9-11e8-856e-ebf326bf26bc.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_a5c01e10-7ad9-11e8-856e-ebf326bf26bc.html) [<https://perma.cc/E6AD-BLTK>].

91. Alanah Odoms Hebert, *Louisiana Is no Longer the World's Prison Capital. Here's What's Next*, ACLU (July 2, 2018), <https://www.laclu.org/en/news/louisiana-no-longer-worlds-prison-capital-heres-whats-next> [<https://perma.cc/7K65-HQ6S>].

92. Grace Toohey, *Louisiana Reserved \$8.5M of Criminal Justice Reform Savings and Here's Where it Will Go*, ADVOCATE (Oct. 27, 2018), [https://www.theadvocate.com/baton\\_rouge/news/politics/article\\_a5c8b012-d244-11e8-819b-5fb590ae1508.html](https://www.theadvocate.com/baton_rouge/news/politics/article_a5c8b012-d244-11e8-819b-5fb590ae1508.html) [<https://perma.cc/CE6G-7N9M>]. As of July 2018, Louisiana's total prison population dropped by 7.6%, and the number of people imprisoned for nonviolent crimes decreased by 20%. *Id.*

93. William Brangham & Frank Carlson, *How 'The Incarceration Capital of America' Embraced Criminal Justice Reform*, PBS NEWS HOUR (Aug. 31, 2018), <https://www.pbs.org/newshour/show/how-the-incarceration-capital-of-america-embraced-criminal-justice-reform#transcript> [<https://perma.cc/4PQV-XBDU>].

94. *See generally* Hebert, *supra* note 91.

The JRI legislation has only had a negligible impact on the number of individuals serving time for violent offenses.<sup>95</sup> The JRI legislation primarily focused on reserving prison beds for those who pose a serious threat to public safety rather than nonviolent offenders.<sup>96</sup> As Louisiana was sending nonviolent offenders to prison one and a half to three times more than other southern states with similar crime rates, the Louisiana Legislature took steps to address the over-incarceration of nonviolent offenders.<sup>97</sup> The JRI effort represents a laudable step in the right direction, but the JRI legislation also creates the dangerous insinuation that populations excluded from the 2017 reforms necessarily pose a serious threat to public safety if released.<sup>98</sup> A full reading of the Task Force's initial Report and Recommendations to the legislature clarifies that the Task Force did not intend to adopt this conclusion.<sup>99</sup>

The Louisiana Legislature excluded a number of the Task Force's proposed reforms in the final JRI legislation.<sup>100</sup> One of the unadopted recommendations was Majority Recommendation 1, which provided some of the longest-serving inmates in Louisiana—including those convicted for violent offenses—an opportunity for parole consideration.<sup>101</sup> In the Task Force's report to the legislature, the Louisiana District Attorneys Association ("LDAA") posted a disclaimer stating that the LDAA is committed to working with the Task Force—but only to the extent that the policy recommendations "do not go beyond nonviolent and non-serious offenders."<sup>102</sup> Again, the fear of political vulnerability kept bipartisan support for reform from reaching longer sentences.<sup>103</sup> Admittedly, the drafting and enactment of the JRI legislation signaled a progressive step for Louisiana, which necessarily involved a delicate balance of numerous and varied interests.<sup>104</sup> To achieve true reform, however, legislators must

---

95. See JRI PERFORMANCE REPORT, *supra* note 79, at 6. The number of individuals serving time for violent offenses is approximately the same as it was before JRI. *Id.*

96. *Id.* at 14, 23.

97. *Id.* at 5.

98. *Id.* at 14, 23.

99. See TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

100. Hebert, *supra* note 91.

101. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

102. *Id.* at 5.

103. *Id.* at 5; PFAFF, *supra* note 21, at 185.

104. The drafters of the JRI legislation sought input from a diverse group of Louisianans, including law enforcement, victims of violence, community members, business leaders, district attorneys, and the previously incarcerated. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 2.



defer less to appealing all involved parties and instead place greater weight upon the scientific data supporting parole eligibility for lifers.<sup>105</sup>

## II. “LIFE MEANS LIFE”: EXCESSIVE USE AND ABUSE OF LIFE WITHOUT PAROLE IN LOUISIANA

Louisiana is one of the six remaining states where “life means life”—all life sentences foreclose the possibility of parole.<sup>106</sup> Furthermore, Louisiana broadly abuses the life sentence.<sup>107</sup> Louisiana currently stands as one of only two states where second-degree murder mandates a life-without-parole sentence.<sup>108</sup> Since the 1970s, Louisiana has steadily increased the use of life sentences and decreased the possibility of release for prisoners serving life.<sup>109</sup> In 2003, Louisiana had 3,822 lifers, or 10% of prisoners, serving life without parole.<sup>110</sup> By 2015, the number serving life without parole increased to 4,850, approximately 12% of all Louisiana prisoners.<sup>111</sup> As the climb in individuals serving life sentences played a critical role in Louisiana’s rise to mass incarceration, a change in the state’s utilization of life sentences will be crucial to successful reform.<sup>112</sup>

### *A. From 10 Years to Life: Understanding the Motivations for Longer Sentences in Louisiana*

Although Louisiana has one of the highest percentages of prisoners serving life without parole, that was not always the case.<sup>113</sup> From the 1920s to the 1970s, a life sentence in Louisiana frequently meant only 10 years in prison.<sup>114</sup> Commentators refer to this pre-1970s practice as the “10/6

105. Ghandnoosh, *supra* note 25, at 139–40.

106. MARIEKE LIEM, *AFTER LIFE IMPRISONMENT: REENTRY IN THE ERA OF MASS INCARCERATION* 6 (2016). The other five states where life sentences do not carry the possibility of parole are Illinois, Iowa, Maine, Pennsylvania, and South Dakota. *Id.*

107. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57.

108. *Id.* at 56. Mississippi is the only other state that mandates life without parole for second-degree murder. *Id.* For comparison, in Texas, second-degree murder is punishable by a 5- to 99-year sentence, with parole eligibility after 30 years. In Arkansas, second-degree murder carries a 10- to 40-year sentence. *Id.*

109. Marc Mauer et al., *The Meaning of “Life”: Long Prison Sentences in Context*, SENT’G PROJECT 6 (May 2004).

110. *Id.*

111. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

112. *Id.*

113. Nellis, *supra* note 24.

114. Nellis, *supra* note 39.

law,” where prisoners who demonstrated good conduct in prison could be released after serving 10 years and 6 months of their life sentences.<sup>115</sup> For Louisiana, the 1970s introduced a tough-on-crime political movement at the same time that the state was restructuring its prisons to accommodate larger populations.<sup>116</sup> This restructuring enabled Louisiana to handle the influx of prisoners without having to moderate sentences or release prisoners to make space.<sup>117</sup> Along with these structural changes, the definition of “life” changed in Louisiana.<sup>118</sup> By the 1990s, rather than the possibility of 10 years and 6 months, “life meant life” in Louisiana.<sup>119</sup> Today, absent a pardon by the governor, a life sentence likely means dying in prison.<sup>120</sup> In order to truly understand why Louisiana has yet to adjust its excessive use of life sentences, one must understand the politically motivated decisions that propelled the increase in life sentences and the actors that continue to benefit from its rise.<sup>121</sup>

### *1. Bad Timing: Prison Expansion During the Tough-on-Crime Era*

Unlike Louisiana’s sentencing structure, which has become progressively more severe, prison conditions in Louisiana have actually witnessed a dramatic improvement.<sup>122</sup> Louisiana gained national attention for its notorious prison conditions in 1971 after four inmates at the Louisiana State Penitentiary—commonly referred to as “Angola” and previously referred to as the “bloodiest prison in the nation”—brought suit against the state for unconstitutional conditions.<sup>123</sup> Upon review, United States Magistrate Judge Frank Polozola of the Middle District of Louisiana agreed with the inmate plaintiffs, finding that the conditions at Angola

---

115. Kate Hatheway, *Creating a Meaningful Opportunity for Review: Challenging the Politicization of Parole for Life Sentenced Prisoners*, 54 AM. CRIM. L. REV. 601 (2017).

116. See Lydia Pelot-Hobbs, *Louisiana’s Turn to Mass Incarceration: The Building of a Carceral State*, AAG (February 1, 2018), <http://news.aag.org/2018/02/louisianas-turn-to-mass-incarceration-the-building-of-a-carceral-state/> [<https://perma.cc/5MT7-43UM>].

117. *Id.*

118. Nellis, *supra* note 39.

119. Pelot-Hobbs, *supra* note 116.

120. Nellis, *supra* note 39.

121. See *infra* Section II.A.1.

122. Pelot-Hobbs, *supra* note 116.

123. *Id.*; William Quigley, *Louisiana Angola Penitentiary: Past Time to Close*, 163 LOY. J. PUB. INT. L. 203, 204 (2018).

would “shock the conscience of any right thinking person.”<sup>124</sup> Federal District Judge Elmer Gordon West adopted Polozola’s findings and ordered that Louisiana take serious steps to rectify the unconstitutional conditions.<sup>125</sup> Addressing the most immediate issue—overcrowding—the Middle District of Louisiana ordered state-owned prisons to reduce the number of prisoners in each facility by almost half.<sup>126</sup> After the Fifth Circuit Court of Appeals upheld the Middle District’s decision, the state was left with only two options: prison reform or prison expansion.<sup>127</sup>

Having observed the strain that increasingly long sentences were having on Louisiana’s already-burdened prison system, many actors inside the Louisiana Department of Corrections (“DOC”) used the federally mandated reform as an opportunity to advocate for expanded parole eligibility and shorter sentences.<sup>128</sup> The DOC Secretary, the Angola Warden, and several advocacy groups banded together to lobby for the early release of prisoners, especially those serving life sentences.<sup>129</sup> The District Attorney of New Orleans, Harry Connick, however, had just introduced a well-financed “tough on crime” campaign that instituted mandatory minimum sentences and reduced parole eligibility.<sup>130</sup> Connick’s largely successful lobbying quickly spun the then-current narrative of reform into one of fear and retribution.<sup>131</sup> By the 1980s, Louisiana Governor David Treen ensured that jail construction took priority over education, health care, and levees in the state budget—“not out of a desire to make life easier for these convicts but to make sure that no judge feels compelled to release somebody back into society who should not be there just because prisons are overcrowded.”<sup>132</sup> The focus of

---

124. See *Williams v. Edwards*, 547 F.2d 1208–09 (5th Cir. 1977); Wilbert Rideau & Billy Sinclair, *Prisoner Litigation: How it Began in Louisiana*, 45 LA. L. REV. 1060, 1074 (1985). The judge cited evidence of medical neglect, unsafe facilities, discrimination, and abuse. See *Williams*, 547 F.2d at 1208–9.

125. *Williams*, 547 F.2d at 1208; Rideau & Sinclair, *supra* note 124, at 1074.

126. Pelot-Hobbs, *supra* note 116.

127. *Williams*, 547 F.2d at 1208. See generally Pelot-Hobbs, *supra* note 116; Rideau & Sinclair, *supra* note 124, at 1074.

128. Pelot-Hobbs, *supra* note 116.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* (citing *Comments on Governor David C. Treen’s Criminal Justice Package for Possible Use by President Reagan in his September 28 Speech to the International Association of Chiefs of Police*, Folder 4: Law Enforcement and Criminal Justice 1981, Box 796: L 1981, David Treen Papers, Tulane University).

the state government thus shifted from moderating incarceration rates to prioritizing their rise.<sup>133</sup>

## 2. *Capitalizing on the Situation: Local Actors Learned to Profit off of Prisoners*

The federal mandate requiring state prisons to reduce overcrowding simply transferred the problem from the state to the parishes.<sup>134</sup> Accordingly, the mandate forced parish prisons, which parishes themselves owned and operated, to accommodate the overflow of state inmates while the DOC scrambled to create new prisons.<sup>135</sup> Parishes, however, did not build prisons to handle the dramatic uptick in population.<sup>136</sup> By the 1980s, the mandate created a situation in Orleans Parish so severe that the Sheriff began housing prisoners in tents outside of the prison for lack of adequate space.<sup>137</sup> To incentivize local prisons to house state prisoners and expand their facilities, the state raised the per diem rate of \$4.50 per day per prisoner in 1975 to \$18.25 by 1980, which not only compensated parishes for housing state prisoners, but also made it profitable to do so.<sup>138</sup> By 2012, local prisons housed over half of all state inmates in Louisiana, a higher percentage than any other state.<sup>139</sup> Private companies quickly jumped at the opportunity as well, accepting state money to house prisoners and prioritizing occupied beds to make a profit.<sup>140</sup>

The vast expansion of local prisons caused rapid prison growth and obviated the need to moderate sentence lengths, as was required in other states, to control incarceration rates.<sup>141</sup> As a result, Louisiana slowly developed one of the most severe sentencing structures in the country, sending more people to prison to serve longer sentences than any other state.<sup>142</sup> Local law enforcement and businessmen became strong lobbyists

---

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Chang, *supra* note 32.

