

Releasing Older Prisoners

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The rising number of older prisoners is a major factor in the nation's exponential prison growth over the last four decades. There are now over a quarter million people age 50 or older in state and federal prisons. It is estimated that by 2020, older inmates will represent up to one-third of the prison population. Many are serving life sentences with the possibility of parole for violent crimes, especially murder, committed when they were young. Many of them have redeemed their lives in prison, but will die in prison because of restrictive changes in sentencing and corrections laws and policies during the 1980s and '90s. These are America's most expensive prisoners, costing up to or more than \$60,000 per prisoner a year. The continued incarceration of many serves no public-safety purpose; indeed, it undermines public safety by wasting scarce resources, particularly prison beds. Over the last four years in Maryland, judges have implemented a 2012 appellate court decision by approving the negotiated releases on probation of over 160 long-incarcerated lifers. To date, none of these former inmates has been convicted of a new crime other than driving/traffic offenses. Policymakers and legislatures should be aware of these experiences in making decisions, including cost-effective decisions, about proposed sentencing and release proposals.

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INTRODUCTION

The rising number of older prisoners is a major factor in the nation's exponential prison growth over the last four decades. Preliminarily, we note there is no consensus about what age is "old" for a prisoner, with the commonly stated range being from 50 to 60. It's clear a prisoner's "physical age" is higher than chronological age, and the needs prisoners have for health services begin to significantly increase around the age of 50. There are many factors that produce earlier prisoner aging, including the stress of incarceration, poor nutrition, inadequate health care, the dangers of prison life, and the damaging effects of pre-incarceration behaviors and poverty.¹

In 2013, according to the Bureau of Justice Statistics, there were 1,574,700 state and federal prisoners, six times as many as in 1980.² In 2010, 246,600 were age 50 or older.³ From 1995 to 2010, the number of prisoners age 55 or older nearly quadrupled, from 32,600 to 124,400.⁴ It is estimated that by 2020, older inmates will represent 21% to 33% of the prison population.⁵

There are many reasons for America's aging prison population, including repeal of, or restrictions on parole;⁶ repeat-offender laws;⁷ mandatory minimum

1. TINA CHIU, VERA INST. JUST. CTR. SENTENCING & CORRECTIONS, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, & GERIATRIC 5 (2010); Jeremy Luallen & Ryan Kling, *A Method for Analyzing Changing Prison Populations: Explaining the Growth of the Elderly in Prison*, 38 EVALUATION REV. 459 (2014).

2. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 1, 2 (Sept. 2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf>; HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 24 (2012). For a discussion of mass incarceration, see Todd R. Clear & James Austin, "Mass Incarceration," in the present Volume.

3. OSBORNE ASS'N, THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON POPULATION 2 (2014).

4. HUMAN RIGHTS WATCH, *supra* note 2, at 6, 19.

5. R.V. Rikard & Ed Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System*, 13 J. CORRECTIONAL HEALTH CARE 150, 151 (2007).

6. OSBORNE ASS'N, *supra* note 3, at 5, 7, 8. See generally Francis T. Cullen, "Correctional Rehabilitation," in the present Volume; Douglas A. Berman, "Sentencing Guidelines," in the present Volume.

7. OSBORNE ASS'N, *supra* note 3, at 5; Luallen & Kling, *supra* note 1, at 463 (citing Kathleen Auerhahn, *Selective Incapacitation, Three Strikes, and the Problem of Aging Prison Populations: Using Simulation Modeling to See the Future*, 1 CRIMINOLOGY & PUB. POL'Y 353 (2002)).

sentences;⁸ truth-in-sentencing laws;⁹ longer sentences;¹⁰ more life sentences;¹¹ and limited uses of compassionate/medical release and executive clemency.¹²

In this chapter, we make a series of arguments in support of releasing many more older, long-incarcerated prisoners from the country's prisons and offer recent experiences in Maryland in which over 160 older, long-incarcerated, life-sentenced prisoners were released as evidence that this can be done safely.

I. WHAT THE EXPERTS HAVE SAID ABOUT THE OLDER-PRISONER PROBLEM

A. THE PROBLEM IS SEVERE, GROWING AND VERY EXPENSIVE

Experts from an array of disciplines—including medicine,¹³ social work,¹⁴ mental health,¹⁵ criminology,¹⁶ and law¹⁷—have written about older prisoners, with many points of consensus. To begin with, older prisoners are expensive, costing about \$16 billion per year, including \$8.2 billion in medical care in 2009.¹⁸ It costs twice as much or more, up to \$68,270 per year, to incarcerate an elderly prisoner than a younger one.¹⁹ Indeed, it costs over \$1.5 million to

8. OSBORNE ASS'N, *supra* note 3, at 5. See generally Erik Luna, "Mandatory Minimums," in the present Volume.

9. Among other things, the 1994 Federal Violent Crime Control and Law Enforcement Act required that 50% of program funding go to states that adopt truth-in-sentencing laws. Rikard & Rosenberg, *supra* note 5, at 152.

