

Why people who have been incarcerated for long periods and the elderly, even if convicted of violent offenses, deserve special consideration in any parole system.

By Joseph Dole

The main goal of any parole system should be to ensure that people aren't kept incarcerated past the point that they cease posing a threat to society. This ensures both the safety of society and that limited resources are not wasted on over-incapacitation. Having incarcerated so many millions of our fellow citizens for so long, we now have reams of data showing who is most or least likely to commit a new crime if released from prison. Unfortunately, the facts are often drowned out by rhetoric and stigma.

The facts are that: 1) people in prison for violent crimes and people who have served long prison terms are the safest people to release; and 2) the only way to address the problem of mass incarceration is to reduce sentences for violent crimes and release people from prison who statistics show are unlikely to commit another crime.

With her book *The New Jim Crow*, Michelle Alexander kicked off a lively debate about the causes of mass incarceration and how to address the problem. While *The New Jim Crow* was an incredibly important contribution to addressing the racist criminal laws of our country, and has been the main catalyst for sentencing reforms concerning drug crimes, it has come under criticism for being too narrow.

Contrary to her assertions, incarcerating people for drug crimes has not been the main driver of mass incarceration. More recent research has shown, unequivocally, that it actually has been the incarceration for violent crimes for extraordinarily long periods of time.

Fordham law school professor John Pfaff notes in his book *Locked In* that “over half of all state inmates are in prison for violent crimes, and the incarceration of people who have been convicted of violent offenses explains almost two-thirds of the growth in prison populations since 1990. Similarly, almost all the people who actually serve long sentences have been convicted of serious violent crimes.”¹ In her book *Caught*, professor Marie Gottschalk came to the same conclusion:

The reality is that tougher sentences across the board for both serious crimes and petty offenses initially fueled the prison buildup. But the contribution of violent offenders to the prison population now significantly dwarfs the contribution of drug offenders. . . . Ending the war on drugs—one of the top priorities for many penal reformers—will not necessarily end mass incarceration in the United States because drug offenders have not been the primary driver of growth in the prison population.²

Both Pfaff and Gottschalk seem to agree with the conclusion of the Urban Institute, which found that “[w]e can’t tackle mass incarceration,” without addressing long prison terms,”³ which inevitably means addressing sentences for violent crimes.

Bringing back a parole system for *all* incarcerated people, including those in prison for violent crimes and applying it retroactively is not only the humane thing to do, but can be done safely and make a serious dent in addressing mass incarceration. Not to mention save the state a lot of money.

According to The National Conference on State Legislation, Illinois currently spends over 800 million dollars per year incarcerating people convicted of violent offenses.⁴ This is in

1 John F. Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*, Basic Books (New York, NY) 2017, p. 11.

2 Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, Princeton University Press (Princeton, NJ) 2016, p. 167.

3 “A Matter of Time: The Causes and Consequences of Rising Times Served in Americas’ Prisons.” Urban Institute, July 2017, p. 9; see also Pfaff, *supra* note 1 at p. 185-187; and Gottschalk, *supra* note 2 at p. 11-12. See also Nazgol Ghandnoosh, “Policy Brief: Can We Wait 75 Years to Cut the Prison Population in Half?” The Sentencing Project (March 2018), p. 4.

4 “Defining Violence: Reducing Incarceration by Rethinking America’s Approach to Violence,” Justice Policy Institute (August 2016), p. 20.

part due to the fact that in the late 1990s Illinois passed its own Truth-In-Sentencing law without any examination beforehand of what it would cost. Illinois thereby legislated itself into an annual minimum of 250 million dollars in added liabilities.⁵

Those who study the issue in any depth find that severely long prison sentences for violent crimes bring extraordinarily high costs with almost no benefit once the person remains incapacitated past the point that he or she poses a threat to society.⁶ Like many others, Marie Gottschalk laments that people “are serving savagely long sentences for violent offenses even though they no longer pose serious threats to public safety.”⁷

Unfortunately, due to decades of tough-on-crime rhetoric and political machinations, Americans in general have a misperception that people who are incarcerated for violent crimes pose a serious threat of committing further violence if released. Due to this misperception, we have enacted laws to implement our nonsensical rhetoric of “lock-em’-up and throw away the key,” and we now have hundreds of thousands of Americans, and thousands of Illinoisans, who will die in prison of old age due to having “committed” a violent offense. Many people are convicted of violent crimes under theories of accountability or felony murder, meaning they personally did nothing violent but may have simply aided someone who did.