140. *Id.*

141. Chang, *supra* note 76.

142. Elizabeth Johnson, *Life in Louisiana: People Aging in Prison Seek A Second Chance*, S. POVERTY L. CTR. (March 5, 2018), <https://www.splcenter.org/news/2018/03/05/life-louisiana-people-aging-prison-seek-second-chance> [<https://perma.cc/9ASQ-Y4Z4>].

for harsher sentences to maintain their own salaries.<sup>143</sup> Today, the two groups that helped to build the incarceration empire, the Louisiana Sheriffs' Association and the LDAA, remain strong lobbyists against sentence modification in Louisiana.<sup>144</sup>

A culmination of tough-on-crime policies, prison expansion, and the newly created “business” of incarceration incentivized local actors to support legislation that sent more individuals to prison for longer.<sup>145</sup> The Louisiana Legislature primarily increased sentence lengths through decreased parole eligibility.<sup>146</sup> New legislation progressively increased the time that prisoners needed to wait before they could apply for parole and began to categorically bar certain populations, such as violent offenders, from parole eligibility.<sup>147</sup> Eventually, the possibility of parole disappeared altogether for individuals serving life sentences, leaving Louisiana with a growing population of older prisoners, many of whom had aged out of crime and would pose little to no risk to society if released.<sup>148</sup> The removal of parole eligibility was instrumental in creating Louisiana’s state of mass incarceration; thus, an increase in parole eligibility—specifically, to older, rehabilitated, prisoners who have served the longest sentences—is necessary if Louisiana endeavors to fully embrace impactful criminal justice reform.<sup>149</sup>

### *B. How Parole Functions in Louisiana*

When a parole board grants parole, the board concludes that there is reasonable probability that the state can release the prisoner without detriment to the community.<sup>150</sup> Parole is simply the carrying out of one’s

---

143. Chang, *supra* note 32.

144. Maya Lau, *Reducing Louisiana’s Prison Population Could Save Money and Reduce Crime*, ADVOCATE (June 17, 2016, 2:20 PM), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_0c3b2fe9-f5b2-55f3-9b4e-a0ad13c29878.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_0c3b2fe9-f5b2-55f3-9b4e-a0ad13c29878.html) [https://perma.cc/PC7Y-2MTG].

145. *See generally* Chang, *supra* note 32.

146. *Id.*

147. *Id.*

148. *See* Mauer et al., *supra* note 109, at 6.

149. *See generally* TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57.

150. LA. REV. STAT. § 15:574.4.1(B) (2018). As stated in Louisiana Revised Statutes § 15:574.11, “Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint, and the granting, conditions, or revocation of parole rest in the discretion of the committee on parole.” LA. REV. STAT. § 15:574.11 (2018). Parole is an executive rather than a judicial function, and a prisoner therefore has no due process rights in the granting

sentence outside of the prison walls, allowing a prisoner to return to society while still under state supervision for the remainder of his sentence.<sup>151</sup> The paroled prisoner may live among the public, but he faces certain restrictions on his freedom that the state and the parole board dictate prior to release.<sup>152</sup> Despite the onerous parole restrictions, most prisoners revere parole as an opportunity to live a semblance of a normal life.<sup>153</sup> Parole offers an opportunity to visit loved ones, watch children grow, hold a normal job, and, most importantly, make one's own choices.<sup>154</sup> Parole provides a glimpse of the most fundamental value stripped away in prison: freedom.<sup>155</sup>

State statutes generally outline parole eligibility in relation to the type of sentence.<sup>156</sup> In addition to the standard parole provisions, many states have a “geriatric” parole statute.<sup>157</sup> Geriatric parole statutes grant parole eligibility to prisoners over a certain age who have served an enumerated portion of their sentences.<sup>158</sup> States often utilize geriatric parole as a way to mitigate costs because older inmates carry a far lower public safety risk

---

or denying of parole. Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 235 (2017); see also *Bosworth v. Whitley*, 627 So. 2d 629 (La. 1993) (holding that a “lifer” had no liberty interest in parole because the state’s parole statute gave sole discretion to the pardon board).

151. Hatheway, *supra* note 115, at 624.

152. See generally, Edward E. Rhine et al., *Improving Parole Release in America*, 28 FED. SENT’G REP. 96, 101 (2015). Such limitations frequently include, among others, refraining from alcohol and drugs, observing a curfew, living in DOC-approved housing, and completing community service. *Id.* at 102. A parole officer is assigned to the paroled prisoner to ensure compliance with the mandated conditions. *Id.* In the case of a violation, the prisoner is usually sent back to prison for a length of time that varies with the nature of the re-offense. *Id.* at 101. A technical violation (such as missing curfew) might result in a few nights back in prison, whereas a felony offense will clearly result in a much more severe re-sentencing. *Id.*

153. See generally LIEM, *supra* note 106, at 84.

154. See *id.* at 84–85.

155. See generally *id.* at 119–54.

156. LA. REV. STAT. § 15:574.4(A) (2018). For example, in Louisiana, a person serving time for a violent offense with no prior felony convictions is eligible for parole after serving 65% of the sentence, whereas a person serving time for a nonviolent offense is eligible for parole after serving 25% of the sentence. LA. REV. STAT. § 15:574.4(A)(1)(a)–(b)(ii) (2018).

157. Nellis, *supra* note 39, at 6.

158. *Id.*

if released and impose a heavier financial burden on the state than younger inmates.<sup>159</sup>

The Louisiana Legislature introduced the standards for Louisiana's current geriatric parole policy in Act 790 of the 1990 Louisiana Regular Session, now incorporated into Louisiana Revised Statutes § 15:574.4(A)(2).<sup>160</sup> Louisiana's geriatric parole statute allows prisoners sentenced to at least 30 years in prison to obtain the possibility of parole after serving 20 years of their sentence and reaching age 45.<sup>161</sup> The statute, however, renders prisoners serving life sentences ineligible for the possibility of parole unless the governor commutes the sentence.<sup>162</sup> Therefore, a prisoner serving a 7,000-year sentence may be eligible for parole after 20 years of his sentence, but parole eligibility on a life sentence is impossible absent a pardon and commutation of the sentence by the governor.<sup>163</sup>

159. *Id.*

160. Act No. 790, 1990 La. Acts 1794 (codified at LA. REV. STAT. § 15:574.4(A)(2) (1990)).

161. LA. REV. STAT. § 15:574.4(A)(2) (2018).

162. *See id.*

Notwithstanding the provisions of Paragraph (1) of this Subsection or any other law to the contrary, unless eligible for parole at an earlier date, a person committed to the Department of Public Safety and Corrections for a term or terms of imprisonment with or without benefit of parole for thirty years or more shall be eligible for parole consideration upon serving at least twenty years of the term or terms of imprisonment in actual custody and upon reaching the age of forty-five. This provision shall not apply to a person serving a life sentence unless the sentence has been commuted to a fixed term of years.

*Id.* The commutation of a sentence simply means that a life sentence was changed to reflect some determinate time period; consequently, the process is frequently referred to as “getting your numbers.” Shihadeh et al., *supra* note 29, at 4. In addition to lifers, Louisiana's geriatric parole statute also excludes individuals convicted of armed robbery, crimes of violence, or sex offenses. LA. REV. STAT. § 15:574.4(A)(2) (2018).

163. Mauer et al., *supra* note 109, at 6. A pardon does not mean that an inmate is “forgiven” or can walk away free, but rather that the individual's sentence is changed from an indeterminate sentence to a determinate sentence—from life to 50 years—so that the individual is then parole eligible. Shihadeh et al., *supra* note 29, at 4. For example, if the governor pardons a lifer who served 45 years and commutes his life sentence to 40 years, the lifer would be released without supervision from the state. If the governor only commutes the sentence to 80 years, the prisoner would have to serve another 35 years, but he would be eligible for parole. *See* LA. REV. STAT. § 15:574.4(A)(2) (2018).

Under the current statute, an individual serving life may only achieve parole through the pardon process.<sup>164</sup> If, after reviewing the prisoner's file and hearing his case, the Board of Pardons recommends the prisoner for pardon, the recommendation goes to the governor's desk for signing.<sup>165</sup> The governor's decision to grant or deny the request for pardon, however, is highly political and greatly dependent on who is in office.<sup>166</sup> If the governor decides to grant the pardon, the governor does so by commuting the life sentence to a numerical sentence, a process colloquially referred to as "getting your numbers."<sup>167</sup> If the prisoner has not already served the length of the commuted sentence, he will then apply for parole and restate his case before the Committee on Parole.<sup>168</sup> The Committee on Parole consists of the same five people on the Board of Pardons, with the addition of two governor-appointed members who do not serve on the Board of

---

164. LA. REV. STAT. § 15:574.4(A)(2) (2018). The Louisiana Legislature has taken affirmative measures to increase the difficulty and decrease the chances of a prisoner applying for a pardon. Mauer et al., *supra* note 109, at 6. During the 1973 Louisiana Constitutional Convention, the legislature added that the governor cannot commute a sentence absent a recommendation from the newly created Board of Pardons that the prisoner is pardon-eligible. In 1995, the legislature again increased the difficulty of receiving a pardon by stipulating that at least one member of the board must be a representative from a Louisiana nonprofit victim's advocacy organization. Two years later, the legislature passed a law requiring that four of the five members agree upon a recommendation before it could reach the governor. *Id.*

165. LA. REV. STAT. § 15:572.5(A) (2018). The Board of Pardons consists of five members that the governor appoints who serve for as long as the appointing governor is in office. *Id.* § 15:572.1(A)(1)(a). In deciding whether to recommend an applicant for pardon, the Board of Pardons reviews, among other things, the records surrounding the facts and circumstances of the incarcerating offense, prior criminal record, social history, prison record. *See id.* § 15:572.5(A).

166. Julia O'Donoghue, *John Bel Edwards Reduces 22 Prisoners' Terms—And Gets Angola's Attention*, TIMES-PICAYUNE (March 9, 2017), [https://www.nola.com/news/politics/article\\_13317f8f-7f6b-55e5-a4ea-455c7456dbb9.html](https://www.nola.com/news/politics/article_13317f8f-7f6b-55e5-a4ea-455c7456dbb9.html) [<https://perma.cc/7QQD-PNT7>]. In his first year in office, Governor John Bel Edwards, a Democrat, commuted the sentences of 22 inmates. *Id.* Bobby Jindal, Governor Edwards' Republican predecessor, commuted a total of three sentences during his eight-year term. *Id.*

167. Shihadeh et al., *supra* note 29, at 4.

168. *See* LA. REV. STAT. § 15:574.2.



Pardons.<sup>169</sup> In 2016, the Committee granted parole to 44% of applicants.<sup>170</sup> Under Louisiana's current geriatric parole statute, therefore, a lifer's only chance at parole eligibility involves going through the lengthy, unpredictable, and often unsuccessful pardon process.<sup>171</sup>

If the Louisiana Legislature expanded parole eligibility to lifers, an individual's release would depend on an objective review of his or her character rather than the political persuasion of the current governor.<sup>172</sup> Additionally, bypassing the pardon process increases administrative efficiency because five of the seven members of the Committee on Parole comprise the Board of Pardons.<sup>173</sup> The applicant, therefore, would avoid the same evaluation twice by the same five people.<sup>174</sup> Considering that a significant amount of evidence indicates that lifers pose a low public safety risk if released, the current exclusion of lifers from Louisiana's parole statute is unnecessary and inefficient.<sup>175</sup> The desire to bring efficiency and administrative justice to Louisiana's parole system, unfortunately, is not universal.

