

## Introduction

The mass incarceration of women has increased by more than 700 percent in the last several decades.<sup>1</sup> That is more than double the already staggering rate of incarceration for men during the same time period.<sup>2</sup> This important trend is often obscured by discussions that focus more broadly on movement in the “total” prison population, which is predominately male.<sup>3</sup> So, despite the unmitigated surge in women’s incarceration most recent reforms have primarily only reduced men’s population sizes.<sup>4</sup> In concrete numbers, while both populations reached a peak nationally in 2009, in the following six years the number of incarcerated “men in state prisons fell more than 5% ... while the number of women in state prisons fell only a fraction of a percent (.29%).”<sup>5</sup> In fact, according to the non-partisan Prison Policy Initiative, in “35 states, women’s population numbers have fared far worse than mens, and in a few extraordinary states, women’s prison populations have even grown enough to counteract reductions in the men’s population.”<sup>6</sup>

More troubling still, women are being increasingly slapped with extreme sentences. Life without possibility of parole (LWOP) is a sentence given in which the convicted individual will remain in prison for the entirety of their natural life, and they will not have potential access to a conditional release before they die.<sup>7</sup> In states that have abolished the death penalty, this is the most extreme sentence that can be imposed.<sup>8</sup> This outrageous sentence of death in prison is supposedly reserved for, as prosecutors often quip, “the worst of the worst.” However, between 2008 to 2020, the “number of women serving sentences of life without possibility of parole soared [by] 43%,” which is greatly disproportionate to the

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<sup>1</sup> *Incarceration of Women is Growing Twice as Fast as that of Men*, EQUAL JUST. INITIATIVE (May 11, 2018), <https://eji.org/news/female-incarceration-growing-twice-as-fast-as-male-incarceration/>. Between 1980 and 2016, the number of women incarcerated in American prisons and jails increased from 26,378 to 213,722.

<sup>2</sup> *Id.* See also Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

<sup>3</sup> Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POL’Y INITIATIVE (Jan. 9, 2018), [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html). Please note that there is not sufficient data available that focuses on the experiences of transgender and non-binary individuals in prison. By using binary male and female categories, I do not mean to discount the lived experiences of other people but am using the data that is available. Hopefully research will soon focus on the experiences of these individuals so that advocacy for decarceration can focus on specifically on them as well.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Life without possibility of parole*, CORNELL L. SCH. (last updated June 2020), [https://www.law.cornell.edu/wex/life\\_without\\_possibility\\_of\\_parole](https://www.law.cornell.edu/wex/life_without_possibility_of_parole).

<sup>8</sup> See *id.*

“overall 2% increase in women imprisoned for violent crime” during that same period.<sup>9</sup> Like with total prison populations, the population of women serving life without parole has increased substantially and much faster than men serving the same sentence.<sup>10</sup>

The leading reasons women find themselves sentenced to die in prison differ greatly from the reasons men wind up in the same position. Recent research suggests that gender-based stigmas and patriarchal views of femininity greatly affect women’s court outcomes for the worse.<sup>11</sup> Critically, there has also been an increase in mandatory minimum laws that “require equally harsh punishments whether an offender is a major or minor participant in the crime.”<sup>12</sup> Women who end up sentenced under these mandatory minimum laws are quite often victims of abuse and coercion who were only minor participants in the underlying crime.<sup>13</sup> Ultimately, these mandatory minimum laws often end up harshly punishing abuse victims who never intended to commit a crime. At worst, these mandatory minimums—like felony murder—result in women being sentenced to die in prison when they never even pulled a trigger.

