
PAROLABLE LIFERS IN MICHIGAN:

Paying the price of unchecked discretion



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Executive Summary



Michigan could save nearly \$17 million a year by paroling just half of the aging, low-risk “lifers” who have been eligible for release for decades.

These prisoners continue to be incarcerated because policies and practices that have evolved since 1992 drastically changed how lifers are reviewed by the parole board. Restoring past practices would implement both the legislature’s intent in enacting the “lifer law” and the intentions of judges who imposed parolable life sentences in the 1960s, ‘70s and ‘80s. These reforms would in no way reduce public safety or the rights of victims to participate in the parole process.

Unlike most states, Michigan gives judges the broad discretion to impose a sentence of “life or any term” for serious crimes such as second-degree murder, armed

robbery, assault with intent to murder and first-degree criminal sexual conduct. If the judge sets both a minimum and maximum sentence, the person becomes eligible for parole after serving the minimum. If the judge imposes “life,” the person becomes eligible for parole under the “lifer law” after serving 10 years for offenses committed before October 1992 and 15 years for offenses committed thereafter.

As a practical matter, for decades there was relatively little functional difference between a parolable life term and a long indeterminate sentence. Before 1999, prisoners could reduce their minimum sentences substantially by earning good conduct credits. A 40-year minimum imposed in the 1970s could be served in 16 years. Lifers were commonly paroled after 14 years. Judges chose sentences based on how long they believed the person would actually serve.

Lifers were by no means “the worst of the worst.”

People who received life sentences and those who received long terms of years had generally committed similar crimes — often situational offenses unlikely to be repeated. The difference was in how the sentencing judge chose to exercise his or her discretion. Today, sentencing guidelines help constrain judicial discretion. However, there are no effective constraints on parole board discretion. As a result, while people who received terms of years were released long ago, lifers sentenced at the same time

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continue to languish in prison. Consider, for example, people convicted of a single count of second-degree murder:

- ◆ For sentences imposed in the 1970s, 90 percent of those who received a term of years but only 30 percent of the lifers have been granted parole.
- ◆ For sentences imposed in the 1980s, 79 percent of those who received a term of years but only 10 percent of the lifers have been granted parole.

The process that produces these results is worth examining.

With the average annual cost of incarcerating an aging prisoner at roughly \$40,000, each decision to continue a lifer for five years costs taxpayers about \$200,000. Research demonstrates that lifers have by far the lowest re-offense rates of all parolees. Yet because of the many years when virtually no lifers were paroled and the slow pace of releases since, the number of lifers currently eligible for parole has grown to roughly 850.

In deciding to deny release, the parole board is accountable to no one.

The only legal barrier to continued incarceration is the maximum sentence, which lifers do not have. Prisoners can no longer appeal parole denials to the courts (unlike prosecutors and victims who can appeal decisions to grant release). Without judicial review, guidelines that are meant to inform parole board decisions are unenforceable. Decisions that are supposed to be based on the prisoner's re-offense risk are justified by subjective assessments of the person's "insight", "remorse" and "empathy." For lifers, the board has chosen not to even calculate guidelines scores before it decides whether to conduct the public hearing that is required in lifer cases.

The decision-making process for lifers could hardly be less transparent.

A single board member reviews the person's file once every five years and decides whether to conduct a personal interview or to simply recommend that the board take "no interest." Lifers who have not received misconduct citations in decades routinely receive "no interest" notices that give them no idea of why they are being passed over or what they can do to earn release. The board has no idea of how the prisoner, who was typically young when convicted, has matured. It seeks no input from institutional personnel who know the prisoner well. The prisoner has no way of knowing who may have influenced the board's decision and no way to contest what they have said.

The process leads to results that are inconsistent and often inexplicable:

- ◆ A man who has served 45 years for a murder he committed at the age of 19 is denied parole despite several commendations earned while working in the community for years under a now-defunct work pass program. His more culpable co-defendant was released in 1979.
- ◆ A man who pled guilty to second-degree murder as a result of a vendetta between families and whose judge stated clearly at sentencing the belief that life, with good behavior, meant serving ten years, has served 37 years because the parole board decided the last shot he fired was "unnecessary."

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- ◆ A woman, now 64 and in ill health, has served 26 years for killing her abusive spouse, despite her outstanding institutional record and the support of her sentencing judge, apparently because the parole board is dissatisfied with her version of the offense.
- ◆ A man who explained at his public hearing exactly what he would do if he felt tempted to use drugs was denied parole because he did not have an adequate “relapse prevention plan,” a strategy to be developed in an MDOC treatment program he was not allowed to enter because he was a lifer.

Unbridled parole board discretion is compounded by unbridled judicial discretion.

If the board does choose to conduct a public hearing on a lifer, the sentencing judge or that judge’s successor in office has 30 days to submit a written objection that prohibits the board from granting parole. The judge need not conduct any hearing or offer any reasons and a judicial “veto” is not subject to any review. More than a fifth of public hearings scheduled in recent years have been cancelled by judicial vetoes – 50 of them since 2007. Most vetoes are by successor judges who have no personal familiarity with the case.

Unfortunately, the parole process was politicized in 1992 when the board’s membership was changed from corrections professionals with civil service protection to appointees. Members who base their decisions on the best available evidence are no longer insulated from media pressure at the time of review or the judgment of hindsight if something goes wrong.

Solutions

The process for reviewing parolable lifers can be made more open, more consistent and ultimately more cost-effective by simply returning to pre-1992 practices that promoted thorough, individualized assessments of each lifer’s actual risk for re-offending:

- ◆ Use the same decision-making criteria and risk assessment tools for lifers as for all other prisoners
- ◆ Conduct personal interviews (preferably recorded) every two years once the person becomes eligible for release
- ◆ Require written explanations for no interest decisions
- ◆ Reinstate prisoner appeals of parole denials
- ◆ Eliminate judicial vetoes by successor sentencing judges

If just half of the currently eligible lifers are deserving of public hearings, at the current rate it will take nine years to conduct them. The most efficient way to work through this backlog would be to create, at least temporarily, a lifer review board with the capacity and authority to make lifer parole decisions and recommend commutations.

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This report examines how one piece of Michigan’s criminal justice system got broken, what the resulting costs have been and how the system can be fixed.

Hundreds of Michigan prisoners sentenced to “parolable life” terms have been eligible for release for one, two or even three decades. As a group, they are aging, low-risk and guilty of offenses comparable to those for which thousands of other people have served a term of years and been paroled.ⁱ

Each parole board decision to incarcerate a lifer for another five years — often based on nothing more than a single board member’s review of a file — costs taxpayers roughly \$200,000.

Americans have certain expectations of government. In times of tight budgets and soaring costs, the one most discussed is **cost-effectiveness**. We want to

spend as few taxpayer dollars as possible to fulfill governmental functions. We also want **transparency**, so we know how decisions are being made; **accountability**, so that decisions are subject to review and, if necessary, correction; **consistency**, so that outcomes are predictable and similarly situated citizens are similarly treated; and **objectivity**, so that decisions are based on evidence, not emotions or unsupported assumptions.

The parole decision-making process for lifers violates all these norms. It is one of the few areas where a group of unelected officials has virtually unlimited power over people’s lives and the public purse. Over the last few decades, a series of policy changes with no proven impact on public safety has undermined the parole process for prisoners generally and for lifers in particular. The solutions are simple and straightforward: return to practices that protected both public safety and taxpayers’ pocketbooks.

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Controlling discretion in criminal justice decisions

The State of Michigan convicts more than 50,000 people a year of committing felonies. At each stage of the process, officials make discretionary decisions that are then “checked” by other officials. The police decide whom to arrest, then prosecutors decide whether to prosecute. Prosecutors decide what charges to bring and district judges decide whether there is probable cause to make the defendant stand trial. Circuit judges (and sometimes juries) decide whether the evidence shows guilt beyond a reasonable doubt. If so, those judges select the punishment. But both convictions and sentences are subject to review by higher courts.

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This carefully constructed system of checks and balances is designed to control the use of overwhelming government power against the accused. The officials who apply the law to individual cases must be able to exercise judgment with flexibility and common sense in order to ensure that the laws serve their purpose. That exercise of discretion by officials must, in turn, be subject to review to ensure that decisions in individual cases are fair, rational and consistent.

Decisions about how and for how long a guilty person should be punished are especially sensitive. The more serious the crime, the more risk there is that decision-makers will be influenced by their own emotions or by pressure from victims, the community or elected officials.