### *C. Recent Efforts to Modify the Statute Were Quickly Shot Down*

During the 2018 Louisiana Regular Legislative Session, Senator Troy Carter introduced Senate Bill 269, which proposed an amendment to include lifers under Louisiana's geriatric parole statute.<sup>176</sup> The amendment would have allowed parole eligibility for lifers who had no prior violent convictions, had not been convicted of first-degree murder, had reached the age of 50, and had served at least 30 years of their sentences.<sup>177</sup> Under Senator Carter's proposed bill, eligible lifers would have gained the

169. *See id.* "The crime victim or the victim's family, a victim advocacy group, and the district attorney or his representatives, may appear before the committee on parole" in person or by telephone for purposes of voicing an opinion as to the parole ruling. *Id.* § 15:574.1(A)(2).

170. LA. DEP'T OF PUB. SAFETY & CORRECTIONS, 2016 ANNUAL REPORT: LOUISIANA BOARD OF PARDONS AND PAROLE 32 (2016).

171. *See generally* LA. REV. STAT. § 15:574.4(A)(2); O'Donoghue, *supra* note 166.

172. *See generally* O'Donoghue, *supra* note 166.

173. *See* LA. REV. STAT. § 15:574.2.

174. *See id.*

175. *See* discussion *infra* Part III.

176. Mark Mallard, *Louisiana Legislators Refuse to Loosen Sentencing and Parole Rules*, ADVOCATE (April 17, 2018, 11:41 PM), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_b40a5192-42c2-11e8-b6aa-73e3c8850e70.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_b40a5192-42c2-11e8-b6aa-73e3c8850e70.html) [<https://perma.cc/6XXU-VEP2>].

177. S.B. 269, 2018 Reg. Leg. Sess. (La. 2018).

possibility of parole without undergoing the often fruitless pardon process.<sup>178</sup> If the legislature had passed the bill, the state could have saved an estimated \$16.7 million per year.<sup>179</sup> To the state's detriment, however, the Senate Judiciary Committee quickly added an amendment to Senate Bill 269 that excluded prisoners convicted of second-degree murder and first-degree rape from eligibility.<sup>180</sup> The amendment, as a byproduct of the LDAA's successful lobbying, severely "watered down" the bill and drastically narrowed the number of individuals the bill could affect.<sup>181</sup> Even with the amendment, however, the bill failed on the Senate floor due to a fear of backlash from political opponents and constituents for releasing "violent criminals."<sup>182</sup>

Senate Bill 269 demonstrates that at least some legislators acknowledge the need for deeper reform beyond the JRI legislation.<sup>183</sup> Specifically, the legislature is beginning to recognize the incontrovertible evidence that the social and fiscal cost of life without parole for most prisoners, including violent offenders, is simply unnecessary.<sup>184</sup>

### III. AN INCLUSIVE PROPOSAL: EXPANDING GERIATRIC PAROLE ELIGIBILITY TO LIFERS

The Louisiana Legislature must reform its use of life sentences if it is truly committed to ending its practice of mass incarceration.<sup>185</sup> Of the approximately 4,937 prisoners currently serving life sentences in Louisiana, many are older, rehabilitated, and no longer pose a threat to public safety.<sup>186</sup> Continued incarceration of individuals who have "aged out of crime" perpetuates Louisiana's practice of over-incarceration and significantly misallocates resources.<sup>187</sup> The National Research Council defines an excessive sentence as one that incarcerates an individual

---

178. *See id.*

179. Mallard, *supra* note 176.

180. S.B. 269, 2018 Reg. Leg. Sess. (La. 2018).

181. Mallard, *supra* note 176. In fact, the amendment diminished the bill's impact so substantially that the executive director of the LDAA stated, "I guess we're still opposed, but it's hard for me to get up here and argue against the bill because I'm not sure what it does." O'Donoghue, *supra* note 23.

182. *See* S.B. 269, 2018 Reg. Leg. Sess. (La. 2018).

183. Mallard, *supra* note 176.

184. *Id.*

185. *See generally* Nellis, *supra* note 24; TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57.

186. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 16.

187. Ghandnoosh, *supra* note 25, at 147.

beyond the time necessary to achieve desired penological goals.<sup>188</sup> Louisiana's use of life without parole as a mandatory minimum fails to adequately fulfill the penological goals of incapacitation, deterrence, rehabilitation, and retribution.<sup>189</sup> Furthermore, Louisiana's current geriatric parole statute, Louisiana Revised Statutes § 15:574.4(A)(2) ("Act 790"), mandates the administration of excessive and unjust sentences.<sup>190</sup> The recent Supreme Court cases declaring juvenile life without parole unconstitutional, as well as Louisiana's vote to end non-unanimous juries, demonstrate that public support is shifting away from strictly punitive policies that do little to further public safety.<sup>191</sup> As Louisiana's current geriatric parole statute yields only diminishing returns for the state—creating a high cost and producing no societal benefit—the time has arrived for the Louisiana Legislature to amend Act 790 to expand parole eligibility for lifers.<sup>192</sup>

#### *A. The Rising Cost of Life Without Parole*

Louisiana's denial of parole eligibility to lifers creates a significant misallocation of valuable resources that the legislature could better allocate toward programs proven to increase public safety.<sup>193</sup> Not only is the legislature's decision to spend resources by incarcerating older offenders inefficient, but it also requires an increasing amount of taxpayer dollars.<sup>194</sup> The cost of incarceration is rising, not only from the number of people behind bars, but also because of the prison population's changing demographics.<sup>195</sup> As the world's population grows older, so do the world's prison populations.<sup>196</sup> Correctional facilities around the world are trying to combat the "aging crisis," but nowhere is the impact more severe than in

---

188. NAT'L RESEARCH COUNCIL, *supra* note 33, at 326.

189. *See generally* discussion *infra* Section III.B.

190. *See generally* discussion *infra* Section III.B.

191. *See generally* discussion *infra* Section III.B.

192. *See infra*, Sections III.A–B.

193. *See* Ghandnoosh, *supra* note 25, at 147. For example, measures such as increased police presence and greater access to mental health services and substance abuse programming have a much more significant impact on public safety than sentence length. *See* Mauer et al., *supra* note 109, at 18–19; Ghandnoosh, *supra* note 25, at 147. For more information on the negligible impact that incarceration has on public safety, see discussion *infra* Section III.B.2.

194. *See* Ghandnoosh, *supra* note 25, at 149.

195. *Id.*

196. *Id.* "In the United Kingdom, the overall prison population grew by 51% between 2000 and 2009, while the population over the age of sixty grew by 216%." Bedard et al., *supra* note 31, at 917.

the United States.<sup>197</sup> A population of aging baby boomers, coupled with the American sentencing scheme that keeps more prisoners behind bars for longer, is placing an increasing strain on state and federal resources.<sup>198</sup> In less than 20 years, “the total [United States] prison population doubled while the number of incarcerated individuals aged 55 or older increased by 300%.”<sup>199</sup> Since 2000, prisoners over the age of 45 represent the fastest growing population in both state and federal prisons.<sup>200</sup> This growing population of geriatric inmates places an incredible burden on state budgets and resources.<sup>201</sup>

Elderly inmates are costly to accommodate.<sup>202</sup> In order to provide adequate care to aging prisoners, correctional facilities must tend to extensive medical needs and provide increased care.<sup>203</sup> Prisoners often experience “accelerated aging” from the toll of harsh living conditions and suffer age-related maladies earlier in life than non-incarcerated individuals of the same age.<sup>204</sup> Prisoners in the United States, however, are the only group of people with a constitutionally guaranteed right to health care.<sup>205</sup> Given the mandated quality of health care in penal systems, state prisoners actually experience a lower mortality rate than that of the general population.<sup>206</sup> As a product of the rising level of geriatric prisoners who are now living longer in prisons, states must spend more on prison medical care and facility resources, creating sizable costs for both the correctional system and the taxpayers.<sup>207</sup>

The growing elderly population in Louisiana prisons poses a true fiscal problem.<sup>208</sup> Louisiana has a rate of life sentences twice the national average, and almost all individuals serving life in Louisiana will likely die in prison under the current parole eligibility statute.<sup>209</sup> The previous warden of Angola prison—which is home to 84.1% of the lifers in Louisiana—has even complained about his prison “turning into a nursing

---

197. Bedard et al., *supra* note 31, at 917.

198. Timothy Curtin, *The Continuing Problem of America's Aging Prison Population*, 15 ELDER L.J. 473, 479 (2007).

199. Bedard et al., *supra* note 31, at 917.

200. Ghandnoosh, *supra* note 25, at 149.

201. *Id.*

202. LIEM, *supra* note 106, at 4.

203. *Id.*

204. *Id.*

205. Curtin, *supra* note 198, at 475–76.

206. *Id.* at 476.

207. *Id.* at 473.

208. Nellis, *supra* note 24.

209. *Id.*

home.”<sup>210</sup> Louisiana spends on average about \$58 per day, or \$65,000 per year, for an inmate to stay in prison in Louisiana.<sup>211</sup> This number rises to \$80,000 per year if the inmate is sick.<sup>212</sup> Under the first draft of Senate Bill 269, which provided parole eligibility for lifers but excluded individuals convicted of first-degree murder, 565 inmates in Louisiana would have been eligible for consideration before the parole board.<sup>213</sup> If all 565 inmates were released on parole, the state would save approximately \$3.5 million.<sup>214</sup> Expanding Act 790 to allow parole eligibility to lifers would save the state and taxpayers significant amounts of money, 70% of which would be reinvested into improved public safety measures.<sup>215</sup> Considering an extensive amount of research proves that the continued incarceration of older, rehabilitated lifers does nothing to improve public safety, Louisiana’s refusal to extend parole eligibility to lifers is unfounded.<sup>216</sup>

*B. An Unjustified Sentence: The Evidence Undermining the Exclusion of Lifers from Act 790*

The practice of incarceration relies on four basic justifications: incapacitation, deterrence, retribution, and rehabilitation.<sup>217</sup> A life-without-parole sentence reflects a determination that the individual is incapable of rehabilitation, that he or she would be a threat to public safety on release, and that the crime is one that warrants a punishment severe

210. Giovanna Shay, *Double-Edged Pairing Knives: Human Rights Dilemmas for Special Populations*, 38 ABA HUM. RTS. (2011); FACT SHEET, LA. DEP’T PUB. SAFETY & CORRECTIONS 38 (June 30, 2018).

211. *Hearing on S.B. 269 Before S. Judiciary Comm. B.*, 2018 Reg. Leg. Sess., (April 10, 2018), [http://senate.la.gov/video/videoarchive.asp?v=senate/2018/04/041018JUDB\\_0](http://senate.la.gov/video/videoarchive.asp?v=senate/2018/04/041018JUDB_0) [<https://perma.cc/RK8F-QH3F>].

212. *Id.* For a comparison, Louisiana spent approximately \$11,038 per student for public elementary and secondary education in 2016. *2016 Annual Survey of School System Finance: Per Pupil Amounts for Current Spending of Public Elementary-Secondary School Systems by State*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/econ/school-finances/secondary-education-finance.html> [<https://perma.cc/68CS-VTWG>] (last revised May 17, 2018).

213. *Hearing on S.B. 269*, *supra* note 211.

214. *Id.*

215. JRI PRACTITIONER’S GUIDE, *supra* note 85, at 38.

216. *See* PFAFF, *supra* note 21, at 191.