10. OSBORNE ASS'N, *supra* note 3, at 5.

11. From 1984 to 2008, prisoners serving life sentences in state prisons tripled, from 34,000 to 104,610. HUMAN RIGHTS WATCH, *supra* note 2, at 33 (citing ASHLEY NELLIS & RYAN S. KING, SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 7 (2009)).

12. OSBORNE ASS'N, *supra* note 3, at 5, 7–8. See generally Mark Osler, "Clemency," in the present Volume.

13. Rikard & Rosenberg, *supra* note 5; Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, 60 J. AM. GERIATRIC SOC'Y 1150 (2012).

14. Cindy Snyder et al., *Older Adult Inmates: The Challenge for Social Work*, 54 SOC. WORK 117 (2009).

15. Tina Maschi & Lindsay Koskinen, *Co-Constructing Community: A Conceptual Map for Reuniting Aging People in Prison With Their Families and Communities*, 21 TRAUMATOLOGY 208 (2015).

16. Lauren C. Porter et al., *How the U.S. Prison Boom Has Changed the Age Distribution of the Prison Population*, 54 CRIMINOLOGY 30 (2016); CHIU, *supra* note 1.

17. Derek Neal & Armin Rick, *The Prison Boom and Sentencing Policy*, 45 J. LEGAL STUD. 1 (2016).

18. ACLU, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 28 (2012); PEW CHARITABLE TRUSTS & MACARTHUR FOUNDATION, STATE PRISON HEALTH CARE SPENDING 1 (2014) (stating that health care spending peaked at \$ 8.2 billion in 2009 and since declined, due in part to a decrease in state prison populations); OSBORNE ASS'N, *supra* note 3, at 5, 7, 8.

19. ACLU, *supra* note 18, at ii.

imprison a person from age 50 until age 75. This is a major reason that state corrections spending grew by 674% from 1983 to 2008.²⁰

Almost half of prisoners over 50, and over four-fifths over 65, have chronic physical problems.²¹ They visit health facilities five times as frequently as similarly aged persons not incarcerated and often need expensive off-site hospital care for specialized procedures, with enhanced security costs.²² The costs of special diets for older inmates also may double a younger inmate's food costs.²³ Older prisoners have high incidences of mental-health problems as well, including dementia and Alzheimer's disease.²⁴ Only one in three has access to adequate treatment.²⁵

Older prisoners also face dangerous conditions and pose management challenges. At worst, they are victimized (in large numbers). At best, when protected, they struggle to freely move around, faced with having to go up and down stairs, use bunk beds, navigate narrow doorways, and move substantial distances for meals and other services, often without handrails or wheelchair access.²⁶

B. POSSIBLE RESPONSES TO THE OLDER-PRISONER PROBLEM

In the last 15 years, many states have created mechanisms to give prisoners early-release opportunities. These reforms have been largely driven by overcrowding and cost, and more frequently now, have bipartisan support. They include expansions of medical/compassionate release; more earned-time opportunities and reinstatement of traditional parole; limits on parole revocations for technical violations; and development of risk-assessment tools. More recently, "justice reinvestment acts" have included some of these provisions.²⁷

20. *Id.*; CHIU, *supra* note 1, at 4.

21. ACLU, *supra* note 18, at 31; HUMAN RIGHTS WATCH, *supra* note 2, at 73.

22. CHIU, *supra* note 1, at 5; OSBORNE ASS'N, *supra* note 3, at 2.

23. Stan Stojkovic, *Elderly Prisoners: A Growing and Forgotten Group Within Correctional Systems Vulnerable to Elder Abuse*, 19 J. ELDER ABUSE & NEGLECT 97, 104 (2007).

24. OSBORNE ASS'N, *supra* note 3, at 3.

25. *Id.*

26. *Id.* at 4; ACLU, *supra* note 18, at 27.

27. See Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1288 (2011). O'Hear summarizes what he sees as a swinging pendulum: "Parole is making a comeback. Although it was a universal feature of the American criminal justice system as recently as forty years ago, parole fell into precipitous decline over the final three decades of the twentieth century. By 2000, fifteen states and the federal government had abolished parole altogether, while twenty additional states had formally restricted its availability. Since 2000, however, at least thirty-six states have enhanced release opportunities for prison inmates (although some still resist the 'parole' label for their new programs)." *Id.* at 1249.