I. *Gender-Based Stigmas and Patriarchal Views of Femininity*  
a. *Male v. Female criminality*

Societal perceptions of female criminality, compared to that of men, tend to negatively skew court outcomes for women defendants. In 1987, the Department of Justice Office of Justice Programs conducted a study on the gendered differences in the sentencing of felony offenders.<sup>14</sup> The study found that “[w]hile the percentage of males incarcerated [across the eight major offense categories] always exceeded that of women, women were more likely to be sentenced to jail for robbery and assault than were men.”<sup>15</sup> This data suggests that “women may be sanctioned more harshly when their behavior violates sex-role stereotypes.”<sup>16</sup> Dr. Brian O’Neill, Professor of Criminal Justice, elaborates that there is almost a level of tolerance for male violent behavior that is not also extended to females accused of similar crimes.<sup>17</sup> Because female violence is so rare, those offenders are seen as less worthy of a second chance.<sup>18</sup> Simply put, for women, committing a

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<sup>9</sup> *Report: More Women Serving Extreme Sentences in the United States*, DEATH PENALTY INFO. CTR. (Oct. 7, 2021), <https://deathpenaltyinfo.org/news/report-more-women-serving-extreme-sentences-in-the-united-states>.

<sup>10</sup> *See id.*

<sup>11</sup> *See generally* Real Stories, *Dying Out Loud (Prison Documentary)*, YOUTUBE (Jan. 24, 2019), <https://www.youtube.com/watch?v=6pVq5-12duk>.

<sup>12</sup> *Id.*

<sup>13</sup> *See id.*

<sup>14</sup> *Gender Differences in the Sentencing of Felony Offenders*, U.S. DEP’T OF JUST. (1987), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/gender-differences-sentencing-felony-offenders>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Real Stories, *supra* note 11.

<sup>18</sup> *Id.*

crime—especially a violent crime—is seen as a violation of their innate feminine nature.<sup>19</sup>

*b. Women are often victims of abuse, and that trauma tends to contribute to their criminality*

The circumstances surrounding female criminality are often coated in trauma and victimization. The Bureau of Justice Statistics reports that 57% of women incarcerated under state jurisdiction reported experiencing either sexual or physical abuse prior to their incarceration.<sup>20</sup> Another example of the sheer volume of traumatized incarcerated women comes from a study of North Carolina prisons that found that almost two-thirds of their sample of female offenders had experienced childhood physical or sexual abuse and more than twenty-five percent had been sexually abused in the year prior to incarceration.<sup>21</sup> Regarding women serving life sentences specifically, the Sentencing Project found that “[w]omen serving life sentences report [similarly] high levels of psychiatric disorders, histories of physical and sexual violence, and previous suicide attempts.”<sup>22</sup> In fact, it has been estimated that “more than one third of women serving life sentences have attempted suicide.”<sup>23</sup>

Despite what is known about the deep links between trauma and crime, under federal sentencing guidelines, factfinders are generally not supposed to consider victimization as relevant to sentencing.<sup>24</sup> Moreover, in the limited situations in which a look at extenuating life circumstances is permitted, it is only allowed for non-violent crimes.<sup>25</sup> So, though we know that “people who are victims of crime are at greater risk of engaging in activities that place them at risk of incarceration later,”<sup>26</sup> we still fail to account for past victimization at sentencing. In this way,

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<sup>19</sup> *See id.*

<sup>20</sup> *Women in the Criminal Justice System*, THE SENT’G PROJECT 2 (2007) <https://www.sentencingproject.org/wp-content/uploads/2016/01/Women-in-the-Criminal-JusticeSystem-Briefing-Sheets.pdf>.

<sup>21</sup> *See* David Dagan, *Women Aren’t Always Sentenced By The Book. And Maybe They Shouldn’t Be.*, FIVETHIRTYEIGHT (Mar. 30, 2018, 1:37 PM), <https://fivethirtyeight.com/features/women-arent-always-sentenced-by-the-book-maybe-men-shouldnt-be-either/> (Though this study was conducted on a sample of women leaving prison, the general principle that incarcerated women are often victims of abuse can fairly be extrapolated to those serving life without parole sentences as well).

<sup>22</sup> *In The Extreme: Women Serving Life Without Parole and Death Sentences in the United States*, THE SENT’G PROJECT 12 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/09/In-the-Extreme-Women-Serving-Life-without-Parole-and-Death-Sentences-in-the-United-States.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *See* Dagan, *supra* note 21.

<sup>25</sup> *See* Dagan, *supra* note 21.