217. John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 540 (2016).

enough to deter others.<sup>218</sup> Although the justifications are valid, increasing amounts of evidence reveal that life-without-parole sentences do not effectively achieve these goals.<sup>219</sup> In fact, the evidence indicates that longer sentences are actually counterproductive—they do not increase public safety but instead promote high social and monetary costs.<sup>220</sup>

### 1. Incapacitation

Keeping older prisoners behind bars fails to fulfill the incarceration function of incapacitation.<sup>221</sup> Incapacitation rests on the notion that the offender presents a danger to society and that the state must remove him to keep the community safe.<sup>222</sup> Incapacitating an individual longer than necessary, however, creates diminishing returns for the correctional system—resulting in a low impact on public safety and high cost of incarceration.<sup>223</sup> The key inquiry thus becomes: at what sentence length is the function of incapacitation served and the individual rehabilitated?<sup>224</sup> For individuals serving a life sentence in Louisiana, the state answered the question with the blanket parole exclusion encapsulated in Act 790.<sup>225</sup>

Louisiana's current geriatric parole statute embraces a static theory of violence—the idea that an individual will always present the same level of danger to society as depicted by the nature of the crime.<sup>226</sup> A considerable amount of contrary evidence, however, demonstrates that the propensity to engage in criminal activity is not static but, rather, fluctuates over the course of a lifespan.<sup>227</sup> Studies repeatedly confirm that criminal activity decreases after late adolescence into early adulthood as individuals “age

---

218. Nazgol Ghandnoosh, *Delaying A Second Chance: The Declining Prospects for Parole on Life Sentences*, SENT'G PROJECT 11 (2017).

219. See PFAFF, *supra* note 21, at 191.

220. *Id.*

221. Ghandnoosh, *supra* note 25, at 145.

222. *Id.*

223. *Id.*

224. *Id.*

225. See LA. REV. STAT. § 15:54.4 (2018).

226. PFAFF, *supra* note 21, at 190. Such a determination rests on the assertion that individuals who engage in violence are “inherently violent, rather than [the idea that they are people] who have engaged in violence at a particular moment in time.” *Id.* Life without parole, by definition, is a judgment that an individual will be capable of the same level of criminal activity throughout his lifetime and thus requires a lifetime of incapacitation. *Id.*

227. See Raymond E. Collins, *Onset and Desistance in Criminal Neurobiology and the Age-Crime Relationship*, 39(3) J. OFFENDER REHABILITATION 1, 2 (2004).

out of crime.”<sup>228</sup> Because evidence shows that most individuals with life sentences will age out of crime, Louisiana’s practice of excluding lifers from parole eligibility results in questionable public benefits and places a financial and social burden on the state’s systems.<sup>229</sup>

*a. Growing Up and Out of Crime: Predicting Criminality with the Age Crime Curve*

The relationship between age and crime is arguably the most widely accepted fact about crime.<sup>230</sup> Approximately 100 years of studies examining the relationship between criminality and age among all individuals prove that an individual who engaged in violence at a particular time, whether it be murder or some lesser offense, will most likely lose the desire to engage in criminal activity by the time he or she reaches 45.<sup>231</sup> Scholars researching the relationship between age and crime consistently find that the data forms a bell curve, demonstrating an inverse relationship between the two factors.<sup>232</sup> This relationship is commonly referred to as the age–crime curve, and it is of vital importance in determining how long to incapacitate prisoners.<sup>233</sup>

Although researchers have noted the interaction between age and crime since the early 1900s, sociologists Travis Hirschi and Michael Gottfredson popularized the age–crime curve in the 1980s.<sup>234</sup> Hirschi and Gottfredson demonstrated “that across historical time and cultures, involvement in criminal behavior shows a rapid increase at puberty age, followed by a slow decline after reaching its peak” in late adolescence.<sup>235</sup> Hirschi and Gottfredson sought to disprove existing theories that attributed the correlation between age and crime to extraneous variables other than age itself.<sup>236</sup> Hirschi and Gottfredson isolated numerous variables, such as race and environment, to examine how those external factors influenced

---

228. See Mones & Clegg, *supra* note 30.

229. Ghandnoosh, *supra*, note 218, at 11.

230. LIEM, *supra* note 106, at 12. The only variance among the curve was that the peak of the curve was earlier for property offenses rather than for violent crime, which peaked later. See Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (Nov. 1983).

231. PFAFF, *supra* note 21, at 191.

232. Mones & Clegg, *supra* note 30.

233. LIEM, *supra* note 106, at 12.

234. See Hirschi & Gottfredson, *supra* note 230.

235. See *id.*; Mones & Clegg, *supra* note 30.

236. See Hirschi & Gottfredson, *supra* note 230, at 552–54.

the shape of the age–crime curve.<sup>237</sup> After multiple tests, the authors found that only one factor slightly skewed the shape of the bell curve: the type of crime committed.<sup>238</sup> Apart from the type of crime, Hirschi and Gottfredson concluded that the age–crime curve is invariant across variables and is constant across populations.<sup>239</sup> The age–crime curve thus shows that increased age correlates with a decrease in criminal activity, regardless of upbringing or other societal factors.<sup>240</sup>

Scholars have since repeated the 1980s study numerous times, each time revealing the well-known bell curve, which shows a peak of criminal activity between ages 16 to 24 and a steady decline until the ages of 45 to 50, at which time the curve nears zero.<sup>241</sup> Subsequent studies have proven that even the small subset of the population labeled as “persistent offenders” or “career criminals” age out of crime.<sup>242</sup> Further, attempts to identify which offenders will be “persistent” based upon criminal history have been largely unsuccessful, indicating that criminality at one point in time does not indicate criminality in the future.<sup>243</sup> Overall, the studies demonstrate that long sentences serve minimal utility, as criminal careers are proven to be relatively short, ranging from about 5 to 10 years.<sup>244</sup> The

---

237. See generally *id.*

238. See *id.* at 557. Hirschi and Gottfredson found that criminality for personal offenses peaked slightly later than it did for property offenses. *Id.*

239. *Id.* at 560.

240. *Id.*

241. Mones & Clegg, *supra* note 30.

242. See Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555 (2003).

243. *Id.* at 569.

244. Alex R. Piquero et al., *Criminal Career Patterns*, in JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 37–38 (Rolf Loeber & David P. Farrington eds., Oxford Univ. Press 2012). The relationship between age and crime is irrefutable, but the explanation for the effect that age has on criminality is not. Mones & Clegg, *supra* note 30. Some scholars take a primarily sociological approach to explain the age–crime relationship. For example, many scholars believe there are turning points within an individual’s life where they either obtain social capital or go through personality changes that result in a greater sense of self-control. *Id.* The “social control” theory posits that, as people age, they tend to take on more serious roles or acquire greater responsibilities. Whether role-changes occur due to employment, families, or community, individuals with greater responsibility will generally begin to consider the long-term effects of their actions and are more likely to think of crime as risky rather than rewarding. *Id.* Explanatory theories, however, are at odds with Hirschi and Gottfredson’s original theory of



steadfast nature and predictability of the age–crime curve exposes the low utility in policies that bar parole eligibility for older offenders.<sup>245</sup>

*b. Recidivism Rates Demonstrate that Incarcerated Individuals Also Age Out of Crime*

Recidivism rates further demonstrate that incarcerated individuals also age out of crime and therefore play a critical role in demonstrating the utility of an Act 790 expansion.<sup>246</sup> Recidivism refers to “acts that resulted in the re-arrest, reconviction, or return to prison with or without a new sentence during a defined period following the prisoner’s release.”<sup>247</sup> Most scholars use recidivism rates as a means to determine which groups of offenders are most likely to re-offend and therefore be kept in prison, versus the groups of offenders who pose the least risk to society if released.<sup>248</sup> Recidivism rates, therefore, demonstrate the effect of age on criminality, as well as the influence that the type of conviction and length of time served has upon the likelihood to re-offend.<sup>249</sup>

The fact that older prisoners convicted of homicides have some of the lowest recidivism rates directly undermines Louisiana’s current exclusion of lifers from parole eligibility.<sup>250</sup> Specifically, older homicide offenders

---

invariability, which states that there is no social variable that can alter the age–crime curve. *See generally* Hirschi & Gottfredson, *supra* note 230. Other theories attempting to explain the age–crime curve rely on biological and physiological changes in the body that may have a substantial effect on rebellious and antisocial behaviors. LIEM, *supra* note 106, at 12. For example, a 2003 study by Raymond Collins found that a flux in the hormones of serotonin and dopamine may play a large role in the inclination for criminal activity. Collins, *supra* note 227, at 4. Serotonin runs through the cerebral cortex, which includes the region of the brain “‘that determines how the brain acts on its knowledge’ . . . [and influences] judgement, comportment, executive function and motivation.” *Id.* (quoting K.I. KAPLAN, & B.J. SADOCK, SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES/CLINICAL PSYCHIATRY 94 (1999)). Low serotonin levels and high dopamine levels are both highly correlated with aggressive behavior. *Id.* As people age, serotonin levels rise and dopamine levels fall, causing a decrease in violent and aggressive behavior that correlates with the fall in criminal activity on the age–crime curve. *Id.*

245. Ghandnoosh, *supra* note 218.

246. Ghandnoosh, *supra* note 25, at 147.

247. Shihadeh et al., *supra* note 29, at 2.

248. *Id.*

249. *See generally id.*

250. Ghandnoosh, *supra* note 25, at 147.

are categorically the least likely to re-offend.<sup>251</sup> If these offenders do re-offend, the specific recidivism rate—the likelihood that they will commit the same crime—is between 1% and 3%.<sup>252</sup> Studies consistently support the assertion that older, violent offenders, particularly prisoners who have served longer sentences, pose an incredibly low public safety risk.<sup>253</sup> Louisiana’s exclusion of lifers from parole eligibility, therefore, does not improve public safety.<sup>254</sup>

*c. Louisiana Recidivism Rates Highlight the Low Risk of Expanded Parole Eligibility to Lifers*

A Louisiana study of recidivism rates amongst paroled prisoners serving long sentences directly supports the argument for an expansion of Act 790.<sup>255</sup> In 2013, the Crime and Policy Evaluation Research Group (CAPER)<sup>256</sup> examined recidivism rates of prisoners eligible for parole under Act 790 and lifers who had become parole eligible after receiving a gubernatorial pardon.<sup>257</sup> For all prisoners in this category, the recidivism rate was 19.8% for a five-year period, or one-fifth of all offenders.<sup>258</sup> When the authors of the study excluded technical parole violations from the results—violations such as missing curfew or consuming alcohol—the recidivism rates decreased to 8.02%.<sup>259</sup> Thus, half of the offenders under

---

251. LIEM, *supra* note 106, at 12.

252. *Id.*

253. *Id.* at 2. For example, in a California study of 860 paroled lifers, each of whom was serving a sentence for homicide and had been on parole since 1995, less than 1% returned to prison for new felonies, and none of the 860 recidivated for a crime deserving a life sentence. Ghandnoosh, *supra* note 25, at 147.

254. *See generally* LIEM, *supra* note 106, at 2.

255. Shihadeh et al., *supra* note 29, at 2.

256. CAPER is an informal network of policy researchers at Louisiana State University who “seek to promote collaboration in criminology and related areas by combining [Louisiana State University] research talent across a variety of fields.” *Crime and Policy Evaluation Research Group*, LSU DEP’T SOCIOLOGY, <https://www.lsu.edu/hss/sociology/research/CAPER/caper.php> [<https://perma.cc/QX2W-T8LT>] (last visited, Sept. 14, 2019). The majority of the group’s research focuses on the areas of crime and policy in Louisiana. *Id.*

257. *Id.* at 3–4. The authors utilized a data file consisting of 671 records of individuals eligible for parole under Act 790 and of 217 records of individuals who had become parole eligible after receiving a pardon from the governor. *Id.* At the time the study was conducted, not all of the individuals in the data files had been released. *Id.* at 4.

258. *Id.* at 5.