The truth is that people incarcerated even for the most serious, most violent offenses, like murder, are no greater threat to society than anyone else in prison. In fact, for numerous reasons, as time goes by, they actually become less of a threat to society, and thus safer to release than the allegedly “non-violent” people we are so quick to release from prison in a budget crisis.

5 Joseph Rodney Dole, II, “Preliminary Findings Concerning the Financial Costs of Implementing Illinois’ Truth-In-Sentencing Laws (2002-2004).” January 11, 2011, p. 17, available at <http://realcostofprisons.org/materials/dole/preliminary/findings.pdf>.

6 See e.g. Pfaff *supra* note 1 at p. 230; PEW Center on the States, “One in 31: The Long Reach of American Corrections,” Washington, D.C., The PEW Charitable Trust, March 2009.

7 Gottschalk *supra* note 2 at p. 258.

John Pfaff notes how “our current approach to punishing those convicted of violence is almost entirely blind to mountains of sophisticated research about violent behavior.”⁸ That research includes the fact that, according to Marie Gottschalk, “[i]t is well established in the criminology literature that ‘the current offense that one commits is a very poor predictor of the next offense.’”⁹

Gottschalk goes on to explain that:

Many of the people sent to prison for violent offenses are not necessarily violent offenders years later. Nevertheless, the common perception is that they are still violent despite stellar prison conduct records, ample evidence of rehabilitation through education, volunteering, and other programs, and conclusive research findings that people tend to age out of crime.¹⁰

This is because, as Pfaff so cogently explains:

For almost all people who commit violent crimes, however, violence is not a defining trait but a transitory state that they age out of. They are not violent people; they are simply going through a violent phase. Locking them up and throwing away the key ignores the fact that someone who acts violently when he’s eighteen years old may very well be substantially calmer by the time he’s thirty-five.

...
In short, a person’s level of aggression fluctuates over time, and in ways implying that long sentences frequently over-incapacitate. We don’t need to lock up most violent twenty-year-olds for thirty years to keep ourselves safe, since most of them would naturally desist from offending much sooner than that.¹¹

When one thinks about it, this is common sense. Many violent crimes are committed by hot-headed youth whose brains are not yet fully developed, making it difficult for them to control their emotions.¹² Once the brain maturation process is complete and a person reaches psychosocial maturity, around age 25 to 30, people are less likely to act out in rash and violent

⁸ Pfaff *supra* note 1, at p. 186-187.

⁹ Gottschalk *supra* note 2, at p. 168; quoting Robert J. Sampson, “The Incarceration Ledger: Toward a New Era in Assessing Societal Consequences.” *Criminology & Public Policy* 10.3 (2001), 823.

¹⁰ Gottschalk *supra* note 2, at p. 169.

¹¹ Pfaff *supra* note 1, at p. 190-192.

¹² Vincent Schiraldi and Bruce Western, “Why 21-Year-Old Offenders Should be Tried in Family Court,” *Washington Post*, October 2, 2017.

ways. Moreover, once a man passes his physical prime he is less able to defend himself from violence, and thus less likely to instigate or engage in violence himself. Thus, it is easy to understand why “[n]ot only are most violent crimes committed by people under 30, but even the criminality that continues after that declines drastically after age 40 and even more so after 50.”¹³ At some point, nearly everyone will say “screw this, I’m too old for this shit.”

Other than pedophiles, the people stigmatized as being the largest perpetual threat to society are people who commit murder. However, if we look at those who were in prison for murder and then released, we see clear evidence that our assumptions are erroneous. The Justice Policy Institute noted in 2016 that “[p]eople whose most serious crime was homicide. . . show the lowest recidivism rates.”¹⁴ This fact is borne out by one study after another. When a 2012 court decision in Maryland forced the early release of more than 100 people, most of whom were convicted of homicide, none had been convicted of a new felony offense when reviewed in 2016 by National Public Radio.¹⁵

Similarly, in California, where just shy of half of all people released from prison are sent back within three years for new offense, those released after serving time for murder stand out from the rest. In 2011, when researchers looked at the 860 such people paroled since 1995, they found “only *five* individuals” sent back “for new felonies since being released, and none for life-term crimes”¹⁶ (which, in California, is really saying something where the 3-Strikes law has sentenced people to life terms for simple theft of golf clubs or pizza). That represents a “lower than one percent recidivism rate.”¹⁷

13 Robert Weisberg, Debbie A. Mukumal, and Jordan D. Segall, “Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California.” Stanford Law School, Stanford Criminal Justice Center (September 2011), p. 17.