What almost all of these reforms have in common is the exclusion of long-confined, older prisoners convicted of violent crimes. This is true even when such prisoners are eligible for release under, for example, medical/compassionate release laws. By the end of 2009, 15 states and the District of Columbia had provisions for medical, geriatric releases. Yet these laws are rarely used. “Four factors help explain the difference between the stated intent and the actual impact of geriatric release laws: political considerations and public opinion; narrow eligibility criteria; procedures that discourage inmates from applying for release; and complicated and lengthy referral and review processes.”²⁸

There are obstacles to reform, including politically cultivated public anger and understandable skepticism about cost/benefit arguments. When cost savings are offered, “[p]olicymakers and taxpayers want to know whether costs are simply being shifted to other state agencies, such as social service or health departments, or to the federal government through Medicare or Medicaid reimbursements after individuals return to the community.”²⁹ Cost-effective arguments, however, have factual support.

Release does reduce a significant “collateral cost associated with obtaining [required] medical treatment. Although governments may have to pay for elder inmates’ medical needs regardless of whether they are incarcerated, transactional costs of providing health care in the prison system compound state and federal expenditures.”³⁰

And specialized housing units for older inmates are expensive too. They can include assisted living care,³¹ convalescent care,³² and hospice-care units,³³ as well as special units for inmates with dementia and cognitive impairments.³⁴ Correctional officers must deal with common age-related conditions like loss of vision and hearing, falls and incontinence, and clinically diagnosed cognitive issues. These conditions pose difficult and expensive challenges in prisons.³⁵

We believe that one safe and cost-effective answer to these problems simply is to get many older inmates out of prison, so the state saves the excessive costs of their continued incarceration and they can live their remaining years,

28. CHIU, *supra* note 1, at 2.

29. *Id.* at 8.

30. Jason S. Orduff, *Releasing the Elderly Inmate: A Solution to Overcrowding*, 4 *ELDER L.J.* 173, 185 (1996).

31. HUMAN RIGHTS WATCH, *supra* note 2, at 50–51, 74.

32. *Id.* at 50–51.

33. *Id.* at 50–51, 83, 84.

34. *Id.* at 6, 52, 53, 55.

35. OSBORNE ASS’N, *supra* note 3, at 3–4, 12; Williams et al., *supra* note 13, at 1475.

sometimes two to three decades, with their families, family members, friends, or in community-based housing.

When released, older prisoners have low recidivist rates, confirming that people “age out” of criminal activity.³⁶ Over 40% of all released inmates recidivate within three years of release, compared to 7% of released prisoners who are 50-64 years old, and 4% who are 65 or older.³⁷ These data are true for those convicted of violent crimes and sentenced to life.³⁸ In sum, older prisoners, when released, have the lowest recidivism rates and pose the least threat to public safety of all prisoners.

If released on parole, the average daily cost will be \$3.50 to \$13.50 a day, or \$1,278 to \$4,928 per year.³⁹ These relatively low numbers reflect the reduced needs for supervision.

We now turn to one state’s recent experiences in *safely* releasing over 160 older, life-sentenced prisoners to make our basic point that thousands of older prisoners serving life sentences across the country can be safely released.

II. RELEASING LONG-INCARCERATED, OLDER PRISONERS SAFELY: THE MARYLAND EXPERIENCE

During the last three years, Maryland courts have released 178 older, life-sentenced prisoners convicted of murder (most) or rape.⁴⁰ The releases of 177 were based on agreements between prosecutors and the prisoners to implement a 2012 decision of the Maryland Court of Appeals granting older prisoners

36. CAL. DEPT. CORRECTIONS & REHABILITATION, OFFICE OF RESEARCH, 2010 ADULT INSTITUTIONS OUTCOME EVALUATION REPORT 15 (2010) (citing D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (4th ed. 2006)); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 556–61 (1983) (criminal propensity tends to peak in the late-teens).

37. OSBORNE ASS’N, *supra* note 3, at 5 (citing PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS* (2011)).

38. Dana Goldstein, *The Misleading Math of “Recidivism,”* MARSHALL PROJECT (Dec. 4, 2014); CAL. DEPT. CORRECTIONS & REHABILITATION, *supra* note 36, at 15, 26; ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, *LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA* 17 (Stanford Criminal Justice Center 2011); Snyder et al., *supra* note 14, at 34; OSBORNE ASS’N, *supra* note 3, at 2; HUMAN RIGHTS WATCH, *supra* note 2, at 73, 75; ACLU, *supra* note 18, at viii, 47.