259. *Id.*

Act 790 who returned to custody after release did so because of a mere technical violation.<sup>260</sup>

The recidivism rates for paroled prisoners convicted of armed robbery, second-degree murder, and first-degree murder are particularly noteworthy.<sup>261</sup> The CAPER study revealed a five-year recidivism rate of 4% for individuals convicted of first-degree murder—2% of which was technical. Moreover, the study showed a 5.8% recidivism rate for those convicted of armed robbery, not including technical violations. Lastly, the CAPER study found a 2% recidivism rate for those convicted of second-degree murder, 2% of which was technical.<sup>262</sup> The non-technical recidivism rate for convicted second-degree murderers held steady at 0%.<sup>263</sup> Not one individual convicted of second-degree murder returned to prison within the five-year window.<sup>264</sup>

The length of incarceration before release, as well as the age of the prisoner, significantly impacted recidivism rates.<sup>265</sup> Of all offenders granted parole eligibility under Act 790, offenders having served over 26 years of their sentence had a recidivism rate of almost 0%, regardless of the type of crime.<sup>266</sup> Of the second-degree murderers who committed technical violations on parole, all were under 47.<sup>267</sup> Of the 46 first-degree murderers released on parole, only two committed new offenses, one of whom was over 50.<sup>268</sup> The CAPER study authors concluded that the low recidivism rates were due, in large part, to the advent of “criminal menopause,” in which most of the offenders had either become disinterested or too old to engage in crime by the time they were released on parole.<sup>269</sup> The study found that the remarkably low recidivism rates signified that offenders who had served at least 26 years were possible

---

260. *Id.*

261. *Id.* at 6.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 3.

267. *Id.*

268. *Id.* Additionally, the CAPER study found that the recidivism rate for armed robbers released under the age of 50 was 22.1%, while the recidivism rate for armed robbers released over the age of 50 was 6.98%. *Id.* The authors considered this finding consistent with the second and first-degree murder recidivism rate. *Id.* at 6.

269. *Id.* at 3.

candidates for early release because they were unlikely to compromise public safety.<sup>270</sup>

The low recidivism rate associated with paroled lifers undermines Louisiana's current policy barring lifers from parole eligibility and highlights the need for reform.<sup>271</sup> The proposed expansion of Act 790 would extend parole to prisoners over age 50 who have served at least 20 years of a life sentence.<sup>272</sup> Currently, in Louisiana, 43% of all offenders released from prison will return to prison within five years.<sup>273</sup> In contrast, the CAPER study demonstrated that older lifers present only a minor risk of recidivism.<sup>274</sup> Lifers granted parole under the proposed amendment to Act 790 would therefore pose a significantly lower public safety risk than half of all prisoners that Louisiana already releases from prison.<sup>275</sup>

To efficiently serve the purpose of incapacitation, inmates should not be imprisoned longer than necessary to assure public safety.<sup>276</sup> The age–crime curve and recidivism rates consistently demonstrate that paroled lifers over the age of 50 pose an extremely low public safety risk.<sup>277</sup> Louisiana's exclusion of older lifers from parole eligibility ensures the over-incapacitation of prisoners and is therefore both inefficient and excessive.<sup>278</sup> Advocates for long sentences argue that, even if the sentences over-incapacitate, excessive sentences still serve the purpose of deterrence.<sup>279</sup> Again, such arguments in favor of long sentences are undermined by significant evidence to the contrary.<sup>280</sup>

## 2. Deterrence

As most prisoners over 50 years old will age out of crime and pose a low risk to society if released, the justification for mandatory life-without-parole sentences requires a strong deterrent effect on younger criminals;

---

270. *Id.*

271. *Id.*

272. *Id.*

273. LA. DEP'T OF PUB. SAFETY & CORRECTIONS, RECIDIVISM, ADMISSIONS, AND RELEASES 38 (2018).

274. Shihadeh et al., *supra* note 29, at 7.

275. *Id.*

276. *See generally* Mauer, *supra* note 25, at 2.

277. *See generally* Mones & Clegg, *supra* note 30; Sampson & Laub, *supra* note 242, at 569.

278. *See generally* Mauer, *supra* note 25, at 2; Shihadeh et al., *supra* note 29, at 7.

279. *See generally* LIEM, *supra* note 106, at 19–20.

280. *See* NAT'L RESEARCH COUNCIL, *supra* note 33, at 132–40.

yet, “no reliable evidence is available that such an effect is sufficiently large to justify the costs of long prison sentences.”<sup>281</sup> The classical theory of deterrence rests on the idea that the expected personal cost of punishment to the offender exceeds the benefits of offending.<sup>282</sup> Modern sentencing laws, however, over-emphasize the impact that incremental increases in severity, such as life with parole versus life without parole, have upon criminal deterrence.<sup>283</sup> Additionally, fluctuations in crime rates show little correlation between crime and changes in sentencing, demonstrating that severe sentences do little to further the goal of crime prevention.<sup>284</sup> The exclusion of lifers from the current version of Act 790 has a negligible deterrent effect on future crime, therefore eliminating any empirically founded argument for the continued exclusion of lifers from parole eligibility in Louisiana.<sup>285</sup>

*a. Misapprehension: Severe Punishments Fail to Deter Crime*

By imposing a severe sentence like life without parole on individuals who have participated in what the legislature deems abhorrent activity, the legislature hopes to deter other individuals who may consider that particular crime.<sup>286</sup> Empirical evidence routinely demonstrates, however, that the certainty, not the severity, of punishment carries a far greater deterrent effect.<sup>287</sup> Thus, the certainty and swiftness of apprehension deters crime, rather than the length of the sentence imposed.<sup>288</sup> Certainty of punishment in modern society requires that the victim report the crime and bring it to an officer’s attention, that the police apprehend the correct individual, and that courts successfully prosecute and sentence the offender.<sup>289</sup> According to a 2017 report by the PEW Research Center, victims only report half of all violent crimes each year to the police, and most of those reported crimes do not successfully make it through to the

---

281. Ghandnoosh, *supra* note 25, at 147 (quoting Durlauf and Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL’Y 13, 38 (2011)).

282. See NAT’L RESEARCH COUNCIL, *supra* note 33, at 153.

283. *Id.*

284. *Id.*

285. Ghandnoosh, *supra* note 25, at 147.

286. NAT’L RESEARCH COUNCIL, *supra* note 33, at 153.

287. Ghandnoosh, *supra* note 25, at 148.

288. *Id.*

289. NAT’L RESEARCH COUNCIL, *supra* note 33, at 153–54.

prosecution stage.<sup>290</sup> Uncertain apprehension—as seen in the United States—significantly reduces the deterrent effect of any crime, regardless of the severity of punishment.<sup>291</sup>

Further, marginal differences in the severity of punishment are unlikely to produce any additional deterrent effect because the “deterrence-through-harsher-punishment” theory largely overestimates the rational calculus of the potential offender.<sup>292</sup> First, the theory assumes that the individual has actual knowledge of the consequences and understands the sentence associated with the criminal actions if caught, which is rarely true.<sup>293</sup> Second, impulsivity is one of the most “well-documented risk factors for criminal behavior.”<sup>294</sup> Impulsive actions accompany a near-sighted view of the future and do not involve weighing potential consequences—especially not consequences 30 years down the line.<sup>295</sup> Apprehension, rather than length of incarceration, is therefore the more feared consequence, in large part because of the immediacy of its effect.<sup>296</sup> Once arrested, social consequences, such as ostracism, lost job opportunities, family pressures, and responsibilities, become a reality regardless of innocence or guilt.<sup>297</sup> The fear of apprehension is far more immediate—and thus a greater deterrent—than the exact length of the jail sentence associated with a particular crime.<sup>298</sup> The added punishment of denied parole eligibility for lifers is thus unlikely to carry additional deterrence or produce any added public safety.<sup>299</sup>

*b. The Data Do Not Lie: Severe Sentencing Does Not Increase Public Safety*

In addition to the sociological argument, crime rates unambiguously emphasize the weak deterrent effect of long punishments.<sup>300</sup> Empirical

---

290. John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RES. CTR. (March 1, 2017), <http://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/> [<https://perma.cc/4ZTU-6VSA>].

291. NAT’L RESEARCH COUNCIL, *supra* note 33, at 153–54.

292. *Id.* at 155; PFAFF, *supra* note 21, at 190.

293. NAT’L RESEARCH COUNCIL, *supra* note 33, at 155.

294. PFAFF, *supra* note 21, at 194.

295. *Id.*

296. *Id.*

297. *Id.* at 190.

298. *Id.*

299. *Id.*

300. See Ghandnoosh, *supra* note 25, at 142–45.

evidence repeatedly demonstrates that harsh sentences have, if anything, only a minor impact on crime.<sup>301</sup> Although crime rates have steadily fallen in the United States since the country's criminal peak in the 1990s, the rate of violent crime has actually risen.<sup>302</sup> In 2014, the national rate of violent crime reached twice that of the 1990s.<sup>303</sup> Following the national trend, Louisiana had the highest murder rate in the country from 1989 until 2012—coincidentally the same year that Louisiana's incarceration rate reached an all-time high.<sup>304</sup> Individuals convicted of first- or second-degree murder when Louisiana was the murder capital of the world were also sentenced to life without the possibility of parole.<sup>305</sup> If the sentences had any deterrent effect, the community did not feel it.<sup>306</sup>

Empirical evidence demonstrates that the deterrence justification for mandatory life without parole, at least in Louisiana, is largely futile in its attempt to increase public safety.<sup>307</sup> Therefore, there remains no additional public safety argument for denying parole eligibility to prisoners who have aged out of crime.<sup>308</sup> An expansion of Act 790, on the other hand, would inject increased funds directly into communities throughout Louisiana to increase public safety and would allow rehabilitated offenders the opportunity to positively contribute to society.<sup>309</sup>

### 3. Rehabilitation

Many of the individuals sentenced to life in Louisiana would likely be parole eligible if they were convicted in almost any other state.<sup>310</sup> Compared to other states, Louisiana has taken a minority position on the ability of certain offenders to reform.<sup>311</sup> A life-without-parole sentence, by definition, is a determination that an individual cannot be rehabilitated.<sup>312</sup>

---

301. PFAFF, *supra* note 21, at 12.

302. *Id.*

303. *Id.*

304. Turkington, *supra* note 35.

305. *Id.*

306. *Id.*

307. *See generally id.*

308. *Id.*; PFAFF, *supra* note 21, at 12.

309. *See generally* JRI PRACTITIONER'S GUIDE, *supra* note 85, at 38.

310. Only six states do not allow parole eligibility to individuals serving life sentences, and only one other state, Mississippi, gives a life-without-parole sentence to individuals convicted of second-degree murder. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

311. *See generally id.*

312. William W. Berry III, *More Different Than Life, Less Different Than Death*, 71 OHIO ST. L.J. 1109, 1132 (2010).

Although it is often difficult to accept that individuals capable of committing atrocious crimes are also capable of rehabilitation and reform, Louisiana should follow the lead of the other 44 states that grant parole eligibility to lifers and recognize the evidence indicating that rehabilitation is not only possible, but highly probable.<sup>313</sup>

*a. The Non-Unique Experience of Prison as a Turning Point*

The array of effects that incarceration might have upon an individual—such as difficulty maintaining employment, development of medical and psychological issues, and increased likelihood of returning to prison—are highly studied and widely known.<sup>314</sup> There is, however, a shocking lack of research documenting the experiences of individuals incarcerated for longer periods of time.<sup>315</sup> Where research does exist, it documents drastic transformations in prisoners who have served long sentences.<sup>316</sup>

Seeking to fill the gap in literature, Marieke Liem, Senior Researcher at Leiden University, spent more than two years interviewing over 60 men and women convicted of homicide, all serving life sentences and either released on parole or returned to prison after release.<sup>317</sup> The study hoped to discover the factors that determine whether a lifer will be successful on parole.<sup>318</sup> In her study, Liem found that all of the interviewees, both in and out of prison, cited a period during their incarceration when they reached a “turning point” at which they turned away from a life of crime and accepted an alternative life.<sup>319</sup>

The provocation for the sudden desire to change ranged from person to person.<sup>320</sup> Some individuals described prison as their first opportunity to reflect on their lives and to address what was leading them astray.<sup>321</sup> For others, accepting a lifetime behind bars required finding new purpose and

---

313. LIEM, *supra* note 106, at 2.

314. *Id.* at 4.