14 “Defining Violence,” *supra* note 4, at p. 6.

15 “Defining Violence,” *supra* note 4, at p.6-7; cited “From a Life Term to Life on the Outside: When Aging Felons are Freed.” National Public Radio, February 18, 2018.

16 Weisberg, et. al. *supra* note 13, at p. 17.

17 ID.

In New York, one review after another looking into whether people who are released after serving time for murder commit further crimes came to the same conclusion—they almost never do. Only three percent of such people who were released between 1985 and 2002 “were returned to prison for new crimes after 3 years.”¹⁸ “Of the 368 people convicted of murder who were granted parole in New York between 1999 and 2003, only six, or less than 2 percent, were returned to prison within three years for a new felony conviction and none were reimprisoned for a violent offense.”¹⁹ Out of the nearly 1,000 people granted parole between 2009 and 2012 in New York for A-1 violent felony offenses (most of which were homicide) “only two—or less than one percent—were reimprisoned for a new felony conviction.”²⁰ Moreover, “over a longer timeline, of the 871 A-1 violent felony offenders who were conditionally released from their life sentences in 2008, 2009, 2010, and 2011, only five were returned for new felony convictions.”²¹

No other cohort of people released from prison has as low recidivism rates as those who served long sentences for murder. Unfortunately, nowadays people convicted of murder, especially in Illinois, almost never get out of prison.

John Pfaff puts it bluntly:

The harsh sentences we impose on people convicted of violent crimes are not buying us the security we think they are: they incapacitate people longer than necessary and provide little deterrence in exchange. It’s a situation that begs for real reform.²²

...

It’s quite likely that being less harsh toward people who commit violent crimes might actually make us *safer*. Or at least it would have no impact on safety while freeing up

18 Hill, Michael, “Amid parole controversy, released murderers stay out of trouble.” *Newsday*, March 23, 2008.

19 Gottschalk *supra* note 2, at p. 177; citing “Low Recidivism Rate Reported NY Murderers,” *The Crime Report*, January 7, 2011, which cites a 2011 study by the New York State Parole Board.

20 “Defining Violence,” *supra* note 4, at p. 7; citing Freedom of Information Law appeal, email message from Terrence Tracy, April 19, 2013.

21 Defining Violence,” *supra* note 4, at p. 7; citing “Returns for A-1 Violent Offenders. How do Violent Offenders perform in the community?” 2012 Annual Report from the Parole Board to the New York State Legislator.

22 Pfaff *supra* note 1, at p. 187.

resources to be better used elsewhere and reducing the social costs of punishments as well.²³

Due to the fact that violent offenders have extraordinarily low recidivism rates and are constantly overincarcerated due to misperceptions about the threat they pose to society, any actuarial tool or algorithm should give great weight to the fact that after a certain point statistics show people no longer pose a threat of committing a new offense if released. This should be done to ensure those with violent crimes aren't incapacitated longer than necessary to achieve the goal of rehabilitation.

With such a stigma surrounding "violent criminals," however, the idea of granting them a chance at parole may, at first, appear extremely controversial and not politically feasible. As we have seen though, such controversy is based largely on the false idea that they pose the greatest threat if released; while the reality is that they are really the least threat, and therefore safest to release.

Moreover, attitudes are quickly changing to the point that society is now realizing that we have gone overboard in handing out extremely long sentences. In 2004, United States Supreme Court Justice Anthony Kennedy noted that "our punishments [are] too severe [and] our sentences too long," and while "[c]ourts may conclude the legislature is permitted to choose long sentences, . . . that does not mean long sentences are wise or just."²⁴ Likewise, "[a] survey conducted by the U.S. Sentencing Commission found that 62% of federal judges interviewed felt that mandatory minimum sentences were too high for *all* offenses."²⁵

23 Pfaff *supra* note 1, at p. 190.

24 Kennedy, Justice Anthony, American Bar Association, Justice Kennedy Commission. Reports with Recommendation to the ABA House of Delegates. August, 2004.