39. ACLU, *supra* note 18, at xiv.

40. This information, as well as virtually all of the facts in this chapter, was provided by Becky Kling Feldman, Chief of the Collateral Review Division, Maryland Office of Public Defender, and is current through January 19, 2017. We do not provide citations to further facts unless the information did not come from Ms. Feldman.

new trials.⁴¹ (The other prisoner was retried, acquitted, and released.) In total, there were 235 prisoners entitled to new trials. We call these 235 the “Unger group,” after the name of the case. All were convicted before 1981, most in the 1960s and 1970s, and one in 1952. Rather than retry most of these old cases, most prosecutors negotiated conditional releases. The great majority of the prisoners were resentenced to life sentences with all of the sentence suspended except time served, and put on probation. There will be more releases in the future.⁴²

On average, when released, the 178 released prisoners were 63 years old (from 52 to 82), and had been incarcerated 39 years (from 33 to 62). All but one were men. Eighty-seven percent of those who have been released (whose race is known) were African-American, a rate significantly disproportionate to

41. Unger v. State, 48 A.3d 242, 261 (Md. Ct. App. 2012); *see also* State v. Waine, 122 A.3d 294 (Md. Ct. App. 2015) (reaffirming *Unger*). One of the 178 prisoners was acquitted after a retrial. The underlying issue in *Unger* involved the interpretive authority of juries. Before 1981, trial judges were required by the Maryland Constitution to instruct juries in criminal cases that they—the jurors—were the ultimate judges of *the law* and what the court said about the law was *advisory only*. Here is a typical instruction by a trial judge (referring to himself as “we”) in a 1976 case:

We say to you at the onset of these remarks that ...you ladies and gentlemen are *the judges* of not only the facts, as you are in every case, but on *the law* as well. It is your responsibility in this case to *determine ... for yourselves what the law is*. Therefore, everything the court says to you in these remarks ... is *advisory upon you only*. You ... *are free to find the law to be other than as the Court says it is and if they wish to do so, counsel will be permitted to argue to you that the law is other than as the Court says it is*. We are going to give you our best opinion about the matter, but the final determination of it is *solely in your hands*.

Transcript of Trial at 153-54, State v. Jerome Chase, No. K-75-1235 (Md. Cir. Ct. Calvert Cty., July 12, 1976) (emphasis added). In 1980, the Maryland Court of Appeals invalidated this instruction because it invited jurors to disregard the presumption of innocence and the government’s obligation to prove guilt beyond a reasonable doubt, among other fundamental rights. *See* Stevenson v. State, 423 A.2d 558 (Md. Ct. App. 1980). In 2012, the *Unger* court made the 1980 decision retroactive, entitling the defendants to new trials.

42. There have been only four retrials, resulting in three convictions and new life sentences and the one acquittal. At retrials, prosecutors have introduced the original transcribed testimony of those witnesses who at the time of the retrials were dead or missing. The process of implementing *Unger* has been protracted and is continuing. As of August 1, 2017, the complete accounting of the 235 was as follows: 178 have been released; 9 died before they could litigate their *Unger* claims; 21 were awaiting new trials after reversals of their convictions and sentences (a number of these will be released by agreement prior to trial); 8 were released to detainers based on other valid convictions and sentences; 7 entered into agreements pursuant to which they pled guilty and were sentenced to fixed terms that required additional but limited incarceration; 3 were reconvicted and sentenced to life; and 9 had pending *Unger* litigation and/or ongoing settlement negotiations.

the races of those arrested for homicide when they were convicted.⁴³ All were sentenced to life with the possibility of parole,⁴⁴ and the Parole Commission had recommended some for parole.⁴⁵

Prosecutors in 17 of Maryland's 24 jurisdictions agreed to releases. They considered the strength of the case against the prisoner; the prisoner's age, prison record, and length of incarceration; the nature and notoriety of the crime; and the prisoner's release plan, among other factors. In a few jurisdictions, prosecutors have refused to negotiate, opposed motions for new trials, and when they lost, have been setting the cases in for retrials.⁴⁶

The 178 were released (individually or in small groups) from maximum- and medium-security prisons.⁴⁷ They have been free an average of approximately two years and six months. How have they done? As of January 19, 2017, *none* had been convicted of a crime other than a traffic/driving offense, and no judge had ordered that probation be revoked *in a single one* of these 178 cases.

To put it another way, Maryland has now released over 75% (178) of all of its lifers (235) who were convicted by juries before 1981 and were still in prison in 2012. Again, this is a continuing project. Because lifers in Maryland are not eligible for minimum security or work-release, the 178 have come out without the benefits of work-release programs and transitional placements in community residential centers. The extraordinary success of this group

43. Feldman data, *supra* note 40. There is no reason to believe that these data are not representative of the Unger group. See generally RACE, CRIME, AND JUSTICE: A READER 246 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (discussing historical homicide offending rates by race and citing many studies conducted on the matter during the time frame in question); see also FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 117 (1965) (showing the total number of homicide arrests by race in the year 1965, and indicating that there were 4,558 arrests of white persons for criminal homicide in the United States that year and 4,245 arrests of black persons for homicide).