315. *Id.* at 5.

316. *Id.*

317. *Id.* at x–xi.

318. *Id.* at 6–7. Marieke Liem conducted the study through a series of personal interviews with each offender. The interviewees were comprised of offenders from across the country, excluding the six states where life does not carry the possibility of parole. *Id.* at 4.

319. *Id.* at 9.

320. *Id.* at 100.

321. *Id.*



meaning in daily life.<sup>322</sup> Despite the various factors that led to each person's epiphany, all of the individuals described a cognitive shift and an effort to distance themselves from their old lives.<sup>323</sup> The interviewees also cited the importance of "vehicles of change" in their transformation, which can include education, religion, or a work-release program.<sup>324</sup> The interviewees found that the various programs "facilitated the development of a 'replacement self,' or a more socially acceptable identity."<sup>325</sup> The study concluded that because nearly all interviewees shared a story of rehabilitation, the lack of cognitive transformation did not lead to the parole failures, but rather a sense of being "doomed from the start" when facing the societal hindrances to reentry.<sup>326</sup> As lifers in Louisiana have greater access to programming and reentry services than most prison populations, Louisiana already has many of the mechanisms in place to ensure that lifers are successful on parole.<sup>327</sup>

*b. Recognizing Rehabilitation in Louisiana*

Louisiana's practice of mandatory life without parole fails to account for the possibility of rehabilitation for lifers. The Louisiana Legislature, however, has not only recognized the rehabilitation of a certain group of lifers, but also the unique ability that lifers have to prepare other prisoners for successful reentry.<sup>328</sup> Criminal justice advocates hail the reentry program at Angola prison as "the gold standard for how to rehabilitate criminals and prevent re-offending when prisoners are eventually released back into society."<sup>329</sup> The legislature created the reentry program in 2010 as an effort to better address successful reintegration into society.<sup>330</sup> Since

---

322. *Id.* at 101.

323. *Id.*

324. *Id.* at 107.

325. *Id.*

326. *Id.* at 109.

327. See Rebekah Allen, *Criminal Justice Advocates Eye Angola's Re-Entry Program as Gold Standard for Prisoner Rehabilitation*, *ADVOCATE* (May 26, 2017, 3:02 PM), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_3e1f3d78-424e-11e7-8815-23ee3c5d043a.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_3e1f3d78-424e-11e7-8815-23ee3c5d043a.html) [<https://perma.cc/XV54-KYXP>].

328. See *Reentry Programming*, *supra* note 12.

329. Allen, *supra* note 327.

330. *Reentry Programming*, *supra* note 12. The long-term goals of the program are "to improve public safety, reduce recidivism, decrease victimization, and reduce the financial burden of the correctional system." *Id.*

the advent of the reentry program, recidivism rates are down, and the legislature is looking to expand the program to other prisons.<sup>331</sup>

The success of the reentry program is largely attributed to the strength of the two lifer-led components: vocational training and mentorship.<sup>332</sup> The program consists of 80 lifers who have volunteered to mentor 160 nonviolent offenders in social, moral, and vocational skills that can translate into a successful reintegration into society after release.<sup>333</sup> Prisoners at Angola are able to receive an Associate or Bachelor's Degree in Theology through partnership with the New Orleans Baptist Seminary College, and many serve as missionaries and chaplains skilled in moral programming.<sup>334</sup> Angola also offers a wide array of vocational programs where prisoners are able to earn construction and mechanic certifications, such as those required by the National Center for Construction Education and Research ("NCCER") and the Automotive Service Excellence ("ASE").<sup>335</sup> Such certifications can easily qualify an individual for at least a \$20 per hour position, affording the newly released prisoner a much higher chance at success.<sup>336</sup>

The program runs on the "90-10" rule, where participants spend 90% of their time working on moral rehabilitation and the other 10% on career development.<sup>337</sup> To achieve the 90%, the program pairs each participant with an inmate serving a life sentence who acts as a mentor.<sup>338</sup> Mentors not only provide career training with mentees during the day but are also roommates with their mentees to provide constant supervision and support.<sup>339</sup> John Sheehan, an inmate mentor serving a life sentence for second-degree murder, explained what it means to be mentor: "If we see something going wrong or see them making a bad choice, we can pull them aside and say, 'you need to rethink this.' We have to live our lives in an exemplary way for them."<sup>340</sup> Sheehan described how the mentors help the

---

331. Rick Portier, *Angola Inmate Now Productive Auto Mechanic Thanks to Re-Entry Program*, WAFB 9 (May 4, 2017, 8:15 PM), <http://www.wafb.com/story/35346930/angola-inmate-now-productive-auto-mechanic-thanks-to-re-entry-program/> [<https://perma.cc/S765-TT5R>].

332. See *Reentry Programming*, *supra* note 12.

333. *Id.* The legislature chose Angola to pilot the program because of the presence of sophisticated career programs and religious groups at the prison. *Id.*

334. *Id.*

335. Portier, *supra* note 331.

336. *Reentry Programming*, *supra* note 12.

337. Callaghan, *supra* note 20.

338. *Id.*

339. *Id.*

340. *Id.*

participants re-evaluate their lives and reach the same “turning point” that many of the lifers themselves have experienced.<sup>341</sup> For many of the program mentors, improving public safety through morality and vocational coaching is a way to give back to society and leave a positive impact on the outside world that lifers themselves are unlikely to see.<sup>342</sup>

The reentry program, though successful, contains numerous contradictions.<sup>343</sup> Lifers—individuals that the legislature has deemed incapable of rehabilitation—are teaching others how to rehabilitate, providing moral guidance, and teaching the practical skills that translate to success on the outside.<sup>344</sup> The legislature recognizes the program’s success, helps to organize the logistics, and has even begun to fund the program’s expansion; yet, the legislature refuses to acknowledge that the mentors are the most qualified prisoners for release.<sup>345</sup> An expansion of Act 790 would end the legislature’s contradictory attitude toward lifers and would also signify a recognition of that which the legislature is clearly already aware—lifers are not only capable of change but also capable of instilling the desire to change in others.<sup>346</sup>

#### 4. Retribution

Retribution, or the idea that the crime deserves the time, provides perhaps the strongest argument against expanded parole eligibility to lifers.<sup>347</sup> Inherent in the classical application of retribution is the idea of proportionality: a punishment should be apportioned in accordance with the seriousness of the offense.<sup>348</sup> Under this theory, many believe that someone who took a life deserves life in prison.<sup>349</sup> Retributive justice,

---

341. *Id.*

342. Portier, *supra* note 331.

343. *See generally Reentry Programming*, *supra* note 12.

344. Portier, *supra* note 331.

345. *See* NAT’L RESEARCH COUNCIL, *supra* note 33, at 345. At least some legislators have recognized that mentors within the reentry program are deserving of parole eligibility. In the 2019 Regular Legislative Session, Representative C. Denise Marcelle introduced House Bill 37, which would have provided parole eligibility to individuals serving as mentors within the reentry program. *See* H.B. 37, 2019 Reg. Sess. (La. 2019). The House of Representatives, however, voted against the bill—68 to 23. *House Vote on HB 37 Final Passage*, H.B. 37, 2019 Reg. Sess., (La. 2019), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=1135806> [<https://perma.cc/7A8F-W8AA>].

346. Callaghan, *supra* note 20.

347. *See generally* NAT’L RESEARCH COUNCIL, *supra* note 33, at 345–46.

348. *Id.* at 345.

349. *Id.*

however, does not support the continued incarceration of rehabilitated prisoners for two primary reasons.<sup>350</sup> First, the tough-on-crime era gave rise to disproportionate sentencing in Louisiana, where relatively minor crimes resulted in severe sentences.<sup>351</sup> Many prisoners in Louisiana currently serve life sentences for disproportionately minor crimes, and Louisiana's failure to expand parole eligibility to those lifers only highlights the unjustness of their sentences.<sup>352</sup> Second, under the classical application of retribution, the punitive effect should be limited by other justifications of incarceration and should not exceed the length of time necessary to achieve the desired effects of incapacitation and deterrence.<sup>353</sup> Louisiana legislators shot down past attempts to modify Act 790 because they believed that giving lifers parole would violate the victim's right to retribution.<sup>354</sup> The legislature, however, must reprioritize the role of retribution with the public safety-driven goals of incapacitation and deterrence if the state wants true reform.<sup>355</sup>

*a. Measuring Proportionality in Louisiana*

Even under the strictest application of proportionality, Louisiana's current sentencing structure clearly is, in many respects, disproportionate.<sup>356</sup> Under Louisiana's habitual offender law, individuals frequently serve life-without-parole sentences for what many consider low-level crimes.<sup>357</sup> For example, the state sentenced Ricky Carthan to life without parole under Louisiana's habitual offender law for his most recent offense of possession of stolen junk metal.<sup>358</sup> Additionally, Kerry Orgeron is serving life without parole for his most recent offense of purse snatching.<sup>359</sup> Where Kerry and Ricky's relatively smaller offenses

---

350. *Id.*

351. *Id.*; Pelot-Hobbs, *supra* note 116.

352. *See* Turkington, *supra* note 35; NAT'L RESEARCH COUNCIL, *supra* note 33, at 342.

353. NAT'L RESEARCH COUNCIL, *supra* note 33, at 342.

354. *See* *Hearing on S.B. 269*, *supra* note 211.

355. *See generally* NATIONAL RESEARCH COUNCIL, *supra* note 33, at 342.

356. Turkington, *supra* note 35.

357. *Id.* Under Louisiana's habitual offender statute, individuals sentenced to a second or third felony conviction or a fourth or subsequent nonviolent offense were sentenced to life without parole. *Id.*

358. *A Living Death: Life Without Parole for Nonviolent Offenses*, ACLU (Nov. 2013), <https://www.aclu.org/report/living-death-life-without-parole-non-violent-offenses> [<https://perma.cc/44QT-CPYW>].

359. *Id.*

ordinarily would have cost them a few years in prison, the habitual offender law ensured that their offenses cost them their lives.<sup>360</sup>

An ACLU investigation into Louisiana's judicial sentencing records made the effects of the habitual offender law clear.<sup>361</sup> The ACLU discovered that in most cases where the state sentenced an individual to life without parole under the habitual offender law, the judge would have imposed a sentence of less than 10 years if he did not have to comply with the mandatory minimum.<sup>362</sup> A life-without-parole sentence for offenses like Kerry's and Ricky's is clearly disproportionate—the seriousness of the punishment is not scaled to the seriousness of the offense.<sup>363</sup> Even under the most severe ideals of exact retribution and proportionality, the justification for the sentence is simply unsubstantiated.<sup>364</sup>

In the 2017 JRI legislation, Louisiana legislators acknowledged the severe and excessive sentences given under the habitual offender statute, as well as the law's contribution to Louisiana's mass incarceration.<sup>365</sup> Senate Bill 221 of the JRI legislation lowered mandatory minimums, reduced the “cleansing period” between offenses, and removed the possibility of a life sentence for a fourth nonviolent offense.<sup>366</sup> The amendment only applied prospectively, however, and failed to address the approximately 650 inmates convicted under the habitual offender statute who are currently serving life sentences in Louisiana.<sup>367</sup> Senate Bill 221 marks the legislature's recognition of the injustice exacted under the habitual offender statute; yet, because the bill did not apply retroactively, it left much of the problem unsolved.<sup>368</sup> The proposed amendment to Act

---

360. *Id.*

361. *Id.*

362. *Id.* In Louisiana, it is possible to see what sentence the judge would have chosen had he not been required to comply with a mandatory minimum. *Id.*

363. See Pelot-Hobbs, *supra* note 116; *A Living Death*, *supra* note 358.

364. See Turkington, *supra* note 35.

365. JRI PRACTITIONER'S GUIDE, *supra* note 85, at 18–19.

366. *Id.*; TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 48. The cleansing period refers to the time between crimes after which a previous offense will not count as an additional offense toward the habitual offender statute. JRI PRACTITIONER'S GUIDE, *supra* note 85, at 18.

367. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

368. See *id.* at 56–59. As a product of the 2019 Regular Legislative Session, Governor Edwards signed into law House Bill 518, which further softened Louisiana's habitual offender law by removing certain first-time offenses from eligibility for sentence enhancement. See *LPA: Louisiana Takes Modest First Step in Reforming Ineffective Habitual Offender Statute*, ACLU LA. (June 5, 2019), <https://www.laclu.org/en/press-releases/lpa-louisiana-takes-modest-first-step-reforming-ineffective-habitual-offender-statute> [<https://perma.cc/9H9N-GHHJ>].

790 would allow the legislature to ameliorate the injustice of sentences exacted under the habitual offender statute and still avoid the administrative cost of re-sentencing all affected individuals.<sup>369</sup>

*b. Balancing the Victim's Right to Retribution*

Retribution represents the societal opinion as to what a criminal deserves and is therefore not as “finely tuned” as the other purposes of incarceration—deterrence, incapacitation, and rehabilitation—which “are more utilitarian [and] intended to promote public safety.”<sup>370</sup> To truly correct the injustices of mass incarceration, Louisiana must reprioritize the goal of retribution alongside the other, more empirically sound objectives of incarceration.<sup>371</sup> Still, the Louisiana Legislature must also balance the victim's interests when retroactively mitigating existing sentences, for retribution is not only linked to conceptions of what the criminal deserves, but to what the victim, the victim's family, and the community deserve as well.<sup>372</sup>

During the Senate Judiciary Committee's deliberation on whether to expand Act 790 under Senate Bill 269, the legislators debated at length about what victims and their families deserved.<sup>373</sup> Through the execution of a life sentence, the judicial system promised victims that their assailants would never again be released into the community, and the LDAA argued that the legislature needed to keep those promises.<sup>374</sup> Ideals of deservedness, however, are inherently linked to the existing sentencing structure.<sup>375</sup> Victims are only led to believe that their assailants will never be released from prison because the mandatory minimum for that crime creates the expectation that life without parole is the “deserved” sentence.<sup>376</sup>

In Texas, for example, an individual becomes parole eligible after serving 30 years of a life sentence.<sup>377</sup> Therefore, family members of

---

Like Senate Bill 221, House Bill 518 does not address individuals sentenced under the previous law. *See* H.B. 518, La. Reg. Sess. (La. 2019).

369. *See generally* TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56–59.

370. NAT'L RESEARCH COUNCIL, *supra* note 33, at 326.

371. *Id.* at 347.

372. *Id.* at 22.

373. *Hearing on S.B. 269*, *supra* note 211.

374. *Id.*

375. *See* NAT'L RESEARCH COUNCIL, *supra* note 33, at 342–45.

376. *Id.*

377. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

second-degree murder victims in Texas have the expectation that the defendant has the potential for release after 30 years.<sup>378</sup> The family members of second-degree murder victims in Texas deserve the consolation of exacted retribution no less than family members in Louisiana, but the Texas Legislature has more appropriately balanced the victims' right to retribution alongside incarceration's other penological goals.<sup>379</sup> If the Louisiana Legislature gives an individual a more severe punishment than the individual deserved—an unjust sentence by definition—the victim's expectations and, understandably, emotionally charged desire to see the individual locked away should not be what stops the state's attempt to remedy or mitigate the prior injustice.<sup>380</sup> It is clear that the voices of victims and prosecutors play a vital role in ensuring the proper carriage of justice.<sup>381</sup> The Louisiana Legislature must appreciate, however, that the victims' and prosecutors' opinions should not be the sole consideration as to whether an individual experiences freedom.<sup>382</sup>

The proposed amendment to Act 790 does not aim to exclude victims or prosecutors from the parole process. Rather, both parties would continue to have an influential role in parole determinations.<sup>383</sup> For any given parole hearing, the DOC notifies the victim or victim's family and the district attorney when the offender's parole hearing draws near, and both the victim and the district attorney have the opportunity to submit opposition and to speak at the hearing if they so desire.<sup>384</sup> A national survey revealed that parole boards across the country rank victim input and opposition at parole hearings as the most significant influence on the parole decision—even over the input of judges and prosecutors—clearly demonstrating the significant role that victims play in the parole process.<sup>385</sup> Victims also have considerable influence over where the prisoner is released on parole and may request that he not be released within a certain proximity of the victim or the victim's family.<sup>386</sup> Because the legislature allows victims the opportunity to play a role in the parole

---

378. *Id.*

379. See NAT'L RESEARCH COUNCIL, *supra* note 33, at 342–45.

380. See *id.* at 346.

381. See *id.* at 326.

382. See *id.*

383. See, e.g., JRI PERFORMANCE REPORT, *supra* note 79, at 10–11.

384. *Id.* at 15. Part of the initial JRI legislation included the right of crime victims to submit a “reentry statement,” which it codified within Louisiana Revised Statutes § 46:1844. JRI PRACTITIONER'S GUIDE, *supra* note 85, at 33.

385. Catherine C. McVey et al., *Modernizing Parole Statutes: Guidance from Evidence-Based Practice*, ROBINA INST. CRIM. L. & CRIM. JUST. 8 (2018).

386. JRI PRACTITIONER'S GUIDE, *supra* note 85, at 33.

hearing, the victims' voices and concerns are not diminished, but they also do not carry so much weight as to overemphasize the role of retribution in the sentencing of the defendant.<sup>387</sup>

*C. Time's Up: Political Shifts Pave the Way for the Expansion of Act 790*

The purposes for incarceration—incapacitation, deterrence, rehabilitation, and retribution—are not properly served when the law mandates a sentence of life without the possibility of parole.<sup>388</sup> Additionally, the continued incarceration of rehabilitated prisoners is an inefficient allocation of the state's limited resources.<sup>389</sup> With this knowledge, the legislature has two options: continue to prioritize purely punitive policies over public safety, or expand parole eligibility under Act 790.<sup>390</sup> Recent events have made clear that the American public and the Louisiana electorate will no longer embrace the willful ignorance that enables the survival of ineffective and inefficient sentencing practices.<sup>391</sup> For instance, the recent Supreme Court decisions, *Graham v. Florida* and *Miller v. Alabama*, demonstrate that societal views defining morally acceptable sentences are changing and that life without parole currently hangs on the cusp of acceptability.<sup>392</sup> Another such event is the Louisiana electorate's vote acknowledging the state's non-unanimous jury system as producing racially disparate and unjust sentences.<sup>393</sup> Both the Supreme Court decisions and Louisiana's vote to end non-unanimous juries signify a societal shift in favor of ending strictly punitive practices that do nothing to further public safety.<sup>394</sup> The current political climate thus marks the opportune moment for the Louisiana Legislature to adopt the proposed amendment to Act 790 and expand parole eligibility to lifers in Louisiana.<sup>395</sup>

---

387. McVey et al., *supra* note 385.

388. See PFAFF, *supra* note 21, at 191.

389. See generally *supra* Sections III.A–B.

390. See generally *supra* Sections III.A–B.

391. See *infra* Sections III.C.1–3.

392. See *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

393. John Simerman & Gordon Russel, *Louisiana Voters Scrap Jim Crow-Era Split Jury Law; Unanimous Verdicts to be Required*, ADVOCATE (Nov. 6, 2018, 9:45 PM), [https://www.theadvocate.com/baton\\_rouge/news/politics/elections/article\\_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html](https://www.theadvocate.com/baton_rouge/news/politics/elections/article_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html) [<https://perma.cc/EKP8-VWD8>].

394. See generally *id.*

395. See discussion *infra* Sections III.C.1.a–b.



*1. The “Evolving” Standard of Life Without Parole and Why Louisiana Should Evolve with It*

Until recently, the United States Supreme Court has held that there exists a stark difference between the levels of Eighth Amendment scrutiny for capital and non-capital cases.<sup>396</sup> The Supreme Court evaluates death penalty cases, unlike non-capital cases, under the “evolving standard of decency.”<sup>397</sup> Using this analysis, the Court looks to “objective indicia to determine whether there is a national consensus against the sentencing practice at issue;” whether the sentence imposed is disproportionate to the crime; and whether the opposed practice performs a legitimate penological goal.<sup>398</sup> In other words, under the evolving standard of decency, the Supreme Court uses “contemporary societal norms” to create the scale against which the proportionality and utility of the sentence is measured.<sup>399</sup> The Supreme Court has long held that “death is different” and that any degree of proportionality review afforded to death penalty cases does not apply to non-capital cases.<sup>400</sup> Under the previous standard, therefore, courts would have never deemed sentences to life without parole excessive or unconstitutional.<sup>401</sup> *Graham* and *Miller*, however, raised the question of whether greater scrutiny for non-capital cases is on the horizon.<sup>402</sup> If so, Louisiana’s refusal to expand parole eligibility to lifers is of questionable constitutionality.

---

396. See U.S. CONST. amend. VIII; *Harmelin v. Michigan*, 501 U.S. 957 (1991).

397. See *Harmelin*, 501 U.S. 957.

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

399. See *Berry*, *supra* note 312, at 1111. “This is because ‘the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.’” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

400. *Harmelin*, 501 U.S. at 958. Prior to the *Graham* and *Miller* decisions, the Supreme Court emphasized that there is no proportionality review for non-capital cases because the Eighth Amendment acts only as a remote check on state legislatures’ use of the limited category of punishments that are cruel and unusual regardless of context. See *id.*

401. See *id.* (holding that a sentence of mandatory life without parole for possessing 650 grams of cocaine, without considering mitigating factors, “may be cruel, but [is] not unusual in the constitutional sense.”).

402. *Berry*, *supra* note 312, at 1115.

*a. Death is Different No Longer: The Importance of Graham and Miller*

The Supreme Court's reasoning in *Graham v. Florida* hinted that a higher standard against which to measure life-without-parole sentences might be forthcoming.<sup>403</sup> In 2010, the Supreme Court held in *Graham* that states cannot sentence juvenile offenders to life without parole for non-homicide offenses under the Eighth Amendment.<sup>404</sup> In reaching its decision, the Supreme Court applied the "evolving standards of decency" test for the first time in a non-capital case, greatly expanding the scope of Eighth Amendment review.<sup>405</sup> In Justice Thomas's dissent in *Graham*, he stated, "Today's decision eviscerates [the] distinction [between capital and non-capital cases]. 'Death is different' no longer."<sup>406</sup>

The Supreme Court later affirmed and expanded its holding in *Graham* with its decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, holding unconstitutional the mandatory sentences of life without parole for all juveniles, including those convicted of homicide.<sup>407</sup> The Supreme Court has not since encountered a case questioning the constitutionality of an adult sentenced to life without parole.<sup>408</sup> Until then, the public is left to hypothesize whether the Supreme Court will employ an Eighth Amendment review for life without parole in the near future and how Louisiana's current sentencing structure measures under the "evolving standards of decency."<sup>409</sup>

*b. Objective Indicia of Consensus Against Mandatory Life Without Parole*

Louisiana's exclusion of lifers from parole eligibility would likely qualify as an unconstitutional practice under the Supreme Court's standard

---

403. *Id.* at 1122.

404. *Graham v. Florida*, 560 U.S. 48 (2010). The *Graham* Court found that the diminished moral culpability of youth entitled non-homicide juvenile offenders to "a meaningful opportunity for release" based upon demonstrated maturity and rehabilitation. *Id.* at 75.

405. Berry, *supra* note 312, at 1122.

406. *Graham*, 560 U.S. at 103 (Thomas, J., dissenting); Berry, *supra* note 312, at 1112.

407. *See Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole is unconstitutional for juvenile offenders); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (holding that the *Miller* decision was to be applied retroactively).

408. *See Miller*, 567 U.S. 460; *Montgomery*, 136 S. Ct. 718.