<sup>26</sup> Candice Norwood, *More women are serving life sentences. Experts are trying to determine why.* THE 19TH\* (Oct. 5, 2021, 11:59 AM), <https://19thnews.org/2021/10/more-women-are-serving-life-sentences-why/> (quoting Sydney McKinney, executive director of the National Black Women’s Justice Institute).

the purportedly gender-neutral sentencing guidelines can place female defendants at an extreme legal disadvantage.<sup>27</sup>

*c. Violence as a response to intimate partner victimization*

It is not uncommon for women to commit an act of violence in response to violence perpetrated by an intimate partner.<sup>28</sup> This phenomenon is in line with the psychological effects we know abuse and violence can have on a person— “[w]e know, for instance, that almost all who commit violence have first experienced it.”<sup>29</sup> In a recent report from the Sentencing Project, interview data collected from 99 women serving life sentences revealed that 17% had been convicted of killing their intimate partner.<sup>30</sup> When examining those convicted of killing their intimate partner specifically, a seminal study of 42 survivors of intimate partner violence (IPV) in the California prison system found that, of the 42 women, “all but two had received life sentences: six were sentenced to life without parole, and the remaining 34 received life sentences with minimums that ranged from seven to fifteen years, but at the time of the study all these women had already served twenty-five years.”<sup>31</sup> So, though not all women serving life sentences are sentenced as such for killing an intimate partner, a substantial portion of women convicted of killing their intimate partner are given a life sentence. A life sentence, though, seems hardly appropriate given the extenuating circumstances of the abuse these women suffered. At the very least, immediate changes to sentencing guidelines that not only allow—but demand—consideration of such factors and life experiences is in order.

*II. Mandatory Minimums and Felony Murder*

Another way in which allegedly gender-neutral sentencing policies disproportionately impact women is mandatory minimums that do not distinguish between being a major or minor participant in a crime. Women often find themselves as minor participants in a crime, like acting as a getaway driver or a lookout, or cleaning up in the aftermath.<sup>32</sup> This is especially true for women who are also survivors of intimate partner violence, as these women can be coerced and manipulated into participation.<sup>33</sup> Because of this forced involvement in crime by romantic partners, women “are also often disproportionately punished where laws require identical punishments for all defendants regardless of their role in the

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<sup>27</sup> See *In The Extreme: Women Serving Life Without Parole and Death Sentences in the United States*, *supra* note 22 at 10.

<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See generally *Real Stories*, *supra* note 11.

<sup>33</sup> Rita Ocegueda & Chloe Hilles, *Illinois change in ‘felony murder rule’ left some behind*, NEWS & OBSERVER (Jan. 30, 2022, 12:23 AM), <https://www.newsobserver.com/news/politics-government/national-politics/article257785543.html>.

crime.”<sup>34</sup> In this way, felony murder, specifically, is a mandatory sentencing regime that ends up throwing the book at women.<sup>35</sup>

Felony murder laws are applicable in situations where a death occurs during the commission of some other felony where the law specifies that all people involved in the underlying felony can be convicted of homicide regardless of their role in the crime and regardless of intent on their part.<sup>36</sup> In most states, felony murder is categorized as first-degree murder which can result in sentences ranging from several years in prison to a life sentence.<sup>37</sup> In about half of these states with a felony murder statute, felony murder is considered a capital offense which means a defendant convicted under the law may be sentenced to death.<sup>38</sup> Many states allow charges of felony murder to proceed if a third party, not any of the defendants, was responsible for the death.<sup>39</sup> A study of the 198 people serving time for felony murder in Illinois found that at least 38 were charged in a case where a third party was the trigger man.<sup>40</sup> Further, in those 38 cases, a police officer was a shooter in more than half.<sup>41</sup> In this way, the felony murder rule “often provides cover for police officers who use deadly force when it is not justified and enables those officers to avoid being disciplined for violating their own guidelines.”<sup>42</sup> Regarding women specifically, that same Illinois study found that one-quarter of the people serving time for felony murder were women, “compared with 5% of women incarcerated on murder charges in Illinois overall.”<sup>43</sup> It is hard to think of a more ridiculous scenario than imprisoning a women for the remainder of her life for playing a minor role in a crime where she was possibly coerced by an abusive partner and where, perhaps, a police officer killed someone on the scene, but that is not only a possibility but is a reality under our sentencing scheme in the United States. Though this is an extreme example, it serves to highlight the asinine way this country allocates “justice.”