44. This was before 1987, when the legislature provided a life without parole option. See Byron L. Warnken, *Life Should Not Mean Life Without Parole (Part III)*, PROFESSOR BYRON L. WARNKEN'S BLOG (Mar. 29, 2011), <http://professorwarnken.com/2011/03/29/life-without-parole/>.

45. Maryland is one of three states in which life-sentenced prisoners cannot be paroled without the approval of the governor. The Maryland Parole Commission does not make public the names of the lifers whom they recommend for parole or commutation to the governor. See *infra* note 52 (providing numbers for lifers the Commission recommended for parole and commutation from 1995-2015).

46. A number of the 43 inmates still litigating their *Unger* cases or awaiting new trials also have good prison records and parole or commutation recommendations.

47. Life-sentenced prisoners in Maryland have been ineligible for minimum security and work-release since 1995.

strongly suggests that thousands, likely tens of thousands, of long-incarcerated, older prisoners throughout the country can be safely released.⁴⁸

The Unger group had an advantage many other released prisoners do not have. A social worker or supervised social-work student was available to help them successfully reenter the free world. Of the 178, approximately 130 asked for and were given reentry help to assist them in meeting the formidable Rip Van Winkle challenges they have faced.⁴⁹

In the last two decades, older prisoners have been stacking up in Maryland's prisons, as they have around the country. By 2013, there were 712 prisoners over 60, and 2,381 between ages 51 and 60, over 14% of Maryland's prison population.⁵⁰ A significant reason for the logjam is that two relatively recent Democratic governors, who served a total of four terms, refused to approve

48. The Unger group experiences are consistent with national empirical data. *See, e.g., WEISBERG ET AL., supra* note 38. The Stanford report found that the "incidence of commission of serious crimes by recently released lifers has been miniscule," with only 5 of 860 paroled murderers being reincarcerated "for new felonies," and "none" for "life-term crimes." *Id.* at 4, 17.

49. *See generally* Susan Turner, "Reentry," in the present Volume. We are not impartial observers. Our interdisciplinary law school clinic volunteered to help with the legal work in 2012 and to provide essential reentry services to those released, and we are still working on this continuing project. Millemann has been a professor, including in the Clinical Law Program, of the University of Maryland-Carey School of Law since 1974. Bowman-Rivas has been the Manager of the Law and Social Services Program, a part of the Clinical Law Program, for almost 15 years. Smith has been a graduate student and now is a Forensic Social Work Fellow in that program. To date, 3 law professors, over 50 law students, 3 part-time law school social workers, and over 30 social work students have worked on this project in a variety of clinical and other courses and placements. The Open Society Institute-Baltimore (OSI) has funded two part-time social workers. As of January 19, 2017, the social workers and social work students had provided in-prison and post-release services to over 80% of the 178 released. The Maryland Office of Public Defender has been the leader in implementing *Unger*, especially Becky Feldman, *see supra* note 40, and Brian Saccenti, Chief of the Appellate Division. Walter Lomax, Executive Director of the Maryland Restorative Justice Initiative, has been another essential partner. He was a leader in prison and, after having been exonerated after 38 years of wrongful incarceration, has been a counselor, mentor, friend, and, when necessary, a "Dutch uncle" to the Unger group.

50. MARYLAND DEP'T OF PUB. SAFETY & CORR. SERVICES, QUARTERLY INMATE CHARACTERISTICS REPORT 4 (July 2013), http://www.dpscs.state.md.us/publicinfo/pdfs/stats/data-reports/I_and_I-Statistics/Inmate_Characteristics/Quarterly_Inmate_Characteristics/FY2014/2013_July_Inmate_Char.pdf.

paroles of any lifers except one.⁵¹ Maryland is one of three states in which the governor must approve parole before a lifer can be released.⁵² In 1995, Gov. Parris Glendening announced to great fanfare that “life means life,” failing to point out that life *with the possibility of parole* had always before meant just that.⁵³ Now, by executive policy, life with the possibility of parole has been converted into life without parole, with a handful of exceptions.

In 1993, the average period served on a life-with-parole sentence before release was between 20 and 21 years.⁵⁴ This explains why there are so many in the Unger group. Glendening’s new policy was a stark break from tradition.