409. Berry, *supra* note 312, at 1111.

for Eighth Amendment scrutiny.<sup>410</sup> The first step in an Eighth Amendment review involves a survey of the current objective indicia of national consensus—or evidence suggesting society’s general view as to the sentencing practice at issue.<sup>411</sup> According to the Supreme Court in *Atkins v. Virginia*, “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”<sup>412</sup> Only six states, including Louisiana, do not separate life from life without parole and have mandatory life sentences that implicitly bar parole eligibility.<sup>413</sup> Of these six states, Louisiana is one of two states where second-degree murder carries a mandatory minimum of a life sentence.<sup>414</sup> The majority of the country has thus clearly reached a consensus as to the indecency of prohibiting parole eligibility for all lifers, and Louisiana is in the minority.<sup>415</sup>

Further, a look to the use of life without parole in other countries reveals that America’s industrialized counterparts have clearly evolved away from the use of excessive sentences.<sup>416</sup> Although not dispositive in an Eighth Amendment analysis, the Supreme Court has looked to international opinions surrounding certain punishments to help inform its determination of what is cruel and unusual.<sup>417</sup> Many democratic countries, including Germany, France, and Italy, have abolished life without parole as unconstitutional.<sup>418</sup> Other countries that maintain life without parole use it in exceedingly rare situations, such as the United Kingdom, in which only 49 people are serving life without parole.<sup>419</sup> Thus, a look to the laws of industrialized nations demonstrates that many countries are mitigating the use of harsh punishments.<sup>420</sup> Under the objective indicia of consensus, it is therefore clear that Louisiana’s practice of life without parole is falling behind societal norms.<sup>421</sup> Louisiana’s use of the sentence will thus be

---

410. *See generally id.*

411. *See id.*

412. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

413. LIEM, *supra* note 106, at 6.

414. TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

415. *See id.*

416. *See Ghandnoosh, supra* note 25, at 151.

417. *Graham v. Florida*, 560 U.S. 48, 80 (2010).

418. Ghandnoosh, *supra* note 25, at 151.

419. Mauer, *supra* note 25, at 2. Further, individuals serving parole-eligible life sentences in the United Kingdom typically spend less than 15 years in prison. Ghandnoosh, *supra* note 25, at 151.

420. *See Mauer, supra* note 25, at 2.

421. *See generally Graham*, 560 U.S. at 80.

considered cruel and unusual if it can also be proven that the sentence given is disproportionately severe in relation to the underlying crime and that the sentence serves no greater societal purpose.<sup>422</sup>

*c. The Skewed Proportionality and Failed Utility of Parole Ineligibility for Lifers*

Under an Eighth Amendment Review, the Supreme Court would likely find Louisiana's use of life without parole as cruel and unusual because the sentence is often inordinately more severe than the underlying crime and does little to further public safety.<sup>423</sup> The second step in the Eighth Amendment analysis considers the "culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment . . . and whether the challenged sentence serves legitimate penological goals."<sup>424</sup> Denying parole eligibility to older lifers unmistakably fails to serve the purpose of each penological goal of incarceration.<sup>425</sup> Additionally, provided the many nonviolent offenders serving life without parole under Louisiana's habitual offender statute, Louisiana's current sentencing structure mandates the imposition of disproportionate and excessive sentences.<sup>426</sup>

The current version of Act 790 would likely be unconstitutional under the Eighth Amendment because older lifers have the lowest recidivism rates, are capable of rehabilitation, and are overly punished according to societal standards.<sup>427</sup> The question then becomes whether the Louisiana Legislature will wait for the Supreme Court to act, like it did with the *Miller* and *Montgomery* decisions, or whether the 2017 JRI legislation truly marked a turning point for Louisiana as a more proactive state.<sup>428</sup> If it is indeed the latter, then an expansion of Act 790 is the next appropriate step.<sup>429</sup> Based upon the November 2018 vote to end non-unanimous juries in Louisiana, the citizens of the state are clearly ready to leave Louisiana's antiquated practices behind.<sup>430</sup> It is time that the legislature did too.

---

422. *See id.*

423. *See id.*

424. *See id.* at 67.

425. *See supra* Section III.B.

426. *See discussion supra* Section III.B.4.a.

427. *See generally Graham*, 560 U.S. at 67.

428. *See generally Berry*, *supra* note 312.

429. *See Miller*, 567 U.S. 460.

430. Simerman & Russel, *supra* note 393; Jenny Jarvie, *In Louisiana, a Fight to End a Jim Crow-Era Jury Law is on the Ballot*, L.A. TIMES (Sept. 12, 2018,

2. *Amending Act 790 Can Ameliorate Harm from Louisiana's Non-Unanimous Jury Verdict Law*

Before November of 2018, Louisiana was the only state to allow a conviction after a non-unanimous jury verdict in a murder trial and one of two states to allow a hung jury conviction in felony trials.<sup>431</sup> The law originally set out to “establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done.”<sup>432</sup> As Louisiana defendants are disproportionately black, and jurors are disproportionately white, the law is clearly effectuating its original, discriminatory purpose.<sup>433</sup> In November of 2018, Louisianans voted to amend the Louisiana Constitution to mandate unanimous jury verdicts; however, the amendment is not retroactive and will not address the erroneous convictions and excessive sentences already imposed.<sup>434</sup> Expanding parole eligibility to lifers will further the goal of the recent constitutional amendment and mitigate some of the harm that the racist law previously exacted.<sup>435</sup>

The impact of the non-unanimous jury verdict law is staggering.<sup>436</sup> In a study that assessed jury voting records for 993 convictions over the course of six years, the unanimous jury verdict law would have invalidated 402.<sup>437</sup> The law has also had a profound impact on lifers.<sup>438</sup> In early 2018, Louisiana had 4,828 people serving life without parole—five times as many inmates serving life without parole as Texas, even though Texas has six times as many people.<sup>439</sup> Another 1,224 Louisiana prisoners are serving virtual life sentences of 50 years or more.<sup>440</sup> In Louisiana, juries convicted

---

3:00 PM), <http://www.latimes.com/nation/la-na-louisiana-jury-20180912-story.html> [<https://perma.cc/4ZV3-RWYB>].

431. Jarvie, *supra* note 430.

432. Swenson, *supra* note 35. The quotation is an excerpt from The Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, which recorded the Louisiana Constitutional Convention of 1898. *Id.*

433. *Id.*

434. Simerman & Russel, *supra* note 393. Article 17 of the Louisiana Constitution now mandates that, in all cases where the penalty is hard labor, a unanimous jury is necessary to obtain a conviction if the offense was committed after January 1, 2019, but a non-unanimous jury may still convict an individual whose offense was committed prior to January 1, 2019. La. Const. Ann. art. I, § 17.

435. See TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 56.

436. See Swenson, *supra* note 35.

437. See *id.*

438. See *id.*

439. See *id.*

440. See *id.*

most of the 6,052 prisoners serving life or virtual life, one-third of which were non-unanimous verdicts.<sup>441</sup> Hence, non-unanimous juries have convicted an estimated 2,000 people currently serving life or virtual life.<sup>442</sup> Those are 2,000 sentences that the citizens of Louisiana have decided are unjust and excessive.<sup>443</sup> An expansion to Act 790 is therefore necessary to ameliorate the injustice that Louisiana's non-unanimous jury law exacted and to extend the recent amendment to the many lifers to whom Louisiana failed to deliver justice.<sup>444</sup>

### *3. The Support for the Proposed Amendment to Act 790 Has Arrived*

The 2017 JRI legislation signified the Louisiana Legislature's commitment to ending criminal justice practices that propelled mass incarceration and did nothing to further public safety.<sup>445</sup> Unfortunately, fear of an unsupportive constituency kept many politicians from advocating for more impactful changes, like reforming sentences for violent crime.<sup>446</sup> Recent events, however, demonstrate higher constituent support for such reforms than politicians originally believed.<sup>447</sup> The Eighth Amendment analysis demonstrates changing societal norms, and public favor for costly and purely punitive policies grows weak.<sup>448</sup> Additionally, the action of Louisiana citizens to affirmatively vote for unanimous juries indicates that when Louisiana citizens are made aware of the failed utility of an existing practice, they will vote in favor of efficiency and justice.<sup>449</sup> The time has come for the legislature to act in accordance with the will of its citizens, to fulfill the initial promises of JRI, and to bring an end to the unjust, inefficient practice of continued incarceration of rehabilitated offenders.<sup>450</sup> The Louisiana Legislature should thus amend Louisiana Revised Statutes § 15:574.4(A)(2) to read as follows:

Notwithstanding any other provision of law to the contrary, any person serving a life sentence, with or without the benefit of parole, *shall be eligible* for parole consideration upon serving at least 20

---

441. *See id.*

442. *See id.*

443. *See generally id.*

444. *See generally id.*

445. *See* TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 23.

446. *See id.* at 56; Johnson, *supra* note 142.

447. *See generally supra* Sections III.C.1–2.

448. *See supra* Sections III.C.1.a–b.

449. *See supra* Section III.C.2.

450. *See generally* Simerman & Russel, *supra* note 393.

years of the term or terms of the imprisonment, and upon reaching the age of 50. This amendment shall apply retroactively.<sup>451</sup>

The proposed amendment to Act 790 offers the Louisiana Legislature the opportunity to make a financially expedient decision that also increases public safety and promotes the administration of just sentences in Louisiana.<sup>452</sup> Instead of spending millions of dollars to incarcerate rehabilitated offenders, the legislature can allocate those funds into public safety measures that are proven to work.<sup>453</sup> The expansion of Act 790 will also realize justice for the thousands of prisoners in Louisiana currently serving excessive sentences.<sup>454</sup> Finally, the legislature's adoption of the proposed amendment will signify that, like the citizens of Louisiana, the legislature is also ready to leave the state's dark past behind.<sup>455</sup>

#### CONCLUSION

Louisiana's overuse of excessive sentences is intricately tied to its history of mass incarceration.<sup>456</sup> A sentence is excessive if it causes the incarceration of an individual beyond what is necessary to achieve desired penological goals.<sup>457</sup> Mandatory life without parole incapacitates beyond efficiency, fails to deter future criminals, and disproportionately exacts retribution, making the continued incarceration of rehabilitated individuals

---

451. The current version of Louisiana Revised Statutes § 15:574.4(A)(2) reads:

Notwithstanding the provisions of Paragraph (1) of this Subsection or any other law to the contrary, unless eligible for parole at an earlier date, a person committed to the Department of Public Safety and Corrections for a term or terms of imprisonment with or without benefit of parole for thirty years or more shall be eligible for parole consideration upon serving at least twenty years of the term or terms of imprisonment in actual custody and upon reaching the age of forty-five. This provision shall not apply to a person serving a life sentence unless the sentence has been commuted to a fixed term of years.

LA. REV. STAT. § 15:574.4(A)(2) (2018).

452. See generally Mauer, *supra* note 25, at 2; NAT'L RESEARCH COUNCIL, *supra* note 33, at 326; PFAFF, *supra* note 21, at 191.

453. See generally Mauer, *supra* note 25, at 2; NAT'L RESEARCH COUNCIL, *supra* note 33, at 326; PFAFF, *supra* note 21, at 191.

454. See TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 16.

455. See generally Simerman & Russel, *supra* note 393.

456. Mauer, *supra* note 25, at 2.

457. NAT'L RESEARCH COUNCIL, *supra* note 33, at 326.

excessive and unjust.<sup>458</sup> As the Louisiana Legislature has finally made a commitment to correcting the failures within the state's justice system, the time has come to recognize the ineffectiveness of mandating parole ineligibility for lifers.<sup>459</sup> Louisiana has an opportunity to move beyond modest reform efforts and toward real change that will have profound impacts for the state.<sup>460</sup> Adopting the proposed amendment to Louisiana Revised Statutes § 15:574.4(A)(2) will signify that the Louisiana Legislature is truly committed to severing ties with past practices of mass incarceration and reaffirm its commitment to a criminal justice system that strives for societal benefit rather than maintaining the status quo.<sup>461</sup>

---

458. *See id.*

459. *See id.* at 23.

460. *See* Ghandnoosh, *supra* note 25, at 148.

461. *See generally* TASK FORCE REPORT AND RECOMMENDATIONS, *supra* note 23, at 57; PFAFF, *supra* note 21, at 14–15.