The judge’s initial decision about punishment is bounded by numerous rules. (See box, Page 12.) But if the sentence imposed is prison, the judge’s choice does not determine how long the person will actually be incarcerated. Once the minimum has been served, the parole board has enormous discretion to decide when the prisoner will be released, based on whatever criteria it chooses to apply. The board itself was politicized in 1992 when its membership was changed from civil servants with substantial corrections experience (the “old” board) to appointees (the “new” board). And its exercise of discretion is not subject to review by anyone. **When it comes to parole decisions, the checks that exist throughout the criminal justice process largely evaporate.**

The impact of unbridled discretion on parolable lifers

The consequences of this unlimited authority are most evident in the cases of parolable lifers. Michigan’s “lifer law” is designed to let parolable lifers earn their way out of prison like other people convicted of serious offenses.ⁱⁱ However, the decision-making process gives first the parole board and then the successor to the sentencing judge total discretion that they can exercise without explanation or review. As a result, release decisions about parolable lifers have been inconsistent, costly and often difficult to understand. Consider, for example, Robert Middleton.



Robert Middleton

By the time Robert Middleton was 18, his mother had married eight times and borne seven other children. The family moved frequently and his adolescence was troubled. When Middleton was 19, he began dating a 17-year old woman named Marie who engaged in prostitution. On February 17, 1968, Marie brought a client to the apartment Middleton shared with another young man, Richard Broughton. A fight ensued. Middleton struck the client once with a board and Broughton hit him repeatedly. Both young men were convicted of second-degree murder and given parolable life terms. The parole board had the discretion to release them after 10 years. It released Broughton in 1979.

During his early years in prison, Middleton's clashes with authority led to many misconduct citations. By the time he became eligible for parole in 1978, the interviewer noted that Middleton had matured and showed insight into the offense and remorse for his actions. However the board wanted more evidence of Middleton's rehabilitation and denied him parole.

Middleton earned an associate's degree, discovered his artistic talent and spent time painting and drawing. He was in the work pass program from 1985 until 1989, when the participation of lifers was ended. During those years, Middleton often worked unsupervised in the community. He has letters of commendation from staff and work supervisors, including the Village of Pinckney police chief. His last misconduct was in 1992.

The "old" civil service parole board voted to start the release process for Middleton in 1988 and again in 1992, but never got as far as conducting the requisite public hearing. The "new" appointed board reconsidered him in 1992 and every five years thereafter but had "no interest" in releasing him until 2013. Board notes from that year indicate that Middleton, who was then 64 years old and had served 45 years, stood throughout his interview because of the pain he was experiencing from cancer.

As required by law, the parole board notified the Oakland Circuit Court of its intent to conduct a public hearing. The successor to the sentencing judge objected to Middleton's release based on the violent nature of the crime and the judge's belief that the murder had resulted from a planned robbery that Middleton still refused to acknowledge. The judge also expressed concern that the MDOC had not completed an assessment of Middleton's current propensity for violence or risk of recidivism. The parole board notified Middleton that, because of the judge's objection, it had lost the authority to grant parole and that he would be reviewed next in 2017.

To place Middleton in context:

- ◆ From 1970-74, the five years after Middleton was sentenced, nearly twenty percent of all the sentences for second-degree murder were parolable life.ⁱⁱⁱ The people who received them became eligible for parole after serving ten years.

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- ◆ The average minimum sentence for those convicted of second-degree murder who received a term of years was less than 17 years. These people actually became eligible for parole much sooner than that because they could earn good time credit that reduced their sentences substantially.
- ◆ By his next review date, Middleton will have served 49 years.

Middleton's case raises numerous questions:

- ◆ Is the public any safer because Middleton continues to be locked up? At what point could he have been released without jeopardizing public safety?
- ◆ Is it consistent to require Middleton to serve 30-35 more years than most other people sentenced for the same crime at about the same time?
- ◆ Although it took Middleton until the late 1970s before he started to settle down, is it reasonable to make him serve 38 years longer than his more culpable co-defendant?
- ◆ Since the “old” board voted to proceed toward release in both 1988 and 1992, why was the “new” board unwilling to proceed when it considered his case in 1992?
- ◆ Why did the board show “no interest” in Middleton during the 21 years from 1992-2013?
- ◆ Why did the board not send a current risk assessment with the materials it sent the successor judge?
- ◆ Should the successor judge, who had no personal knowledge of Middleton or the crime, have been allowed to effectively overrule the parole board and stop the release process?
- ◆ Given his age and health, is continuing to incarcerate Middleton worth \$200,000 to taxpayers?
- ◆ Does it make sense not to review him for another five years?

When “life” and “long” were very much alike

Michigan grants judges enormous discretion in sentencing for such serious crimes as second-degree murder, assault with intent to murder, first-degree criminal sexual conduct and armed robbery. (First-degree murder requires a sentence of life without parole.) Under the state's unusual scheme these offenses all carry the penalty of “life or any term.” That is, the judge can choose to impose life with the possibility of parole or select both the minimum and maximum sentence. Until the advent of sentencing guidelines, nothing prevented one judge from giving 10-20 years, another from giving 20-40 and a third from giving parolable life to virtually identical defendants who had committed virtually identical crimes.

The sentencing guidelines impose some constraints on these choices. As with other offenses, the recommended minimum range depends on both the offender's prior record and the facts of the offense. When the prior record is minimal and/or the facts are relatively less egregious, life is not a recommended option. Many current lifers who were sentenced before sentencing guidelines took effect would not have received life terms today.

Despite this breadth of judicial discretion, until the 1990s, sentences of life and a long term of years were not as different from each other as they sound. The “lifer law” said that anyone, regardless of their sentence, became eligible for parole consideration after serving 10 calendar years. And, for offenses

Sentencing guidelines control judicial discretion

The primary constraint on judicial discretion is the maximum penalty for the offense set by statute. In addition, a Michigan Supreme Court ruling requires that, in most cases, the minimum not exceed two-thirds of the maximum, in order to preserve some area for parole board action. Within these boundaries, judicial discretion used to be absolute.

Two defendants facing a 15-year maximum for breaking and entering could receive widely different minimums, even if their crimes and their backgrounds were similar, because they were sentenced by different judges. Ideas about what was an appropriate sentence for a given individual varied from judge to judge and county to county. And if those ideas were influenced by personal bias or mistaken assumptions, the defendant had no recourse.

This situation began to change in the early 1980s, when the Michigan Supreme Court took the first steps to reduce sentencing disparities and ensure that sentence lengths were proportional to the offense and the offender. The Court held that the length of sentences could be appealed and required judges to comply with an early version of sentencing guidelines. The Legislature subsequently enacted its own version of the guidelines that became effective in 1999.

The guidelines award points based on the details of the offense and the defendant's criminal history. The points determine a range within which the judge is supposed to select a minimum sentence. If the judge wants to go above or below the range, s/he must articulate substantial and compelling reasons for doing so. Both the prosecution and defense have the right to appeal. Over the last several decades a large body of appellate decisions has explained the correct process for scoring the guidelines and defined the reasons that justify judicial departures.

committed before 1999, people serving a term of years could accumulate substantial amounts of “good time” (or, as it was later called, “disciplinary credits”). As a practical matter, few people serving very long minimums were paroled under the lifer law because they could earn enough good conduct credit to become eligible for release in not much more than 10 years in any event.^{iv}

JUDGES WERE WELL AWARE THAT SENTENCES WERE NOT WHAT THEY SEEMED AND THAT “LIFE” DID NOT MEAN LIFE.

Judges were well aware that exceedingly long sentences were not what they seemed and that “life” did not mean life. They chose sentences that they believed, based on past parole board practice, would result in the prisoner serving an appropriate amount of time. This is confirmed by the responses of 95 judges from 43 different counties to a 2002 survey about what they intended when they imposed life sentences.^v

Asked to explain their understanding of a parolable life sentence in the 1970s and ‘80s (with multiple responses possible), 59 said the defendant would become eligible for parole in an average of 12 years, 24 said they expected the defendant to actually serve an average of 15.6 years and nine said it was “possible”

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the defendant would spend the rest of his or her life in prison. Only four believed it was “probable” that defendants would actually be incarcerated for the rest of their lives. In addition:

- ◆ Two-thirds said the availability of parole was a factor they considered in choosing a life term.
- ◆ Sixty percent thought that a life sentence imposed before 1978 was less harsh than a 25- year minimum which, with good time, could be served in twelve years.
- ◆ Two-thirds said that a parole board policy that “life means life” would not reflect their intentions.
- ◆ Two-thirds supported the concept that some action should be taken to promote the release of parolable lifers in appropriate cases, whether by permitting resentencing or changing parole board practices.

More than 40 percent of the survey respondents were aware of defendants being advised of a specific number of years they could expect to serve on a parolable life term, assuming appropriate behavior. For example, in 1978, Detroit Recorder’s Court Judge Joseph Maher sentenced Ralph Purifoy on two counts of second-degree murder for killing his wife’s lover and another man. The judge imposed 30-50 years for one count and parolable life for the other. He explained:

These will be served concurrently. His life sentence should be available for discharge from the State Prison for Southern Michigan at the end of 12 years and on the other one, depending on his conduct, his time for release should run approximately the same, possibly a year or two more.

In 1976, Washtenaw County Circuit Judge William Ager sentenced Edward Hill for armed robbery. The judge gave Hill two choices. A 40-60 year sentence, with all the good time credits available then, would have meant parole eligibility in 16 years. A parolable life term, the judge said, would likely bring release in 12 years, eight months. Naturally, Hill chose life.

PAROLABLE LIFERS WERE NOT THE “WORST OF THE WORST.”

Parolable lifers were not the “worst of the worst.” They were generally similar to thousands of people convicted of the same offenses who have been paroled over the last several decades. Their sentences reflect the understanding and the predilections of their sentencing judges.

Caught in a wave of change

Unfortunately, no one could anticipate how the parole board would change the way it exercises its discretion. As a result, while the large majority of people who received a term of years in the 1970s and 1980s have long since been paroled, the large majority of those who received parolable life are still incarcerated. Edward Hill was not paroled until 2011, after serving 35 years. At age 63, Purifoy is still in prison after 36 years without a single misconduct citation.

The box on Page 14 illustrates how the disparity in release decisions affected nearly 3,000 people convicted of second-degree murder.

The disparity in release decisions between lifers and long-termers

*In the 1970s, 1,236 people were sentenced for a single count of second-degree murder**

Total receiving a term of years = 1,010 (81.7 percent)

Average minimum (which could be reduced by good time) = 12.2 years

- **Proportion paroled by 12/31/2013 = 919 (91.0 percent)**
- Proportion discharged on maximum = 85 (8.4 percent)

Total receiving **parolable life = 226 (18.3 percent)**

- **Proportion of lifers paroled by 12/31/2013 = 62 (27.4 percent)**

*In the 1980s, 1,663 people were sentenced for a single count of second-degree murder**

Total receiving a **term of years = 1,475 (88.7 percent)**

Average minimum (which could be reduced by disciplinary credits) = 16.4 years

- **Proportion paroled by 12/31/2013 = 1,170 (79.3 percent)**
- Proportion discharged on maximum = 140 (9.5 percent)

Total receiving **parolable life = 188 (11.3 percent)**

- **Proportion of lifers paroled by 12/31/2013 = 17 (9.0 percent)**

*People may have had additional sentences for other offenses.

Discretion in parole decisions: the “checks” disappear

In Michigan’s scheme of indeterminate sentencing, the defendant becomes eligible for parole upon serving the minimum sentence. The parole board has the sole authority to decide when, between the minimum and the maximum, the prisoner is actually released. Thus, if the sentence imposed by the court is 5-20 years, the defendant will become eligible for parole after serving five but the board can choose to continue incarceration up to the full 20.

MCL 791.233, the statute that sets the standard for parole board decision-making, says:

(a) A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety.

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The statute, enacted in 1953, sets a single criterion for release: the likelihood that the person will cause future harm. However, it gives no direction as to how specific risk factors should be measured or the relative weight they should be given. The statute not only permits but encourages totally subjective judgments by the board about what facts and circumstances are relevant and how much assurance is reasonable. Not surprisingly, the proportion of parole decisions that are favorable has varied widely depending on the views of the board, from as high as 68 percent to as low as 48 percent.

The rationale for giving the parole board so much discretion is that, in theory, it allows corrections professionals to review the person's progress while in prison, assess the person's current risk for reoffending and make a decision that protects victims and the public. The assumption, relied on by defense attorneys and prosecutors in plea bargaining and by judges in sentencing, is that people who behave well in prison and participate in available programs will be released when first eligible, making the minimum the "real" sentence. People who are continued beyond their minimum, it is assumed, have spoiled their own chances for release through institutional misconduct or failing to respond to treatment programs.

These assumptions have been greatly eroded by the politicization of the parole process over decades of "tough on crime" attitudes. The composition of the parole board itself and the board's policies and practices have changed. Far less credit is given for in-prison conduct and achievements and far more emphasis is placed on the offense and prior record — things the prisoner can never change. Assaultive offenders and sex offenders, in particular, are defined overwhelmingly by their crimes. The traditional goal of rehabilitation has become secondary.

The "new" board's willingness to ignore judicial intentions and override plea bargains is epitomized by the case of Reynaldo Rodriguez, a parolable lifer whom the board has effectively found guilty of first-degree murder and resentenced to life without parole.



Reynaldo Rodriguez

Rodriguez was a 20-year old husband and father who had no criminal convictions and no substance abuse problem. He was employed as a service representative for Pitney Bowes when, as the presentence investigator put it, he "inadvertently became caught up in a vendetta situation."

The Rodriguez and Barrera families both had ongoing disputes with the Cuellar family. At an Easter dance in 1976, Robert Cuellar threatened Rodriguez's younger brother Cruz. In June there were several incidents involving shots being fired at Cruz, at Rodriguez's home and at his mother's house. The Barreras believed that Robert Cuellar had killed a member of their family.

The next month, Rodriguez heard that Cuellar had just threatened him and Cruz again. Rodriguez, Cruz, Raymond Barrera and another friend drove around looking for Cuellar. When they saw him riding a bike, Rodriguez stopped the car and challenged

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Cuellar to fight. Barrera placed a gun on the car's console. When Cuellar made a sudden move towards his waistband, Rodriguez thought Cuellar was reaching for a gun. He took the gun from the console and shot at Cuellar several times. When Cuellar continued to pedal, Rodriguez shot several times more until Cuellar fell off the bike. Someone in the vehicle said: "You better make sure he's dead." Rodriguez left the car and shot Cuellar a seventh time at close range.

Rodriguez pled guilty to second-degree murder. Judge Gary McDonald offered him a choice between 15-30 years or parolable life. Advised that a 15-year minimum would require serving 12 years, 4 months and that Judge McDonald would recommend parole at ten years if he were a model prisoner, Rodriguez opted for the life term. Judge McDonald observed:

"And I feel myself, at this time, that you will not be any menace to society when you're released in ten years."

In prison, Rodriguez obtained his GED and took college classes. His work as a head mechanic responsible for maintaining machinery in the garment factory earned him reference letters filled with praise from several factory superintendents. In 1984, after two years of group psychotherapy, the psychologist described Rodriguez as sensitive to other people's feelings, possessed of excellent conflict negotiation skills and having a good prognosis for parole.

Rodriguez first became eligible for parole in 1986. Despite several letters of support from Judge McDonald, the board did not conduct a public hearing until January 1994. A dozen people attended on behalf of Rodriguez. Sixteen correctional officers signed a petition supporting his release. No one opposed it.

Assessing the Rodriguez decision

- ▶ The facts of the offense had not changed since 1976 and never would.
- Judge McDonald was fully aware of them when he accepted the guilty plea and imposed sentence.
- The old and new parole boards were fully aware of them when they both voted to proceed to public hearing.
- ▶ The board was fully aware of the sentencing court's intent that Rodriguez serve 10 years.
- ▶ Nothing in the decision addressed the multitude of positive factors Rodriguez had presented.

The presiding board member cross-examined Rodriguez about whether the shooting had been an act of vengeance or self-defense. Rodriguez insisted that he had thought Cuellar had a weapon but also agreed when the board member characterized vengeance as a motivation.

When the board decided two months later that it was no longer interested in releasing Rodriguez, it gave him this explanation:

"Nature of crime as described in public hearing causes further concern. During public hearing you admitted the fatal shot was act of vengeance. Victim was shot a total of 7 times, the last shot was reflected upon by you and was unnecessary."

Since 1994, the board has reviewed Rodriguez's file every five years as required by law. The only time it actually spoke to Rodriguez was in 2008, as the result of a court order in federal class action litigation. Now age 57, Rodriguez has served 37 years.

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Parole guidelines fail to control parole board discretion

Parole board discretion is much like judicial discretion before there were sentencing guidelines. The only real constraint is the maximum penalty set by statute.

As with judicial discretion, the legislature has made an effort to create more limits. In 1992 it required the MDOC to develop parole guidelines that focus primarily on the statistical probability that a prisoner will commit an assaultive offense if released. Research has shown that statistically based guidelines are substantially more accurate than the subjective judgments of individuals in predicting whether a person will reoffend.^{vi}

The parole guidelines are comparable in design to the sentencing guidelines. Points are awarded for offense, prior record and institutional conduct but are scaled according to the person's age and time served. Prisoners are categorized as high, average or low probability for release. People who score "high probability of release" are supposed to be granted parole unless the board articulates, in writing, substantial and compelling reasons for denying parole.

THERE IS, HOWEVER, ONE CRITICAL DIFFERENCE BETWEEN THE TWO SETS OF GUIDELINES. THE PAROLE GUIDELINES ARE NOT ENFORCEABLE.

There is, however, one critical difference between the two sets of guidelines. The parole guidelines are not enforceable. There is no judicial review of whether substantial and compelling reasons are adequate in individual cases. The right of prisoners to appeal parole denials was eliminated in 1998.^{vii} Therefore prisoners have no way to challenge the board's decision in their own cases and no body of law has evolved to define what "substantial and

compelling" means in all cases. As of February 2012, his lack of accountability resulted in 1,550 people who had not been paroled despite scoring high probability for release.

Although the guidelines do not effectively limit the substance of the parole board's decisions, the substantial and compelling reasons given for denying release in high probability cases provide some insight into the board's thinking.

Instead of objective evidence of the person's current risk, it frequently:

- ◆ Cites aspects of the offense or the prisoner's prior record, even though these have been scored already.
- ◆ Uses a subjective assessment of the prisoner's thinking. Five characterizations, singly or in combination, are used repeatedly. They are: "lacks sufficient insight," "fails to show remorse," "lacks empathy," "minimizes role in the offense," and "fails to accept responsibility."

These conclusions are largely based on a brief, unrecorded interview conducted by a single board member, typically by videoconference. There may or may not be some sort of treatment report that may or may not support the conclusion, but the controlling opinion is always the board's.

THE BREADTH OF THE BOARD'S DISCRETION MEANS THERE IS LITTLE TRANSPARENCY AND NO ACCOUNTABILITY IN PAROLE DECISION-MAKING OVERALL. FOR LIFERS, THE SITUATION IS EVEN MORE EXTREME.

Reliance on such subjective judgments raises two fundamental questions. First, how are these qualities defined and measured? For example, how much insight is sufficient? How do you show remorse other than by saying you feel it, especially if you have been cautioned against contacting victims or their families? Is it minimizing responsibility to explain that you were high or drunk when you committed your crime? Is it failing to accept responsibility to point out that you were less culpable than your co-defendant? Does expressing regret that you have lost decades of your life to incarceration mean that you lack empathy for others?

Second, how clear is the connection between these assessments and the actual likelihood that someone will reoffend? If, after 30 years of trying to explain his actions as a teenager, a person can only say that he was “young and stupid”, does that mean he is likely to repeat his crime if released at age 47? If a person disagrees with the description of the offense in the presentence report, does that mean he is going to do it again?

The breadth of the board's discretion means there is little transparency and no accountability in parole decision-making overall. For lifers, the situation is even more extreme.

The parole process for lifers

Although lifers may become eligible for parole at much the same time as their peers serving long terms of years, the process for releasing them, designed as a legislative compromise in 1941, differs.^{viii} Unlike non-lifers, who need only two positive votes from a three-member panel, the lifer has to obtain a majority vote for release from the entire board. If the board is favorably inclined, it must conduct a public hearing at which the prisoner is questioned at length and anyone who supports or opposes release can appear and testify. The board must give advance notice of the hearing date to the county prosecutor and to the sentencing judge or that judge's successor in office. If the judge objects in writing, within 30 days, the board loses the authority to grant parole. The judge does not have to give any reasons for objecting or hold any hearing. There is no appeal from the judge's decision.

Before 1992

While the review process differed for lifers, the decision-making criteria did not. The statutory standard for parole decision-making makes no distinction between lifers and other prisoners. And until the 1990s, the parole board itself viewed parolable lifers much like judges did — as no different from people serving a long term of years. As Frank Buchko, a parole board member from 1962-1974, has said:

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“The fact that someone was a lifer...had no bearing on the case. The only question was whether or not the person would be a threat to society if released.”

For decades, the board would begin reviewing lifers before they first became eligible for parole and would advise them of what they needed to do to gain release. With some variation over the years, there would be a personal interview by a board member at seven years and every two years thereafter. Lifer files are full of old notes by board members indicating:

“Program involvement good — looks like a good 10-year case”

“He is a bright, articulate guy who I don’t see as a risk, so it’s a case of time ... [14 years] looks about right to me”

The question of public safety

There is little dispute that the majority of lifers are at low risk for reoffending. They are middle-aged or elderly, well past their crime-prone years. Many entered prison having committed a crime that was very serious but also the result of circumstances that were unlikely to reoccur. They have had decades to mature, reflect and practice the patience that is necessary to survive in prison. Many have health issues that refocus their attention. Most are just tired and want the simple comforts of being with family and having a good meal. They know if they return to prison they will die there.

The data bear out these observations. A 2013 study by the California Department of Corrections and Rehabilitation found the re-offense rate for lifers was 4.8 percent compared to 51.5 percent for people who had served determinate sentences.^{xi}

In a 2006 report, CAPPs analyzed data about all the Michigan lifers who had been released between 1900 and 2003, whether by parole or commutation. Of 688 people sentenced to life for other than first-degree murder just 15, or 2.2 percent, had returned to prison for a new crime during the four years following release.^{xii}

The most current evidence is the 133 parolable lifers who were released from July 2005-October 2013. Of these, three have returned to prison with a new sentence. That’s a re-offense rate of 2.3 percent.

These success rates were fully anticipated when the Lifer Law was enacted 70 years ago. A 1943 report by the parole board discussed the success of the first twelve people who had been released after the law took effect in January 1942.^{xiii}

We have always considered... that lifers in general constituted the best type of parolee, that by reason of long institutionalization they were much more aware of the serious responsibility involved in their release than most other groups... The twelve lifers, as a group, have shown an unusual aptitude to stabilize themselves in the community, working steadily, saving their money, buying war bonds, earning promotions on their jobs, re-uniting themselves with their families and taking serious cognizance of the trust the Parole Board has placed in them.

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“A different person than originally arrived in the system”

“Done all he can — would start the process.”

The board’s first experiment with parole guidelines demonstrates how long it believed lifers should serve. In the early 1980s, “Commutation and Long Term Release Guidelines” were developed that embodied the board’s historic practices. Points were awarded based on the prisoner’s prior record and the offense details, then summarized on a grid that suggested when commutation (in first-degree murder cases) or parole would be appropriate. Although not binding on the board, the “grid score” was intended to help make decisions more objective and consistent. Recommended terms of 14 years or less were common.

The 1990s: discretion expands, transparency contracts

In 1992, three big changes affected lifers:

- ◆ The date of parole eligibility under the lifer law was increased from 10 to 15 years for offenses committed after October 1, 1992.^{ix}
- ◆ The interval between parole interviews for lifers was more than doubled, so that after an initial interview at 10 years, lifers would only have to be seen once every five years.
- ◆ The parole board itself was changed from civil service members to appointees serving four-year terms. They were no longer selected for their experience in corrections. And they were no longer insulated from the fallout when a parolee committed a high profile crime.

The new board had an express mandate to get tough on assaultive and sex offenders.^x Paroles fell dramatically for people with long indeterminate sentences. For lifers, they virtually disappeared.

By 1997, the board had decided that “life means life,” effectively eliminating the distinction between first-degree murder and the “life or any term” offenses. It didn’t matter how long someone had served, what the sentencing judge intended, how hard the prisoner had worked to demonstrate rehabilitation or how little risk the person actually posed. The board used the fact that the court had imposed a life sentence as the sole criterion.

In 1998, prisoners lost the right to appeal parole denials to the courts.

By 2000, the MDOC had obtained additional changes to the lifer review statute that reflected the views conveyed by then-parole board chair Stephen Marschke to a legislative committee on September 28, 1999:

...the parole board can review a prisoner’s file in the office and achieve the same result that the interview would provide...It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that — life in prison... It is a tremendous waste of finite state resources to interview prisoners who will never be suitable for release.

“File reviews” impact consistency, effectiveness of decision-making

Except for the interview required at 10 years, the board no longer has to see eligible lifers in person. The subsequent five-year reviews may consist of simply looking at the prisoner’s file. It is in the sole discretion of the single board member assigned the case whether to actually meet the person. While interviews still occur, there is no predicting who gets them. People who have long been eligible for parole

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commonly go for 10 years or more without any board member laying eyes on them or hearing what they have to say.



James Aubrey

Muskegon Circuit Judge Max Daniels sentenced James Aubrey for second-degree murder in 1985. Aubrey, who was 35 years old and had no prior felony record, had gotten into an altercation with another man. When they met again, Aubrey felt threatened and, believing the victim had a gun, shot to protect himself. The sentencing guidelines recommended a minimum sentence no greater than seven years. Judge Daniels felt the guidelines were too lenient and imposed a life term instead. He explained:

"This will allow the Department of Corrections to report to me or my successor as to your improvement or your lack of improvement during the time that you are in prison and this matter can be reviewed not only at ten years but any additional date, depending on what your conduct is. I believe that anyone who takes someone else's life has — should serve at least ten years in prison. That's my basic feeling. As to whether you serve longer or not will depend on the recommendations and your conduct."

Aubrey is now 64 and has served 28 years. He has had only three misconduct citations in his entire incarceration and was recommended for parole by the warden in 2007. Nonetheless, his only personal interview by the board since 1992 was in August 2009, when it was required by a federal court order. The interviewing board member noted that Aubrey was quiet and cooperative in the housing unit, had family support and showed remorse and empathy.

The board finally voted "no interest" in March 2011. He will next be reviewed in 2016.

Unexplained decisions lack transparency

Aubrey received notice of the board's decision in a standard two-sentence form that states:

The majority of the Parole Board has no interest in taking action at this time. Your case will be reviewed as required by law.

This is followed by a "next review date" five years in the future.

This absence of explanation is permitted by another statutory change.

The board is required to give prisoners a written explanation of the reasons for denying release. However, the decision to deny parole to a lifer was redefined as coming only after a public hearing has been held. Therefore, even though a public hearing is a precondition for paroling a lifer, the board's decision that it has "no interest" in conducting a public hearing is not considered a parole denial—even though it has the effect of making the person serve another five years.

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The result is that lifers who are not given a public hearing are left with no idea of why they are being continued for another five years or what they can do to change that outcome. They have no way to discover who may have spoken to the board privately or to challenge the accuracy of what may have been said. The public has no basis for assessing how its money is being spent. The board itself is not forced to examine its own thinking and articulate reasons justifying the outcome. And no individualized assessment is created for future board members to consider.

Ignoring available information reduces insight, objectivity

The board made still another change on its own. The parole guidelines statute has no exception for lifers. Initially, the guidelines were scored for lifers in the same manner as for other prisoners. However, when lifers commonly scored high probability of release, the board decided to stop scoring the parole guidelines for them unless a public hearing had already been conducted. Thus, the guidelines are not used to assist the board in deciding whether to proceed to public hearing.

Also not used is the input of institutional personnel. Lifers are generally well known by staff members who have interacted with them over many years. In the past, board members requested their assessments. Now, however, an institutional counselor simply completes a form that shows the prisoner's misconduct history, program completion and performance of institutional jobs. The form has no space for summarizing the observations of corrections officers, teachers, work supervisors or living unit managers who see the prisoner daily.

THE PAROLE BOARD CAN DECIDE WHETHER TO INCARCERATE A PERSON FOR ANOTHER FIVE YEARS WITHOUT TALKING TO HIM OR HER

Thus, the parole board can decide whether to incarcerate a person for another five years without talking to the person, without talking to corrections staff who know the person well and without assessing the person's statistical risk of committing a new assaultive offense.

Changing practices affect parole numbers

Until 1941, all life sentences in Michigan were non-parolable. The only way out of prison for any lifer was to win a commutation from the governor. Ironically, the purpose of creating parole as a possibility in all but first-degree murder cases was to depoliticize the process and increase the number of releases. A 1942 report by the Michigan Department of Corrections explained:

With the passing of the Lifer Law, the entire outlook for over three hundred life termers changed significantly... This broadening of the power of the Parole Board will make it possible to consider for release more meritorious cases than had been previously possible... Much political capital has been made of the frequent use of the commuting power in the past; with the result commutations were regarded as fraught with political meanings, rather than open, straightforward granting of parole to a man who had earned consideration.^{xiv}

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From the 1940s through the 1970s, the lifer law worked as intended. A significant portion of eligible lifers was routinely released. While new people became eligible for parole upon completing 10 years and some people left the pool through death or other causes, the steady pattern of paroles caused the pool to shrink year by year.

- ◆ From 1945-49, the average number of lifers eligible for release each year was 212.
- ◆ By 1960-64, the average number eligible had declined to 115.
- ◆ By 1975, the pool of eligible lifers had dwindled to 39.

These are the trends judges had in mind when they sentenced defendants to life terms in the '70s, '80s, and into the '90s.^{xv}

In the late '70s and '80s, the prison population exploded, creating an enormous workload for the parole board and pressure to process the maximum number of releases as quickly as possible. Lifers, whose cases are more time-consuming, were put on the back burner. As more of them became eligible without being paroled, the pool began to grow. In addition, from 1975-1985, 690 new people were sentenced to parolable life terms; many of them would have reasonably expected to be released before or during the 1990s.

The Long-term Release Guidelines adopted in 1982 show that the "old" parole board's criteria for assessing lifers had not changed. When that board was replaced in 1992, there were 47 lifer cases in which it had voted to proceed but had not managed to do so. But in the 14 years from 1992-2006, the new board paroled a total of just 43 non-drug lifers, an average of fewer than three per year.

Beginning in 2007, changes occurred that somewhat increased the number of lifer paroles:

- ◆ New parole board members and a new chair were appointed who had support for paroling lifers.
- ◆ Also in 2007, the parolable lifers won a federal class action lawsuit, *Foster-Bey v Rubitschun*.^{xvi} In early 2008, the District Court ordered the parole board to interview all the lifers who were then eligible for parole. Using the criteria that were employed prior to 1992, the board was to report to the court the reasons for denial in individual cases.
- ◆ In 2009, faced with pressure to reduce the \$2 billion spent annually on corrections, Gov. Granholm expanded the parole board from 10 members to 15. Her goal was to release more people who had been denied in the past in order to reduce the prisoner population as a whole.

With a federal mandate, increased capacity and a somewhat softened attitude, the board scheduled public hearings for 68 non-drug lifers in 2009.

However, things changed again quickly:

- ◆ In February 2010, the Court of Appeals reversed the District Court's decision in *Foster-Bey*.^{xvii} finding that the changes in how parolable lifers are treated does not violate the *ex post facto* clause of the United States Constitution. The parole board was no longer required to systematically interview the entire class of eligible lifers. The number of hearings scheduled dropped to 37.

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- ◆ By April 2011, Gov. Snyder reduced the parole board size back to 10. New board members and a new chair were appointed. From May 2011 –December 2012, hearings were scheduled for just 29 non-drug lifers, an average of 1.5 per month.
- ◆ In 2013, the pace picked back up to some extent but the average number of hearings per month was still less than four.

The number of people who have hearings scheduled does not reflect the number actually released. In some cases the board decides it no longer has interest after conducting a hearing. In a few cases, the person has had a hearing but has not lived to receive a decision. And, as will be seen, more than one-fifth of hearings are cancelled because of judicial objections. Of 223 non-drug lifers for whom hearings were scheduled between January 2005 and December 2013, 145 (65 percent) have had paroles granted to date.

Today, the pool of lifers eligible for parole is roughly 850. If even half are good candidates, at the current rate it will take nine years to hold their public hearings. In the meantime, the pool will continue to grow as more recently sentenced lifers serve the requisite 15 years. It will be diminished by subtracting those people sentenced decades ago who die waiting for their turn.

How DOES the board decide?

So what can a lifer do to obtain parole? What will assure the board that a lifer will not be a menace to society? How much are the board's concerns even related to re-offense risk? Karen Kantzler's case raises all these thorny questions.



Karen Kantzler

Kantzler was convicted of felony-firearm and second-degree murder for the 1987 killing of her husband Paul, a Bloomfield Township radiologist. Kantzler, who has a history of childhood sexual abuse, says Paul was physically and emotionally abusive. The record shows that he also had a history of physical aggression against others, including patrons at the bar where he worked as a bouncer while a medical resident. Kantzler had contacted a divorce lawyer and a domestic violence counselor but was afraid to leave her husband because of both his potentially violent reaction and her own lack of resources. She had no prior criminal record.

Now age 64, Kantzler has a host of medical problems, including a neurological condition that causes tremors. She is blind in one eye and walks with a walker, except on bad days when she needs a wheelchair.

Kantzler's prison record is outstanding. She has not had a single misconduct in 26 years and has had excellent reports from all her prison jobs. Although she already had her college degree and several state occupational licenses, she has participated in numerous academic, vocational and self-improvement programs. She also completed several treatment programs, including anger management, domestic violence prevention and assaultive offender therapy (AOT). Her 2005 AOT

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evaluation shows “excellent” progress on 27 of 28 factors scored and states that Kantzler “addressed all of her needs in her [relapse prevention] plan and has an exceptional support system.” Her scores on the COMPAS risk assessment instrument are low.

On the evening of the killing, the couple had gone to a restaurant for dinner where they were heard arguing about charges she had placed on his credit card. They continued arguing when they got home. Both had been drinking. Kantzler maintains that she shot Paul accidentally when they struggled for a gun with which he was threatening her. However he was shot behind the ear while lying in bed, an act the prosecution contended was premeditated. Kantzler initially reported that her husband had committed suicide.

The jury heard testimony about the repeated instances of physical abuse. However, Battered Spouse Syndrome (a form of post-traumatic stress) had not yet been recognized by the Michigan courts as a basis for expert testimony that could support a claim of self-defense at a murder trial. Nonetheless, the jury chose to convict Kantzler of second-degree murder, not first-degree as the prosecution had charged.

Kantzler was sentenced to parolable life by then-Judge Norman Lippitt, who has since been advocating for her release. Lippitt says that at the time of sentencing he believed she would be paroled in ten years. Had he known that the parole board’s practices would change, he would have imposed a term of years instead. In 1993, Lippitt’s successor resentenced Kantzler to 3-10 years, but the prosecutor appealed and her life sentence was reinstated.

Kantzler was last interviewed by the parole board in 2009, when it was required by the *Foster-Bey* litigation to explain its decisions to the federal court. The board stated that: Kantzler’s “growth and insight are limited, her version of the crime was inconsistent, she blamed her abuse for the murder and she “needs to engage in further treatment to develop a full understanding of [her] assaultive, criminally deviant behavior.”

It is undoubtedly true that Karen Kantzler could benefit from more treatment. She has experienced years of physical and emotional abuse, multiple serious health problems and 26 years in prison. But the question is whether she should still be incarcerated. Even assuming that she can obtain further treatment from the MDOC, is that necessary to protect the community? Could she not be required to receive treatment as a condition of parole?

Whatever demons Kantzler is still wrestling with, no one seems to seriously suggest that she is likely to marry and then shoot another abusive husband, or that 26 years is not adequate punishment for a killing committed with such mitigating circumstances. Is the board’s dissatisfaction with how Kantzler describes and explains her behavior an adequate reason to continue her incarceration? Does it justify spending another \$200,000?

The case of Celso Echavarria, who is serving parolable life for possessing more than 650 grams of cocaine, demonstrates the board’s willingness to put form over substance in weighing the necessity of treatment.

Echavarria was nearly 46 years old and had served a little over 15 years when the board showed interest in his case. In March 2012, it requested an evaluation from an MDOC psychologist. While the report was

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Celso Echavarria

very positive, the psychologist noted that Echavarria “would benefit from programming that would help him come up with a relapse prevention plan.” Preparing these plans is part of the substance abuse treatment program called Phase II. Echavarria immediately asked to be placed in Phase II, noting that he was being considered for parole. He was denied access to the program because it had not been recommended by the Reception and Guidance Center when he entered prison.

The board conducted a public hearing in June 2012. If their institutional records are good, drug lifers typically have a high rate of being paroled. Echavarria’s record was excellent and he had substantial family support, with multiple offers of employment and places to live.

At the hearing, Echavarria was candid about the extent of his drug dealing and remorseful about the harm it had done to his family and the community. He was also candid about how his dealing had resulted from his own addiction. Asked about his participation in substance abuse treatment, he said he had taken a 40-hour program while in federal prison and had completed Phase I of the MDOC’s substance abuse programming. When asked how he would stop himself from returning to drug use, Echavarria talked about avoiding people who use, attending Narcotics Anonymous and turning to his family if he was feeling at risk and in need of support. His future parole officer pointed out that participation in substance abuse treatment would be a condition of his parole. However, when asked to describe his “relapse prevention plan” in detail, Echavarria was clearly unfamiliar with the term.

On August 3, 2012, the board voted 5-5 to deny Echavarria parole because he lacked an adequate relapse prevention plan. It did not make the denial conditional upon his completing Phase II and preparing a plan. It simply continued him for another five years.

After the denial, Echavarria was finally able to get himself into Phase II at the facility where he was then housed. However, three weeks later he was transferred. When he attempted to enter the program at his new facility, he was repeatedly told that admission to Phase II is based on a person’s earliest release date (ERD) and that because he is a lifer, he does not have what is called an ERD (even though he had passed the date when he became eligible for parole). Echavarria finally wrote directly to the contract service provider that delivers Phase II and got himself admitted. He completed the program, including preparation of a relapse prevention plan, in June 2013.

The questions seem obvious:

- ◆ Why wasn’t Echavarria permitted to complete Phase II before his public hearing?
- ◆ Why was he not placed in Phase II immediately after his hearing and granted a parole that was conditional on successful completion?
- ◆ Would permitting him to complete a relapse prevention plan while he was on parole really jeopardize public safety?

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- ◆ Given all the rehabilitation Echavarria demonstrated at his public hearing, are the additional details of a formal relapse prevention plan worth five more years of his life?
- ◆ Is the failure of the MDOC to enable Echavarria to meet the board's expectations worth \$200,000 more of taxpayer money?

Judicial vetoes: more discretion without accountability

THE POWER OF JUDGES TO OBJECT TO LIFER PAROLES MEANS THAT YET ANOTHER ACTOR IN THE SYSTEM HAS TOTAL DISCRETION TO PREVENT A LIFER'S RELEASE.

The power of judges to object to lifer paroles means that yet another actor in the system has total, unaccountable discretion to prevent a lifer's release. Ironically, the decision of a single individual who has no current knowledge of the prisoner and has held no hearing of any kind can prevent a decision being made by 10 people after a hearing at which all interested parties have the opportunity to speak.

Of the 223 non-drug lifers who had public hearings scheduled from January 2005 through December 2013:

- ◆ Fifty (22 percent) had their hearings cancelled because of judicial objections. Four of these subsequently were granted parole.
- ◆ Four people had hearings scheduled and canceled twice because of repeated objections.
- ◆ The majority of judicial objections referred to the offense or its effect on the victim, with little or no mention of current information about the prisoner.
- ◆ At least thirteen gave no reason at all.
- ◆ Several of the objections were in cases where the board's interest in proceeding was based on medical problems that left the prisoner wholly incapacitated.



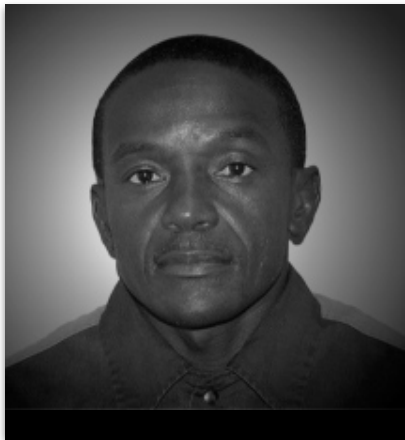
All but four of the vetoes came from successor judges. They had not imposed the life sentence and had no personal familiarity with the case. Initially, the power to object to a lifer's parole was accorded only to the actual sentencing judge. It was extended to successor judges in 1953. It has not been reconsidered since, even though notions of due process have evolved greatly since then.

The veto power puts successor judges, who are, after all, elected officials, in a difficult position. They may be faced with pressure from a victim or prosecutor's office or the probability of media attention in a high profile case. While most defer to the parole board's judgment, some seem to have adopted the position that

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“life means life” and object to lifer paroles in principle. Whether similarly situated lifers, even from the same county, have their paroles vetoed can depend solely on the luck of the draw.

The successor can object even when the actual sentencing judge was on record as not opposing the person’s release. Take, for example, Waymon Kincaid, who was convicted by a jury of second-degree murder.



Waymon Kincaid

In 1975, at the age of 18, Kincaid shot the customer of a prostitute with whom he was associated. There was dispute about whether the killing resulted from an attempted robbery or an argument over the price of the woman’s services. Kincaid was sentenced to a parolable life term by Judge Samuel Gardner, who said in a 1998 letter to the parole board and a 2002 affidavit that, assuming good conduct, he had expected Kincaid to be released after serving 10 years.

Kincaid’s presentence report indicates that his father and sister had both met violent deaths and his brother was in prison. He had dropped out of school in the seventh grade and was using heroin by age 15. During his first two decades of incarceration he received several dozen misconduct citations. Then it all changed. The board member who interviewed Kincaid in 2012 wrote:

“This prisoner has come a long way in the 36 years he has served in prison. He started out as a rebellious, irresponsible and immature inmate insensitive to the needs and rights of others. But even during this period in his incarceration at times he engaged in commendable behavior. In 1981, Mr. Kincaid helped secure the safety of a corrections officer trapped in the middle of a prison riot. After a decade or more of irresponsible conduct sprinkled with momentary demonstrations of empathy and concern for others Mr. Kincaid began to mature and engage in more positive activities.”

Kincaid was described as having “a positive reputation among correctional staff” and being “a role model for other inmates.”

The psychologist who conducted the group therapy in which Kincaid participated described him as “calm and composed”, “articulate” and the “sweet voice of reason.” The prognosis given was: “Mr. Kincaid’s maturity, the character strengths described above, and his demonstrated willingness to adhere to rules and regulations are interpreted as positive indicators for the potential for a future problem-free adjustment to the community at large.” These views are echoed in recent support letters written by his current warden and deputy warden. Most impressive, perhaps, is that Kincaid’s representative at a prior parole board interview was his warden at another facility.

All this information notwithstanding, Judge Gardner’s successor objected to Kincaid’s parole in both 2009 and 2013. The first time the objection was based on “the severity and nature” of the conviction and “a review of his incarceration history over the past thirty-three years.” The second time the entire objection was: “After reviewing the facts of the case and the basis of the crime, this court, at this time, Objects to Consideration of Parole.”

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Throwing away the key drives up the prisoner population and thus, corrections costs.

Zack Morris

Zack Morris was convicted of a 1979 armed robbery in which no shots were fired and no one was hurt. Morris says the gun wasn't loaded. He had a drinking problem and was on parole for another armed robbery in Illinois at the time.

The parole board scheduled public hearings twice, but each time, the Oakland County successor judge objected. In 2009 he relied on a psychological evaluation from which he concluded that Morris lacks remorse and is likely to reoffend. The judge also felt Morris was minimizing his offense by claiming the gun wasn't loaded.

In 2013, the judge again concluded that if Morris had not admitted the gun was loaded, then the purpose of incarceration had not been met. The judge also objected because the MDOC had not provided an evaluation of Morris's risk for violence and recidivism. Morris is now 64 years old and has served 34 years.

The elderly, the ill and the dying

THE PUBLIC INCREASINGLY
QUESTIONS NOT ONLY THE COST BUT
THE USEFULNESS OF INCARCERATING
PEOPLE WHO CAN NOW ONLY
SHUFFLE DOWN PRISON HALLWAYS

In Michigan, as in most of the nation, the legacy of “tough on crime” policies is a startling increase in the number of people aging in prison. States are putting more and more corrections dollars into medical and geriatric care.^{xviii} In 1989, the average age of Michigan prisoners was 31.4; in 2011 it was 38.0. The percentage of the population aged 50 or over is approaching 20 percent. In 2004, the National Institute of Corrections estimated that the average cost of

incarcerating an older prisoner who is chronically or terminally ill was \$70,000.

If released, people would have various options for care. Some could go to family; some to veterans’ facilities. While some would need placements in nursing homes paid for by Medicare or Medicaid, the public would not be paying for the additional cost of custody staff.

The public increasingly questions not only the cost but the usefulness of incarcerating people who can now only shuffle down prison hallways or are bedridden. No one suggests that age or illness should automatically create a free pass on punishment. A person who is over 60 when he or she commits a serious crime can still be expected to serve an appropriate sentence. But when people who have already served decades no longer have the physical capacity, much less the motivation, to commit a new offense, what does the public gain from keeping them behind bars?

With parolable lifers who are already eligible for release, the answer seems to be: not much. Consider, for example, Bernard Prosser.



Bernard Prosser

Placed into foster care as a child, Prosser was sent to a boys’ training school at the age of 12 and stayed there until he was 18. He spent most of his life after that in prison. His four prior felonies included breaking and entering, larceny in a building, indecent liberties and possession of burglary tools. Then, in 1967, while on parole for his last offense, Prosser was working as a handyman for the owner of an apartment building in Detroit. He was doing repairs in the home of an elderly couple when, for reasons that are unclear, he killed them. The presentence report indicates robbery was the motive. However at his public hearing, Prosser could only remember that he had been drinking and using pills and “went out of my head.”

Prosser was 37 at the time of the crime. He pled guilty and received one parolable life term. In prison he got good work reports and few misconduct citations.

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By 1994, when he was 63, Prosser was living in the geriatric unit at Lakeland Correctional Facility. In May 2008 he was hospitalized off-site, then spent nearly a year in MDOC's chronic care unit in Jackson before being returned to the geriatric unit. He was hospitalized off-site again in July 2010 and housed permanently at the chronic care unit until he was paroled in October 2013, at the age of 83.

At his public hearing, Prosser was in a wheel chair. His left side was partially paralyzed from a stroke and he was unable to stand. The hearing began when the parole board chair administered the oath by saying: "Can I get you to raise your right hand to the best of your ability?"

Throughout the hearing, Prosser had difficulty remembering facts. There was confusion about how many siblings he had, what grade he'd completed and when he had last worked a prison job. He said he was telling the truth as best he could but "my mind ain't helping me along."

Asked why he thought he deserved parole, Prosser said he thought 45 years was long enough to serve and asked "what more can I show?"

There is no denying the severity of Prosser's crime. However, it is hard to see how the purposes of incarceration were served by his last years in prison. No one opposed Prosser's parole. The only people who attended his hearing were a parole agent and a medical social worker, who spoke briefly about finding a nursing home placement if Prosser were released.

Would the community have been any less safe if he had been paroled after his first hospitalization in 2008? Or after his second in 2010? Does retribution really require 45 years in prison instead of 35? Was he more likely to be rehabilitated after he turned 80 than, say, after he turned 70?

Prosser lived long enough to be paroled. Many other parolable lifers have not. Among those who had public hearings since January 2005, five died before the parole board acted. Others died within days or months of release.

Sometimes the board's attempts to release a seriously ill lifer are stymied by judges exercising their veto power, as in the case of Leroy Brady.



Leroy Brady

Brady is 77 years old and hospitalized in a prison medical facility because of a crippling stroke. He is wholly dependent on medical staff for his activities of daily living.

Thirty-nine years ago, Brady was convicted in Berrien County of armed robbery and criminal sexual conduct. He had previous convictions for kidnapping, unarmed robbery, burglary and car theft.

Because of his health issues, the parole board scheduled a public hearing for Brady in May 2009. It was cancelled when the successor judge objected based on "the nature and circumstances of the crimes."

Parolable lifers in Michigan: Paying the price of unchecked discretion

Again, Brady's crimes were extremely serious. However his parolable life sentence was designed to allow the parole board to re-evaluate the utility of his continued incarceration as circumstances changed. The question is what the public gains from allowing a single successor judge to ignore current circumstances and prevent that evaluation based solely on the decades-old crimes.

The price of unbridled discretion

When it was enacted in 1941, the "lifer law" was meant to allow people who had committed serious crimes to earn a second chance. Even when it was amended in 1992 to increase the minimum years a lifer must serve, the legislative intent to make parole a realistic possibility remained apparent. The lifer law assumes that rehabilitation is possible and that at some point the need for punishment is satisfied. It assumes that corrections professionals who had come to know the lifer over a period of time

could fairly and reliably assess whether he or she was trustworthy, responsible and possessed the self-control necessary to function safely in society. A lifer who is not likely to become a "menace to society" is to be released just like any other prisoner who meets the statutory standard.



OVER TIME, THE EXERCISE OF TOO MUCH DISCRETION BY TOO MANY PEOPLE HAS MADE LIFER PAROLES AN EXPENSIVE GAME OF CHANCE.

Over time, the exercise of too much discretion by too many people has made lifer paroles an expensive game of chance. Without explanations, decisions appear arbitrary. Without the enforcement of standards, there is little consistency. People are not told why they are being denied release or why everything they were told when they were sentenced has become meaningless. Results often depend less on the

conduct of the lifer than the identity of the reviewing board member or successor judge. Whether the person actually poses a current risk to public safety seems almost irrelevant. Perpetual punishment has become the norm and any deviation from it is a matter of grace.

Parolable lifers in Michigan: Paying the price of unchecked discretion

The current process discourages lifer paroles; it builds in the assumptions of the late 1990s that only exceptional cases will ever be released. As the pool of eligible lifers has grown, the system has responded by processing files, communicating with people.

The parole board never has to explain to anyone why it is fair or reasonable or even cost-effective to keep continuing James Aubrey and Karen Kantzler for five years at a time. Its explanations of why it chose not to release Reynaldo Rodriguez and Celso Echavarria cannot be challenged. And judges can use any reasons they choose to block the paroles of Robert Middleton, Zack Morris and Waymon Kincaid. Regardless of how little opposition there is to release or how much community support exists, it is always more expedient to err on the side of saying no.

The price of failing to place any limits on the exercise of discretion is very high.

- For taxpayers, the average cost of keeping aging lifers is about \$40,000 a year. If half of those currently eligible were released, the annual savings would approach \$17 million.
- For the criminal justice system, it is a failure of integrity.
 - ❑ When the intentions of judges and the bases of plea agreements can be undone because the last decision-maker has the unilateral power to say "no," the system is not reliable.
 - ❑ The functions of judges, prosecutors and defense attorneys are effectively usurped.
 - ❑ Sentences lack predictive value, since no one can anticipate when a prisoner who has good institutional conduct and a low risk of reoffending will be released.
 - ❑ Consistency in the treatment of similar offenders who have committed similar offenses is negated.
 - ❑ The fairness of a system with little transparency and no accountability is perpetually open to question.
- For prisoners and their family members, the shift in emphasis from rehabilitation to punishment destroys the hope that people can ever earn their way home.

Restoring the intent of the “Lifer Law”

Constraining the absolute discretion being exercised in lifer cases requires no radical solutions. On the contrary, it simply means returning to the practices of the past.

To the extent that statutory provisions were changed in order to implement “get tough” policies, they just need to be changed back. To the extent that existing statutes are not being enforced for lifers, their applicability just needs to be made explicit. To the extent that past norms are no longer being followed, they just need to be codified.

► **Problem:** The board does not assess lifers by the same criteria it applies to other parole-eligible prisoners and does not calculate parole guidelines for lifers before deciding whether it will conduct a public hearing.

Solution: Amend the lifer law to state that the statutory standard for granting release (effective since 1953) and the parole guidelines statute (effective since 1992) both apply to lifers.

► **Problem:** The board only reconsiders lifers every five years, effectively implementing an assumption that they need not be seen more often because they won’t be paroled anyway. This leaves the board unaware of relevant changes in the person’s conduct, health, achievements or community support. It also fails to maintain continuity of decision-making as the board members themselves serve four-year terms. The board may be split 5-5 on whether to conduct a public hearing and by the time the person is reviewed again, most or all of the board members may have been replaced.

Solution: Consider lifers every two years once they become eligible for parole, as was required before 1993.

► **Problem:** The board does not get a sense of who the person is currently because it conducts file reviews instead of interviews and does not seek input from MDOC personnel who know individual lifers well.

Solution: Return to personal interviews, as was required before 2000. Solicit the assessments of institutional staff members who know the person well.

► **Problem:** The parole board provides no explanation of its reasons for having “no interest” in proceeding to public hearing, so the prisoner has no understanding of why s/he is not being released and the public has no insight into how decisions are made that affect both public safety and public spending.

Solution: Define a “no interest” decision as a denial of parole, as was the case until 2000, so the board will be required to provide a summary of its reasons.

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► **Problem:** Parole board interviews of prisoners are not recorded so that subjective conclusions reached by the interviewing board member cannot be independently verified.

Solution: Require that parole interviews be recorded and made available to other board members voting on the prisoner's case and to reviewing courts, should prisoner appeals of parole denials be restored.

► **Problem:** There is no judicial review of the board's decisions, so individual prisoners have no recourse, applicable rules cannot be enforced and no body of law interpreting those rules can evolve.

Solution: Restore the right of prisoners to appeal parole denials to the courts, which was eliminated in 1998.

► **Problem:** Successor judges can prohibit the board from granting release just by saying, "I object", without any personal familiarity with the case or current information about the prisoner.

Solution: Allow only the original sentencing judge to exercise veto authority, as was the case until 1953. The Michigan Judges Association supports limiting successor judges to receiving notice of lifer public hearings and giving input, while eliminating their power to prevent parole.

► **Problem:** Years of releasing virtually no lifers has created such a large pool of people eligible for release that there is now a problem of resources. The current 10-member board, with responsibility for making 20,000+ decisions a year in non-lifer cases, is only addressing the backlog incrementally.

Solution: Establish a temporary lifer review board with the authority and capacity to make lifer parole decisions and recommend commutations.

These solutions would not require the parole board to release any particular lifer or any group or number of lifers. The board would retain the discretion to continue the incarceration of individuals who actually pose a risk to the public, so long as its decisions were evidence-based.

These solutions would not affect the rights of victims and prosecutors to convey their views to the board at any time, to testify at public hearings or to appeal grants of parole.

These conservative reforms would fulfill citizens' expectations of government, including the cost-effective use of scarce resources, without decreasing public safety.

End notes

ⁱ See *Citizens Alliance on Prisons and Public Spending, Michigan's Parolable Lifers: The Cost of a Broken Process*, Lansing (June 2013).

ⁱⁱ MCL 791.234 (7) states:

(7) A prisoner sentenced to imprisonment for life, other than a prisoner described in subsection (6), is subject to the jurisdiction of the parole board and may be placed on parole according to the conditions prescribed in subsection (8) if he or she meets any of the following criteria:

(a) Except as provided in subdivision (b) or (c), the prisoner has served 10 calendar years of the sentence for a crime committed before October 1, 1992 or 15 calendar years of the sentence for a crime committed on or after October 1, 1992.

(b) Except as provided in subsection (12), the prisoner has served 20 calendar years of a sentence for violating, or attempting or conspiring to violate, section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, and has another conviction for a serious crime.

(c) Except as provided in subsection (12), the prisoner has served 17-1/2 calendar years of the sentence for violating, or attempting or conspiring to violate, section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, and does not have another conviction for a serious crime.

ⁱⁱⁱ CAPPS's analysis of data provided by the Michigan Department of Corrections.

^{iv} In 1999, Michigan prospectively abolished any form of credit for good behavior. Anyone sentenced after that date must serve every day of the minimum prison sentence in a secure facility. Thus a minimum sentence of 50 years, which at one time could have been served in 18.5 years with all good time credits or would have allowed for release in 10 years under the lifer law, now means there is no parole eligibility for 50 years.

^v Prisons and Corrections Section, State Bar of Michigan, *What Should "Parolable Life" Mean? Judges Respond to the Controversy*, Lansing (March 2002).

^{vi} D.A. Andrews, James Bonta and J. Stephen Wormith, *The Recent Past and Near Future of Risk and/or Need Assessment*, *Crime & Delinquency*, Vol. 52, No. 1 (Jan 2006) pp 7-27; James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, *Federal Sentencing Reporter*, Vol. 16, No. 3 (February 2004) pp 1-6.

^{vii} Prosecutors and victims retain the right to appeal parole board decisions to grant release.

^{viii} See MCL 791.234(8).

^{ix} These time periods do not apply to people initially sentenced to life without parole for possession or delivery of more than 650 grams of drugs. When the law was amended in 1998 to permit their parole, they became eligible after serving 15, 17.5 or 20 years, depending on statutory criteria applied to their cases.

^x Michigan Department of Corrections, *Five Years After: An analysis of the Michigan Parole Board since 1992*, (Lansing, September 1997).

^{xi} California Department of Corrections and Rehabilitation, *Lifer Parolee Recidivism Report*, (January 2013).

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^{xii} CAPPS, *When "life" did not mean life: A Historical Analysis of Life Sentences Imposed in Michigan Since 1900*, (Lansing, September 2006). The 648 people sentenced for first-degree murder were even more impressive. Only one had returned for a new crime, or just 0.2 percent.

^{xiii} State of Michigan, Department of Corrections, *Corrections in War Time*, Third Biennial Report, 1941-1942, p. 92.

^{xiv} *Corrections in War Time*, op cit, pp 93-94.

^{xv} CAPPS, *When "life" did not mean life*, op cit.

^{xvi} *Foster-Bey v Rubitschun*, No. 05-71318, 2005 WL 2010181 (E.D. Mich. August 18, 2005).

^{xvii} *Foster v Booker et al*, 595 F3d 353 (CA 6, 2010), cert den 131 S Ct 225 (2010).

^{xviii} See Tina Chiu, *It's About Time: Aging Prisoners, Increasing Costs, and Geriatric Release*, New York: Vera Institute of Justice (2010); Steve Angelotti and Sara Wycoff, *Michigan's Prison Health Care: Costs in Context*, Lansing: Michigan Senate Fiscal Agency (November 2010).

Citizens Alliance on Prisons and Public Spending (CAPPS)

Mission Statement

The Citizens Alliance on Prisons and Public Spending (CAPPS) is a nonprofit, nonpartisan policy and advocacy organization that works to reduce the social and economic cost of prison expansion. Because policy choices, not crime rates, determine corrections spending, CAPPS advocates re-examining those policies and shifting resources to services proven to prevent crime, better prepare people for success after release, and improve the quality of life for all Michigan residents.

CAPPS members

CAPPS's members are people and organizations concerned about corrections spending and Michigan's over-reliance on incarceration. They include policymakers; corrections, education, human service, and criminal justice professionals; leaders of civil rights, community, business and faith organizations, as well as prisoners and their families.

What CAPPS does

CAPPS develops evidence-based proposals for safely reducing the prison population and corrections spending. The organization informs policymakers, advocacy groups, affected communities and the general public about the issues through a website, FaceBook, newsletters, research reports, legislative testimony and public presentations. CAPPS collaborates with a wide range of organizations and coalitions.

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