25 (emphasis added) Connie de la Vega, Amanda Solter, Soo-Ryun Kwan, and Dana Marie Isaac, "Cruel and Unusual: U.S. Sentencing Practices In A Global Context." University of San Francisco School of Law (2012), p. 43; citing U.S. Sentencing Commission Results of Survey of United States District Judges Table 1 (2010).

Nor is it just our judges that think so. Americans in general “believe that sentences should be shorter”; and more importantly, “[o]ver 80% of voters favor reducing prison time and creating. . .a stronger probation and parole system.”²⁶ Even many victims of crimes seem to agree. The Urban Institute just last year reported that “many people who have experienced the most serious crimes express a desire for restorative measures that help them heal and prevent the violence they suffered from happening again. A 2016 survey showed that 61 percent of crime survivors are in favor of shorter prison sentences and increased investment in crime prevention and rehabilitation.”²⁷

That isn’t to say that people convicted of violent crimes won’t still serve long prison sentences with a new parole system. A rare few may even need to remain incarcerated for most of their lives if they remain violent throughout their incarceration. However, we need to redefine “long” more in line with international standards and what Americans, not so long ago, considered a “long” prison term. Back when Illinois had a parole system, even someone incarcerated for murder usually had the chance to go before the parole board after 11 years. Thus, few people actually spent their entire lives in prison. Today, on the other hand, Illinois has over 5,000 human beings who will die in prison²⁸ if something isn’t done. That’s about one out of every nine people currently under IDOC control. There are probably another 10,000 or more who have excessively long sentences and won’t see release until their most productive years are behind them.

Connie de la Vega and her fellow researchers noted in 2012 that “[s]entence severity in the United States has reached an extreme that contradicts its stated human rights obligation to direct its prisons system towards the primary goals of reformation and social rehabilitation, as set

²⁶ Connie de la Vega et. al., *supra* note 25, at p. 16; citing The Pew Center on the States, *Public Opinions on Sentencing and Corrections Policy in America* (2012).

²⁷ “A Matter of Time,” *supra* note 3, at p. 42.

²⁸ Ashley Nellis, Ph.D., “Still Life: America’s Increasing Use of Life and Long-term Sentences.” *The Sentencing Project* (2017), p. 10, table 2 (showing that in 2016 there were already 1,609 in Illinois serving a life-without-parole sentence, and another 3,478 with virtual life sentences—i.e., serving sentences of 50 years or more).

forth in the International Covenant on Civil and Political Rights (ICCPR), which it ratified in 1992.”²⁹ When one looks at Western industrialized countries, the United States stands apart in its over-use of life-without-parole and de facto, or virtual life, sentences. Many even reject the use of such sentences all together. For instance, many European countries instead promote “the idea that human rights norms require offenders serving life sentences to be treated as capable of rehabilitation,” the understanding that “[n]obody should be deprived of the chance of possible release,”³⁰ and “that no category of prisoners should be ‘stamped’ as likely to spend their natural life in prison and that no denial of release should ever be final, not even for recidivists.”³¹

This is because not only do people change and age out of crime, but as Marie Gottschalk (and others) explain “[r]eleased long-time prisoners do not pose a major public threat.”³² She cites several studies to make the point, one of which “found that the two-year return rate for men who had served eight years or more in New York State prisons was 20 percent. Nearly three-quarters of them were sent back because of a technical parole violation not the commission of a new crime.”³³ In other words, 95% did not return to prison for a new crime.

At some point, you begin to see diminishing returns the longer people stay incarcerated. John Pfaff notes that “[l]ong sentences generally over-incapacitate while producing little to no additional deterrence in exchange. The data are clear on this lose-lose relationship, even if the public is not convinced.”³⁴ This is especially true for the nearly 40 percent of long-termers who

29 Connie de la Vega, et. al., *supra* note 25, at p. 15; citing International Covenant on Civil and Political Rights, December 16, 1966. S. Treaty Doc. No. 95-20 (1992), art. 10 (3), 999 U.N.T.S. 171.

30 Connie de la Vega, et. al. *supra* note 25, at p. 24; citing Draft General Report on the Treatment of Long-Term Prisoners, Doc. No. CM (75) 143 add 3 (1975).

31 Connie de la Vega, et. al., *supra* note 25, at p. 24, Memorandum of the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, Actual-Real Life Sentences 55 (June 27, 2007).

32 Gottschalk *supra* note 2, at p. 189.

33 Gottschalk *supra* note 2, at p. 177.

34 Pfaff *supra* note 1, at p. 230.

were juveniles or young adults (i.e., under the age of 25).³⁵ Due to juveniles' undeveloped brains, researchers and the courts are increasingly recognizing that deterrence is an illusion, especially in regards to the young.³⁶

Because of our outrageously long sentencing laws, and our increasing willingness to incarcerate elderly people in general, the number of geriatric people in prison is expanding rapidly. This has been called the “graying” of the nation’s prisons.³⁷ From 2007 to 2010, the number of people aged 65 or older in prison grew at 94 times the rate of the overall prison population.³⁸

This is causing massive increases in health-care expenditures for correctional agencies, because, on average, it costs three times as much to care for elderly, infirm people in prison.³⁹

As the Urban Institute noted recently:

An aging prison population is one of the clearest signs of a prison system designed to punish people rather than ensure public safety. Keeping elderly people in prison, especially after they have lost their physical or mental capacities, serves no practical purpose, as demonstrated by the extremely low rates of recidivism among older people who are eventually released.⁴⁰

For these reasons, at least 15 states, as well as the District of Columbia, have “provisions for geriatric release,”⁴¹ and the Urban Institute recommends granting “medical parole to people

35 “A Matter of Time,” *supra* note 3, at p. 11.

36 See e.g., *People v. Nieto*, 2016 I.L. App (1st) 121604, par. 55 (March 23, 2016); citing *Montgomery v. Louisiana*, 136 S.Ct. 718, 726 (2016); See also, Dreisinger, Baz, *Incarceration Nation: A Journey to Justice in Prisons around the World* (Advance Copy) (2016) (Other Press, New York) p. 17 and 294; and Gottschalk *supra* note 2, at p. 262.

37 PEW Center on the States *supra* note 6, at p. 19.

38 Connie de la Vega et. al., *supra* note 25, at p. 18; citing Jamie Fellner, “Old Behind Bars: The Aging Prison Population in the United States.” Human Rights Watch 6 (January 27, 2012).

39 Around \$69,000 per year according to the National Center of Institutions and Alternatives; McMahon, Patrick, “Aging Inmates Present Prison Crisis,” *USA Today*, August 10, 2003.

40 “A Matter of Time,” *supra* note 3, at p. 15.

41 Gottschalk *supra* note 2, at p. 189.

with serious health challenges, especially the elderly.”⁴² Georgia’s State Board of Pardons and Paroles “can parole any person who is age 62 or older.”⁴³

Unfortunately, Illinois currently has no safety valve to release elderly or infirm people from prison, save the clemency process, which is almost never used on people in prison and is infested with political machinations.

For all of the above reasons, it is imperative that any parole system be designed to give special consideration to releasing the elderly or anyone who has served at least 10 years in prison, even if they have been convicted of violent offences. The simple fact is that they are often the safest to release, it would help solve our problems of over-incapacitation and mass incarceration, and save the state significant amounts of taxpayer funds that can be better spent on education, crime prevention, and other loftier goals. Thus, any new parole board in Illinois should have the independent authority to parole *any* person who reaches age 50 or who has served at least 15 consecutive years in prison.

It’s time we stop arbitrarily labelling people as irredeemable or permanently incorrigible at the outset, and time to start living up to both our international human rights obligations and our own Illinois constitutional obligation to return people to “useful citizenship.”⁴⁴

42 “A Matter of Time,” *supra* note 3, at p. 50.

43 See the Georgia Board of Pardons and Paroles website, <https://pap.georgia.gov/parole-consideration-eligibility-guidelines>.

44 Illinois Constitution of 1970, article 1, section 11.