As mentioned, life sentences are not mandatory in most instances of felony murder charges, but LWOP is a common sentence for women convicted under

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<sup>34</sup> In *The Extreme: Women Serving Life Without Parole and Death Sentences in the United States*, *supra* note 22 at 10.

<sup>35</sup> Note, felony murder rules also tend to disproportionately impact young Black men. *See* Ocegüera, *supra* note 33.

<sup>36</sup> *See* *In The Extreme: Women Serving Life Without Parole and Death Sentences in the United States*, *supra* note 22 at 10.

<sup>37</sup> *Felony Murder*, JUSTIA (last visited Feb. 2, 2022), <https://www.justia.com/criminal/offenses/homicide/felony-murder/#:~:text=In%20most%20states%2C%20felony%20murder,the%20death%20penalty%20is%20available.>

<sup>38</sup> *Id.*

<sup>39</sup> *See* Ocegüera, *supra* note 33.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* (Quoting Steven Drizin, co-director of the Center on Wrongful Convictions at Northwestern University).

<sup>43</sup> *Id.*

this rule.<sup>44</sup> For example, the Sentencing Project reports that in Michigan, 57 of the 203 women currently serving LWOP have been convicted under the state’s felony murder statute which requires this sentence.<sup>45</sup> Additionally, in Pennsylvania, 40 of the 201 women serving LWOP are there on felony murder convictions.<sup>46</sup>

Not separating punishments for major and minor participants in a crime is a shockingly harsh sentencing requirement. Charging, for example, a getaway driver to the same life sentence that the trigger man is sentenced to is cruel and coated in gender bias. Abolishing the felony murder rule and similar mandatory minimums for minor participants is one way to immediately assist in de-carcerating women prisoners who are serving life sentences and, more broadly, this will drastically improve trial outcomes for women defendants facing punishment for the above-mentioned types of crimes.

### *III. Life sentences do not make sense*

The generally touted four purposes of incarceration are: 1) deterrence; 2) retribution; 3) incapacitation; and 4) rehabilitation.<sup>47</sup> First, while we know prisons are very good at punishing, we also know that prison sentences—particularly long prison sentences—are unlikely to actually deter future crime.<sup>48</sup> We also know that at a certain point incapacitation is no longer necessary for public safety because people age out of crime.<sup>49</sup> Lastly, the idea that anyone would be rehabilitated while serving a life sentence is pretty laughable—rehabilitation comes tied together with the idea that the individual can be returned to their community, when that return is no longer possible, neither is full rehabilitation.

#### *a. People age out of crime*

Decades of social science research demonstrates that “all but the most exceptional criminals, even violent ones, mature out of lawbreaking before middle age, meaning that long sentences do little to prevent crime.”<sup>50</sup> Despite this understanding, sentences in the American criminal system have gotten longer and longer. Between 1990 and 2015, the elderly prison population (those over age 55) increased by 550 percent which is a total of 144,500 inmates.<sup>51</sup> Speaking of those serving life sentences directly, 30% of them are over 55 which is more than

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<sup>44</sup> See In The Extreme: Women Serving Life Without Parole and Death Sentences in the United States, *supra* note 22 at 10.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See generally *The 4 Purposes of Incarceration*, FOURTH PURPOSE (last visited Feb. 2, 2022), <https://4thpurpose.org/4-purposes/>.

<sup>48</sup> *Five Things About Deterrence*, NAT’L INST. OF JUST. 1 (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>.