III. ANALYSIS AND ASSESSMENT: THE RELEVANCE NATIONALLY OF THE UNGER PROJECT EXPERIENCES IN MARYLAND AND IMPORTANCE OF THE SOCIAL-WORK COMPONENT

Maryland, in effect, is conducting a court-imposed experiment to test the potential for safely releasing older, long-incarcerated prisoners across the country. The only bases for selection for the Unger group were that the prisoner was convicted at a jury trial before 1981 and was still locked up in 2012.⁵⁵

51. From 1995 through 2002, and 2007 through 2015, the terms of these two governors, the Parole Commission made 20 recommendations of parole for life-sentenced prisoners; only 1 was approved. It made 45 recommendations of commutation, to reduce life sentences to fixed terms making the prisoner eligible for an imminent or possible future release by the Parole Commission; all were denied. Governor Robert Ehrlich, Jr., a Republican, who served from 2003-2007, approved 6 releases of lifers, largely through commutations. By comparison, from 1985 through 1994, the Parole Commission made 93 recommendations of parole for life-sentenced prisoners (some more than once), and governors approved paroles for 39 prisoners.

52. See FACTSHEET: MARYLAND’S POLICIES AROUND PAROLE-ELIGIBLE LIFE SENTENCES, JUSTICE POLICY INSTITUTE (undated, citing 2010 data), http://www.justicepolicy.org/uploads/justicepolicy/documents/documentary_factsheet.pdf, at 1. The other two states are California and Oklahoma.

53. Kate Shatzkin, *Glendening Acts to End Parole for Inmates with Life Sentences: Those on Work Release Summoned Back to Prison*, BALT. SUN, Sept. 29, 1995, at 2B. The precipitating event occurred when a lifer on work release killed a woman companion and himself. All prisoners on work-release were immediately returned to maximum security prisons. *Id.* A number in the Unger group were on work release in 1993 and weeks or months from parole when they were loaded on buses and shipped back to maximum security prisons, where they remained for three decades or more. After 1995, none were eligible for minimum security or work release.

54. See Darren M. Allen, *Killer Asks for Lighter Sentence: Parole Seeker Cites “Oz” for Hope*, BALT. SUN, June 16, 1993, at 1B (“The lifers now on parole served an average of 20.6 years before being released.” (quoting Paul Davis, Chairman of the Maryland Parole Commission)).

55. In all pre-1981 trials, Maryland judges gave the unconstitutional advisory-law instructions. See *supra* note 41.

With the help of Open Society Institute-Baltimore, we created our own reentry program for the Unger group, and we believe that providing reentry services has been important to this success, but we cannot quantify this. We have learned much.

We were pleasantly surprised by the relatively large numbers who had family members—often sisters and sometimes more-distant relatives—who agreed to take in their prisoner relatives. We estimate that approximately 70% of the 178 were released to relatives. This is an important fact in the cost-benefit analysis. A little under 25% were placed in nursing homes (5), assisted-living arrangements (6), senior buildings (10), and forms of transitional housing (17). The remainder are living with roommates or in rentals (often without leases). These are not hard numbers, however, since housing arrangements are fluid.

To differing degrees, our social workers and students, working with social workers from the Public Defender's Office, have helped those released not only to obtain housing (hands down the hardest part),⁵⁶ but also state identification cards, Social Security cards, and even birth certificates; basic benefits;⁵⁷ Medical Assistance or Medicare; MTA Mobility Assistance; prescriptions; referrals to reentry programs; and, with the more involved clients, help on a daily basis.

Although this may appear to be an expensive and comprehensive safety net, it's not. Many have received, at best, approximately \$370 a month,⁵⁸ and often only \$189 in food stamps (not cash).⁵⁹ For some, this lasted for the period (one month to almost three years) that it took for them (the older ones) to establish eligibility for Supplemental Security Income benefits, a little over \$700 a month. For others, the more limited income has continued. Neither is adequate to cover not just food, but also prescription co-pays, transportation, and the big item for some—housing.

The services we have provided have not only benefitted those released and their families; they also have helped to reassure prosecutors that prisoners could be safely released (prosecutors usually required release plans as conditions of

56. Most in the Unger group are ineligible, because of their criminal records, for most senior housing and all public housing; and they have no credit or rental histories, often placing even cheap rental properties beyond their reach.

57. For example, Supplemental Security Income, Temporary Disability Assistance, and Supplemental Nutrition Assistance (commonly known as "food stamps").

58. The total of Temporary Disability Assistance (which about ten percent received for a time) and Supplemental Nutrition Assistance payments.

59. The monthly amount of Supplemental Nutrition Assistance payments.

release), to reassure the resentencing courts, and to help to create some degree of public confidence in the releases.⁶⁰

In arguing for the releases of older, long-incarcerated prisoners, we add a justice-based consideration. Those in the Unger group are disproportionately African-American. In some of the older cases, African-Americans were not generally summonsed for jury duty.⁶¹ In many cases when African-Americans were summonsed, prosecutors routinely struck them from juries.⁶² It was not until 1986 that the Supreme Court prohibited this.⁶³

In the late 1960s and early 1970s, race relations were inflamed by the backlash against the Civil Rights Movement, the assassination of Dr. Martin Luther King, the violent disturbances in reaction to that event and the angry counter-

60. Initially, the releases generated high-profile controversy. There were headlines about “released murderers” and other critical media coverage. Over time, the continuing releases have become non-stories. Indeed, the more recent coverage, while not disregarding the crimes and awful losses of victims and their survivors, has described the positive features of the lives of those returning home after decades of incarceration. See, e.g., *More than 130 Maryland Lifers Adjust to Freedom After Court Ruling*, NPR (Feb. 17, 2016), <http://www.npr.org/2016/02/17/467118226/more-than-130-maryland-lifers-adjust-to-freedom-after-court-ruling>; *From a Life Term to Life on the Outside: When Aging Felons Are Freed*, NPR (Feb. 18, 2016), <http://www.npr.org/2016/02/18/467057603/from-a-life-term-to-life-on-the-outside-when-aging-felons-are-freed>; Jason Fagon, *Meet the Ungers*, HUFFINGTON POST, <http://highline.huffingtonpost.com/articles/en/meet-the-ungers/>.

61. There was a “key man” system in effect in Baltimore City until 1969, pursuant to which each judge, including each of the 17 judges on the circuit court (then called the Supreme Bench), asked “key men,” friends of the judges, to nominate jurors for criminal trials. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 114 n.562 (1990). After this practice ended in 1969, African American representation in Baltimore City on venire panels increased. However, prosecutors still routinely struck black jurors from the trial (petit) juries until after the U.S. Supreme Court invalidated the practice in 1986.

62. In Maryland in the 1960s and 1970s, legal challenges to the exclusion of minorities from trial juries met with little success. See, e.g., *Brooks v. State*, 240 A.2d 114 (Md. Ct. App. 1968) (of 400 prospective jurors, only 14 were African American, and that—as well as other evidence of exclusion of African Americans from the jury—was not enough to establish a prima facie case of purposeful discrimination).

63. *Batson v. Louisiana*, 476 U.S. 79 (1986).

responses and “Law and Order” rhetoric.⁶⁴ Most of the trials were one to three days long, many of which we would not recognize today as complying with due process. We believe, based upon detailed reviews of the records in many cases, that some in the Unger group likely were factually innocent⁶⁵ and others were not guilty of the degree of homicide (first-degree murder) for which they were convicted. Maryland is a border state. What we found here likely applies to thousands of older prisoners in other states who were convicted before 1981.

In any event, as prisoners get older, the accepted reasons for punishment have less and less application. There is little meaning to rehabilitation, admittedly a value in decline for several decades, when most prison programs and jobs are off-limits to lifers and there is no way out of prison no matter how well you do. Incapacitation is for predictably dangerous people, not predictably safe bets for release.⁶⁶ The incremental difference between 39 years in prison (the average of the 178 released) and life is unlikely to have any deterrent effect, particularly for the many who were convicted when they were teenagers or young adults.⁶⁷ Some may argue that the die-in-prison practice serves retribution, but that depends on one’s theory of retribution,⁶⁸ and is undercut by the fact that when the Unger group was sentenced, the reasonable expectations of the judge, counsel and victims or victim survivors were that, with good behavior, the actual time served would be about 20 to 21 years. This was the accepted measure of retribution when they were sentenced.

64. In the 1960s and early 1970s, Baltimore City was a majority-white city with a substantial white working class population and a growing African-American population. See KENNETH D. DURR, *BEHIND THE BACKLASH: WHITE WORKING-CLASS POLITICS IN BALTIMORE, 1940–1980*, at 126 (2003); HAROLD A. MCDUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* 98 (1993). Race bias was a regular part of life in Baltimore and throughout the State. See SUZANNE E. GREENE ET AL., *MARYLAND: A HISTORY OF ITS PEOPLE* 262 (1986) (discussing racial violence occurring in Maryland in the 1960s). A measure of this was the relative success of George Wallace in the 1964 presidential primary in Maryland. Famous for his “segregation now, segregation tomorrow, segregation forever” pledge as Alabama governor, he got 43% of the vote statewide and generally won the majority-white precincts, including throughout Baltimore City.

65. For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report.

66. See Shawn D. Bushway, “Incapacitation,” in the present Volume.

67. The average age of the 178 upon incarceration was twenty-four. For a discussion of deterrence, see Daniel S. Nagin, “Deterrence,” in the present Volume.

68. See O’Hear, *supra* note 27 (arguing that retribution should allow for different treatment of defendants convicted of similar crimes based on their performances in prison). For a discussion of retribution, see Jeffrie G. Murphy, “Retribution,” in the present Volume.

RECOMMENDATIONS

We recognize the formidable political obstacles most of our recommendations will face, but make them because we believe they are right, practical, cost-effective, and substantiated by compelling evidence, including the Maryland experience.

1. **Remove the governors' veto powers over parole recommendations in lifer cases, which exist in three states.** Since the Willie Horton affair,⁶⁹ consideration of releases of life-sentenced prisoners convicted of violent crimes has been politically charged. All the reasons for creating parole boards with some distance from governors support taking the governor out of the decisional process. Maryland is a classic example of why governors should not have veto powers. This veto substitutes fear of public anger and of its impact on a political career for reasoned decision-making. It is bad and unnecessarily expensive public policy.
2. **Re-establish and expand parole for life-sentenced prisoners, using a presumptive parole model.** This model requires parole boards to demonstrate with facts why prisoners who meet certain criteria should not be paroled. The proposals to date exclude those convicted of violent crimes.⁷⁰ The length of time served, age, and good behavior might trigger the presumption in lifer cases. A version of this model was imposed in California by court order.⁷¹ Prisoners who are 60 years old or older and have served 25 years or more of their sentences are eligible for a parole hearing at which the issues are “how the inmate’s advanced age, long-term confinement, and diminished physical condition, if any, may impact the inmate’s potential risk for future violence.”⁷² A 2016 account stated “that since the Elderly Parole Program began in February 2014, more than 1,000

69. Beginning on September 21, 1988, the Americans for Bush arm of the National Security Political Action Committee (NSPAC) began running a campaign ad entitled “Weekend Passes” using the Willie Horton case of a work-release prisoner who kidnapped and assaulted a family to attack Democratic nominee Michael Dukakis. The ad closed with the punch line: “Weekend prison passes. Dukakis on crime.” See National Security PAC, *Willie Horton 1988 Attack Ad*, YouTube, <https://www.youtube.com/watch?v=Io9KMSSEZOY>.

70. Michigan provides one model. See Kathleen Gray, *Mic. House passes bill adopting ‘presumptive parole,’* DETROIT FREE PRESS (Oct. 1, 2015), <http://www.freep.com/story/news/2015/10/01/mich-house-passes-bill-adopting-presumptive-parole/73155514/>.

71. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM & No. C01-1351 TEH, 2010 WL 99000 (E.D. Cal. & N.D. Cal. Jan. 12, 2010), *aff’d* *Brown v. Plata*, 563 U.S. 493 (2011).

72. STATE OF CALIFORNIA—BOARD OF PAROLE HEARINGS, MEMORANDUM ON ELDERLY PAROLE PROGRAM (June 16, 2014), http://www.cdcr.ca.gov/BOPH/docs/Policy/Elderly_Parole_Program_Overview.pdf. Attempts to codify the court-ordered elderly parole provision and to reduce the age from 60 to 50 and the time served from 25 to 15 years failed to pass. Sen. Bill 224, 2015-2016 Reg. Sess. (Cal. 2015).

inmates have had parole hearings, with 371 granted parole, 89 deemed ‘not ready,’ and 781 denied release.”⁷³ There are no recidivism data yet for the 371 granted parole. In any event, time served and age should be given extra weight in parole decisions when there is a record of good conduct and a good release plan.

3. **Make parole-eligible, life-sentenced prisoners eligible for prison programs and work-release.** Unless lifers can demonstrate their readiness for release in these ways, there will be reluctance to release them even when they are parole-eligible. Many of our clients have said that their participation in educational courses and programs, including at the college and masters’ levels, were the turning points in their lives.
4. **Expand medical parole for older prisoners and remove exclusions for violent crimes.** Medical-parole laws allow people who are seriously ill to be released to supervision, where they can receive appropriate care in the community. Medical parole should be expanded beyond those facing imminent death who are released into hospice care.
5. **As a state releases larger numbers of older prisoners, close a prison and use the real savings from that, in part, to fund reentry services, and in part, to fund crime-prevention and victim-remediation services.** The confined-until-you-die paradigm undermines public safety by wasting expensive and scarce resources, i.e., prison cells. Although upon release, the vast majority of old and long-incarcerated prisoners will be successful, the provision of essential reentry services will reduce the failures to a few, and encourage public confidence in, and add a humane dimension to, these releases. Other savings might be used to fund victim-compensation and support programs.⁷⁴ In the end, the over-incarceration of older prisoners diverts funds that could be invested in real public-safety initiatives.

73. See Katherine C. Pearson, *Victims Oppose California’s Elderly Parole Program*, ELDER LAW PROF BLOG (Mar. 23, 2016), http://lawprofessors.typepad.com/elder_law/2016/03/victims-oppose-californias-elderly-parole-program-.html.

74. For a discussion of victims in the criminal process, see Paul G. Cassell, “Crime Victims’ Rights,” in Volume 3 of the present Report.