<sup>49</sup> See Dana Goldstein, *Too Old to Commit Crime?*, MARSHALL PROJECT (Mar. 20, 2015, 1:00 PM), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

61,417 people.<sup>52</sup> Alice Green is 91 years old and the oldest female lifer.<sup>53</sup> In the documentary *Dying Out Loud*, Dr. Marie Gottschalk discusses the greying of the prison population and emphatically exclaims that people age out of crime.<sup>54</sup> She recounts a study conducted in California where almost 900 lifers were released and the reoffending rate—people who were reincarcerated for a felony—was about one percent.<sup>55</sup> What America is doing at large is “keeping people in prison who are physically unable to represent a threat to anybody.”<sup>56</sup> Indeed, many prisons have to operate assisted living facilities on account of the sheer volume of elderly inmates.<sup>57</sup> In this way, death in prison is a more evocative and perhaps better suited term to describe this sentence.

A woman serving life who was interviewed for the *Dying Out Loud* documentary states that, “nothing really changes, you are just waiting to die.”<sup>58</sup> And to what end? If keeping our communities safe and crime free isn’t the reason behind these extreme sentences, what is? Punishment? Echoing Marc Mauer, director of the Sentencing Project, in his testimony before Congress: it is well past time to ask “[h]ow much punishment is enough?”<sup>59</sup>

*b. The United States is one of a few democracies that will sentence their citizens to die in prison*

It is worth noting as well that the prevalence of life sentences, not to mention the use of the death penalty, in the United States makes it an outlier among other industrialized nations.<sup>60</sup> For comparison, most European countries use these types of sentences quite sparingly.<sup>61</sup> Nine members of the European Union do not allow for life sentences and “32 nations allow a life sentence but with a fixed term of years after which the individual can be considered for parole,” with the terms ranging from seven to twenty-five years.<sup>62</sup> These types of systems where sentences can always be reevaluated allow for accountability, rehabilitation, and dignity in a carceral system which is sorely lacking in the United States.

*c. No incentive for lifers to be good prisoners*

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<sup>52</sup> Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment*, THE SENT’G PROJECT (Feb. 17, 2021), <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>.

<sup>53</sup> See *In The Extreme: Women Serving Life Without Parole and Death Sentences in the United States*, *supra* note 22 at 8.

<sup>54</sup> Real Stories, *supra* note 11.

<sup>55</sup> *Id.*

<sup>56</sup> Goldstein, *supra* note 49.

<sup>57</sup> Paul Butler, *Chokehold: Policing Black Men* 233 (The New Press 2017).

<sup>58</sup> See Real Stories, *supra* note 11.

<sup>59</sup> Goldstein, *supra* note 49.

<sup>60</sup> Marc Mauer, *Incarceration Rates in an International Perspective*, THE SENT’G PROJECT (June 28, 2017), <https://www.sentencingproject.org/publications/incarceration-rates-international-perspective/>.

<sup>61</sup> See *id.*

<sup>62</sup> *Id.*

Lastly, life without parole sentences ensure that those individuals have no incentive to be good prisoners. We leave these people with no hope, and without hope rehabilitation is an unlikely outcome. As Lieutenant Governor of Pennsylvania Michael Stack explains, people with this sentence might think, “what is the point?”<sup>63</sup> If I’m stuck in here forever, why would I try to behave; why would I try to rehabilitate; what is the point?<sup>64</sup> This defeats the entire purpose of rehabilitation.

## **Conclusion**

Life sentences, and especially those attached with no possibility of parole, are particularly inhumane, unforgiving, and vastly disproportionate to the underlying crime. This is especially true when looking at the population of female lifers in the United States. So many of these women are impacted greatly by intimate partner violence and have been minor participants in felony crimes, yet they have been sentenced to die in prison. The immorality of these extreme sentences needs to be promptly and directly addressed. Ending life sentences going forward and immediately reconsidering those currently serving life would help to dramatically reduce incarceration rates which is not only morally necessary, but also fiscally responsible.<sup>65</sup> Ending the overbearing sentencing regime described in this article is not only a criminal justice issue, but a women’s rights prerogative. For those that care about women’s issues, sentencing reform is a mantel that must be taken up.

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<sup>63</sup> See Real Stories, *supra* note 11.

<sup>64</sup> See *id.*

<sup>65</sup> See *No End in Sight: America’s Enduring Reliance on Life Imprisonment*, THE SENT’G PROJECT 5 (2021), file:///Users/savannajones/Downloads/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf.