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**“Second Looks, Second Chances”: Collaborating with Lifers on a Video
about Commutation of LWOP Sentences**

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on Documentaries & the Law

“Second Looks, Second Chances”: Collaborating with Lifers on a Video about Commutation of LWOP Sentences

“Second Looks, Second Chances for Pennsylvania Lifers: Commutation by the Numbers” is a 17-minute advocacy video produced by the Penn Program on Documentaries & the Law (the “Docs Program” or “Docs&theLaw”), in collaboration with Lifers Inc. at SCI Graterford (“Lifers Inc.”) and the Pennsylvania Prison Society (the “Prison Society”). The video calls for an expansion of parole eligibility through increased exercise of the Governor’s executive power of commutation for Pennsylvanians serving life without the possibility of parole (sometimes referred to as “LWOP”). The video is available on the websites of Docs&theLaw¹ and the Lifers Parole Eligibility Education Initiative,² as well as on YouTube.³

In Pennsylvania, all life sentences for which no lesser minimum term is stated carry no possibility of parole. There are presently over 5,000 persons serving LWOP sentences; of these approximately 1,500 lifers are 55 years of age or older and have served 25 or more years in prison. In the last 20 or so years, the sentences of only 8 lifers have been commuted by Pennsylvania governors as compared with several hundred in the prior two decades.

In 2015, Lifers Inc. received a grant from the Bread and Roses Community Fund to conduct an educational campaign in support of expanded parole eligibility for lifers. The Lifers wanted an advocacy video to distribute via DVDs as part of the campaign. At the suggestion of the Prison Society, Lifers Inc.’s fiscal sponsor for the grant, Lifers Inc. contacted Penn Law’s Docs Program and we agreed to take on the project.⁴ “Second Looks, Second Chances” is the result of a collaboration

¹ See *Second Looks, Second Chances*, PENN PROGRAM ON DOCUMENTARIES & THE LAW, <https://www.law.upenn.edu/institutes/documentaries/> (last visited July 20, 2018).

² See *Second Looks, Second Chances: Commutation by the Numbers*, LIFERS INCORPORATED, <https://www.lifersincpa.org/second-looks-second-chances> (last visited July 20, 2018).

³ See *Second Looks, Second Chances*, YOUTUBE, https://www.youtube.com/watch?v=khWB6_hThOw (last visited July 20, 2018).

⁴ Students enrolled in the Visual Legal Advocacy Seminar were offered the opportunity to work on the Lifers’ project, but turned it down. The Program’s director and one of its long-time videographer-facilitators took it on. The students instead chose to produce a video on compassionate release of terminally and seriously ill prison residents. Their video “A Dignified

between the Docs Program and Lifers Inc., with the assistance of the Prison Society.

This article tells the story of that collaboration from the perspective of the Docs Program. Much research and theorizing that is not evident to the viewing eye went into the making of the video. This article, which is basically an account of the video's backstory, relates the details of the collaboration between a law-school based advocacy video production unit and a group of incarcerated persons and, drawing on other disciplines, describes the methodology employed and its theoretical support. The collaborators faced many strategic decisions about the video's content as to which research in the areas of criminology, political science, and law proved extremely helpful. Scholarly findings and technical expertise, however, do not translate into power and control over a collaborative documentary project initiated by grassroots activists. Legal and image ethics dictate that the party with superior resources use persuasion, negotiation, and compromise to influence the choices entailed in the joint production of a work of visual legal advocacy.

Finally, we confronted the issue of how to include in the video images of the members of Lifers Inc. who participated in the pre-and post-production process. Department of Corrections regulations barred their direct participation as interviewees. Nonfiction media images of incarcerated persons generally portray them as "convicts" or "inmates" who deserve the punishment they get. The search for an alternative politics of representation led us to the scholarship of visual criminology which suggested a more reflexive portrayal of our collaborators.

I. A Different Kind of Collaboration: More Dialogue, More Say

Since 2005, the Docs&theLaw Program at Penn Law has been teaching, producing, and promoting "visual legal advocacy" ("VLA"), that is advocacy or persuasive argument undertaken by lawyers to advance the interests of clients by using

Death: Compassionate Release in Pennsylvania" is available at <https://www.law.upenn.edu/institutes/documentaries/studentvideos/> and on YouTube at <https://www.youtube.com/watch?v=Vsq3J1J0SBw>.

digital technology, primarily video. Contrary to popular belief, video is well-suited to educate lay persons about the law and to visually lay out logical and rational legal arguments. VLA is especially good at capturing evidence of the environment in which social and economic conflicts and problems amenable to legal reform play themselves out. In addition, it can enable ordinary clients to present their claims in their own words and address a targeted audience directly. VLA is especially valuable in social justice campaigns where successful legal representation of a client or clients requires appeals to legislators, policy makers, bureaucrats, and the public. It can produce the empathy and identification required to support demands for fair-minded, attentive justice by legal decisionmakers. Moreover, it can employ art and artistry, in both visual and auditory forms, where words alone are inadequate. Finally, visual legal advocacy can be a powerful tool when it adheres to the highest forms of both legal and image ethics.

For more than 10 years, the DOCS Program has provided Penn Law students and a few students from other parts of the University the opportunity to produce and direct visual legal advocacy videos made on behalf of local social justice clients and causes. In doing so, the students have worked with attorneys from such legal public interest organizations as Community Legal Services of Philadelphia, the Innocence Project of Pennsylvania, the Defender Association of Philadelphia, Nationalities Service Center, HIAS of Philadelphia, and the Women's Law Project. The public interest lawyers and organizations have generally requested the videos and in turn introduced the students to individual clients and grassroots activists who agree to be interviewees. While the legal professionals provide expert analysis of the legal issues involved, the clients and activists tell stories that bring into focus the human impact of the injustices against which they and the lawyers are fighting. In keeping with the interdisciplinary focus of much of Penn Law's academic program, the Docs Program also calls upon Penn faculty from other parts of the University whose research, be it in education, medicine, environmental science, or political science, adds depth to the viewers' understanding of the legal issues addressed in the videos.

These collaborations have generated visual work covering a wide range of subjects, including client self-representation in child custody cases, unpaid and unpayable criminal court fees and fines, Philadelphia's Ban-the-Box law, domestic

violence and immigrant women, deed fraud, and the shackling of incarcerated mothers during childbirth. Much of it is streamed on the Program's website and on the Law School's YouTube channel.⁵ In addition to participating in the production process, our collaborators often vet rough cuts, generate audiences for group screenings, and facilitate the distribution of the videos by posting them on their websites. As Sam Gregory of WITNESS, the NGO that supports the visual documentation of human rights violations around the world, has written: "Collaborative message creation, production . . . , distribution, and advocacy allow for the possibility of drawing on all the potential resources in a given advocacy community."⁶

Thus, the Docs Program has found that joint efforts involving the production of legal advocacy videos create meaningful opportunities for public interest organizations, grassroots social justice groups, committed activists, and individual social justice claimants or victims to get their messages packaged in a format that can be disseminated over the internet and via social media at no financial cost to them. It became clear after the first meeting, however, that a collaboration with Lifers Inc. would differ from others in which the Program had been involved. We knew next to nothing about the importance of commutation to persons serving LWOP sentences, while they knew little about the technicalities and ethical demands of documentary production and distribution. Our first task, then, was to arrive at a process by which all the folks at the table could agree upon and achieve joint goals.⁷

Lifers Inc. is an organization composed of persons serving life sentences at SCI Graterford, a Pennsylvania Department of Corrections ("PDOC") maximum security prison located about an hour from Philadelphia. Lifers Inc. began as a

⁵ The students' videos are available online at: <https://www.law.upenn.edu/institutes/documentaries/studentvideos/> or <https://www.youtube.com/playlist?list=PL21FF8A914F87F246>.

⁶ Sam Gregory, *The Participatory Panopticon and Human Rights: WITNESS's Experience Supporting Video Advocacy and Future Possibilities*, in *SENSIBLE POLITICS: THE VISUAL CULTURE OF NONGOVERNMENTAL ACTIVISM* 517, 541 (Meg McLagan & Yates McKee eds., 2012).

⁷ See generally Kim Fortun, *Figuring out Theory: Ethnographic Sketches*, in *THEORY CAN BE MORE THAN IT USED TO BE: LEARNING ANTHROPOLOGY'S METHOD IN A TIME OF TRANSITION* 147 (Dominic Bayer et al. eds., 2015) (describing how acting in collaboration and thinking collaboratively can be a form of theorizing).

therapy group in 1978 and was incorporated as a nonprofit in 1981.⁸ It has been described as “a fraternal organization of life-term inmates dedicated to improving the condition of inmates at the State Correctional Facility at Graterford through cultural, educational and recreational projects and legislative advocacy.”⁹ It provides support services within the prison and sponsors programs in the community beyond. Its mission includes securing the right of lifers to apply for and be granted parole by the Pennsylvania Board of Parole and Probation. An education committee (the “Committee”) was formed to produce a white paper to support an initiative to expand the eligibility of lifers for parole through increased commutations or the passage of legislation making all lifers eligible for parole after a fixed number of years.¹⁰

The Docs&theLaw participants in this effort consisted of me, the director of the program and Adam Brody, a videographer and long-time Program technical facilitator who generally works with the student video producers. We meet with the Lifers’ Committee through the auspices of The Pennsylvania Prison Society. Under Pennsylvania law, the Society’s volunteer official visitors have access to all state and county correctional facilities. Joan Porter, the Prison Society’s Official Graterford Visitor, meets with representatives of Lifers Inc. weekly. By accompanying Joan, we were able to meet with members of the Education Committee roughly once a month between January and August of 2016 when video production began. Joan Porter also acted as a liaison or an intermediary, carrying messages and materials (including DVDs) back and forth between us and the Lifers. We also corresponded with Committee members through the U.S. Mail. As incarcerated persons in Pennsylvania, lifers have no access to the internet, email, or social media.¹¹

⁸ Lifers at SCI Graterford, Pennsylvania Lifers Work Profile 2, 2015 (unpublished report) (on file with author).

⁹ *Id.*

¹⁰ The White Paper is available on the Lifers Inc. Parole Eligibility Education Initiative homepage at <https://www.lifersincpa.org/> (last visited Aug. 27, 2018).

¹¹ See *Pennsylvania v. Burton*, 158 A.3d 618, 636-37 (Pa. 2017) (rejecting the claim of Superior Court dissenters who erroneously maintained that “[i]ncarcerated individuals (whether pro se or represented by counsel) reside in prisons, not off-the-grid islands. Prisons within this Commonwealth have law libraries, computer terminals, internet access, and legal aid

Thus, the rules and regulations of the PDOC put limits on the ability of the collaborators to collaborate. In addition, they prohibited the lifers from personally appearing on camera to directly address their views on parole eligibility. Moreover, the rules and regulations limit the lifers' access to, or even knowledge of, the internet and social media, potential means of distribution of the video and other materials related to the Lifers' Parole Eligibility Initiative.

Documentary filmmakers, like visual artists of other kinds, have considered the implications of collaborations with community-based associations and institutions, particularly where there are disparities in status and resources between the filmmakers and communities.¹² Such undertakings raise important practical questions like how well does the proposed video project mesh with the community's needs; who controls the content; to what extent should a transfer of technical expertise and equipment be an aspect of the collaboration; to what extent should objectivity balance partisanship and advocacy in the content; and who owns the final work product, particularly with regard to distribution.¹³

When documentarians enter into working relationships with communities of people who have limited ability to tell their own stories, the former are likely to have their ethics questioned if their work is deemed "extractive." "[E]xtractive storytelling" involves "mining stories of others to further a career, with no thought as to how those who appear in the film can contribute input to ideas as the film is being made or can participate in the outreach and engagement as the film goes out and lives in the world."¹⁴ Mindful of such criticism, one

assistance" in a case involving delayed filing of a post-conviction relief petition by a pro se defendant who lacked access to matters of public record).

¹² See generally Elizabeth Coffman, *Documentary and Collaboration: Placing the Camera in the Community*, 61 J. FILM & VIDEO 62 (2009) (delineating the challenges of community collaborations based on case studies of four examples); Maggie O'Neill, *Asylum Seekers and Moving Images: Walking Sensorial Encounters and Visual Criminology*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF VISUAL CRIMINOLOGY (Michelle Brown & Eamonn Carrabine, eds. 2017) (enumerating the challenges of using arts-based methods to "envision alternative ways of thinking and imagining social justice"). Somewhat similar concerns are raised by legal participatory action research. See e.g., Emily M.S. Houh & Kristin Kalsem, *It's Critical: Legal Participatory Action Research*, 19 MICH. J. RACE & L. 287 (2014).

¹³ Coffman, *supra* note 12, at 71-75.

¹⁴ "Profound Communication Only Happens When There Is Persistence": Director Pamela Yates | 500 YEARS, FILMMAKER MAG. (Jan. 24, 2017), <https://goo.gl/P7ZUtC>.

documentarian suggests taking “an immersive approach whenever possible, by spending a meaningful amount of time in a community during the production process to really get to know its members and allow them to get to know me.”¹⁵ In addition, “reach out to . . . activists or scholars who have worked with the community closely—and ask for guidance [as] [t]heir longitudinal perspectives are often invaluable.”¹⁶ He continually monitors his engagement with the community to determine whether he is “being condescending to the subjects” because he assumes he knows “the real story better than they do” or is making “a propaganda piece” because he has “bought too much into a specific perspective.”¹⁷ He tries to be reflexive about his own “process while sincerely staying engaged with the community—especially in the post-production and distribution process, when the 'extractive' storytellers have long disappeared.”

A non-extractive documentary would be an inclusive documentary, one that reflects the community’s engagement in pre-production planning, contains content that tells the community’s stories, and is both comprehensible and available to the community and its targeted audience. The community should function as one of the work’s authenticating audiences.¹⁸ “An authenticating audience speaks from genuine experience and draws on an engaged, organic or grounded expertise.”¹⁹

Image ethics may require more deference to the autonomy of the “subjects” and greater appreciation of their potential to contribute to the advocacy of their own cause than legal ethics requires of lawyers in representing their clients.²⁰ Exploitation of the community is less likely if the video is intended to be “part of a

¹⁵ Lauren Wissot, *Whose Story?: Five Doc-Makers on (Avoiding) Extractive Filmmaking*, DOCUMENTARY MAG. (Fall 2017), (<http://www.documentary.org/feature/whose-story-five-doc-makers-avoiding-extractive-filmmaking>) (quoting documentarian S. Leo Chiang).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Coffman, *supra* note 12, at 72.

¹⁹ Regina Austin, *The Next ‘New Wave’: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809, 842 (2006).

²⁰ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1469-72 (2005) (discussing how legal ethics empower defense counsel to be at best a translator of the client’s narrative into an argument that will produce the best outcome for her or him).

campaign, rather than about an issue or in isolation.”²¹ The reason for the video will dictate a style and format that are appropriate for the intended audience which will in turn be encouraged to participate or collaborate in solving the problem being addressed.²² As a work of advocacy, the video should generate “an impetus to act” and “offer ways to act.”²³

Preproduction for “Second Looks, Second Chances” involved extensive dialogue, a two-way exchange of information and opinions, and active negotiation of strategic choices.²⁴ We accepted that the collaboration had to be a genuine joint effort. We had to defer to the members of Lifers Inc. as authorities regarding the culture of the prison in which they reside and as agents and activists attempting to exercise whatever powers of persuasion they could muster to effect a positive legal change in their lives. The exchanges we had generated information about the lived experience of serving LWOP and of petitioning for commutation that is not found in written sources. The lifers who served on the Parole Eligibility Education Committee are very smart, articulate men who keep up with the case law and policy studies pertinent to commutation, parole, and prisoner’s rights. They also follow changes in the state and national political and legal climate regarding such matters to the extent possible. In essence our charge was to critically engage with, and provide a law-informed advocacy statement of, the views of a group of citizens who, though subject to physical constraints, are nonetheless deeply interested in the democratic process with regard to criminal justice issues about which they know much.²⁵

At the same time, lifers have great respect for academics who are willing to work with them. This increased the onus on us to be attentive to the power dynamics

²¹ Gregory, *supra* note 6, at 525.

²² *Id.*

²³ *Id.*

²⁴ See generally Luke Eric Lassiter, *Collaborative Ethnography and Public Anthropology*, 46 CURRENT ANTHROPOLOGY 83 (describing collaborative ethnography as “an active communicative process with another culture”).

²⁵ See generally Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL’Y 249 (2004) (advocating that prisoners’ lawyers work to bring prisoners’ voices into democratic discourse); Natapoff, *supra* note 20 (supporting increased opportunities for speech by persons accused and convicted of crime in order to promote their democratic participation and social empowerment as speakers from subordinated groups).

between ourselves and the other individuals sitting at the table who had a personal stake in effectuating Lifers Inc's desire to have a video that made its case for greater parole eligibility.²⁶

We discussed with the Lifers' representatives where our approach to the project and our interest in completing it diverged from theirs and how their role in pre- and post-production of the video required that they adopt some of the responsibilities of documentary filmmakers. While the Lifers' committee members would be the first audience to see the rough cuts of the visual work, as collaborators they were also its creators and as such had to anticipate and take into account the likely responses of subsequent viewers, namely other lifers, social justice advocates, government officials, legislators, supporters, and ordinary uninformed citizens.²⁷ We and they had to be mindful of the ethics of representation and the politics of reception. Because, whether one is producing images or interpreting images, "any critical intervention into the visual [calls for an alertness] . . . to hierarchies of difference."²⁸

It was in the interest of the Docs Program to produce a video of the highest aesthetic quality possible given its resources, but we knew that we had to pursue that objective within the limitations of our collaboration with the Lifers.²⁹ In addition, we knew that as an ethical and professional matter we had the responsibility to the video's audience of fact-checking assertions. Advocacy videos are not propaganda. According to WITNESS's Sam Gregory, "Most advocacy videos do have a point of view and an outcome in mind, but the best do this with clear respect for the facts of the situation."³⁰ This "backstory" and the documents

²⁶ See generally Jocelyn Simonson, *Foreword Breaking the Silence: Legal Scholarship as Social Change*, 41 HARV. C.R.-C.L. REV. 289 (2006) (describing the efforts of student editors to keep their power in check as they worked with an author serving two life sentences in Florida on an article that included a discussion of his experiences with pro se litigation and the Antiterrorism and Effective Death Penalty Act).

²⁷ Gemma-Rose Turnbull, *Surface Tension: Navigating Socially Engaged Documentary Photographic Practices*, 36 NORDICOM REV. 79, 83 (2015).

²⁸ Eamonn Carrabine, *Just Images: Aesthetics, Ethics and Visual Criminology*, 52 BRIT. J. CRIMINOLOGY 463, 486 (2012).

²⁹ Turnbull, *supra* note 27, at 80.

³⁰ Gregory, *supra* note 6, at 527.

produced by Lifers Inc. and posted on their website contain proof of the fulfillment of that obligation.

“Second Looks, Second Chances” is a distillation of the discussions that took place at Graterford during frequent meetings with representatives of Lifers Inc., for which there were circulated agendas and minutes; a PowerPoint presentation and White Paper prepared by the Lifers’ Parole Eligibility Education Initiative;³¹ a profile prepared by Lifers Inc. of the work done by the many in-house organizations that provide “the opportunity and means for lifers at Graterford to demonstrate social responsibility and community concerns;” on-camera interviews, all of which were conducted according to scripts and transcribed; telephone conversations with practicing legal experts; telephone conversations with PDOC administrators; legal research; screenings of documentaries about sentencing reform and prison conditions; and public presentations dealing with commutation and parole eligibility for lifers.

Operating within the context of this mass of data and research, the collaborators had to make strategic choices and compromises with regard to the information and argumentation contained in the video of which viewers should be aware. The most significant of these are explored below.

II. Choices and Compromises

A. The Politics of Sentencing Reform and the Push for Commutation

In Pennsylvania at the present time, a life sentence is a sentence of life without the possibility of parole. It is euphemistically referred to as “death by incarceration.”

A life sentence in the Commonwealth did not always result in a person actually serving a full life term. The possibility of parole for life-sentenced defendants was retroactively ended in 1941 with an amendment of the parole act that made parole eligibility dependent on an applicant’s having served her or his minimum term. Unless otherwise stated, the minimum sentence for a lifer is life. Still, a grant of executive commutation by the governor was available to allow individual

³¹ See note 10 *supra*.

lifers parole eligibility. At one time, the number of commutations was quite high. Between 1967 and 1995, Pennsylvania Governors Raymond Shafer, Milton Shapp, Dick Thornburgh, and Robert Casey granted 380 commutations. The practice of granting commutations gave lifers the hope of release.

That hope died after lifer Reginald McFadden was commuted, moved to New York with the Commonwealth's blessing, killed two people, and raped and tortured a third. In 1997, following the election of Governor Tom Ridge, Pennsylvanians voted to amend their constitution to require that no "sentence [be] commuted, . . . in the case of a sentence of death or life imprisonment, [except] on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice."³² Though the Board continued to make positive recommendations, between 1995 and 2017, Governors Ridge, Mark Schweiker, Ed Rendell, and Tom Corbett granted only 8 commutations.

Nationally, however, the political climate was changing in ways that gave Pennsylvania lifers renewed optimism about sentencing relief. The Innocence Project and similar organizations were securing exonerations for persons convicted of murder and rape and not solely through DNA testing.³³ The U.S. Supreme Court ruled that it was unconstitutional to sentence juveniles to mandatory life terms without the possibility of parole.³⁴ Furthermore, the Court subsequently held that its decision was retroactive.³⁵ Over 500 juvenile lifers in Pennsylvania are now being resentenced, with some being released outright or on parole. California voters passed a referendum measure to amend portions of its "Three Strikes law" to establish a procedure whereby persons sentenced to life for minor, nonviolent third-strike crimes could petition in court for a reduced

³² PA. CONST., art. IV, § 9. The measure was unsuccessfully challenged in federal court under the Ex Post Facto provision of the U.S. Constitution. See *Pennsylvania Prison Soc. v. Cortes*, 622 F.3d 215 (3d Cir. 2010) (declaring that the unanimity requirement did not increase the risk of prolonged sentences for lifers, nor change the definition of, or increase the penalty for, their crimes).

³³ The National Registry of Exonerations has tracked exonerations occurring between 1989 and the present on its website. See <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Aug. 22, 2018).

³⁴ *Miller v. Alabama*, 567 U.S. 460 (2012).

³⁵ *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

sentence.³⁶ In April of 2014, the U.S. Department of Justice, acting at the request of President Barack Obama, announced the Clemency Initiative, which invited commutation petitions from some nonviolent drug offenders who likely would have received substantially lower sentences had they been convicted of the same offenses in 2014.³⁷ As of January 19, 2017 [his last full day in office], Obama had granted commutations to 1,715 individuals.³⁸ Across the country, increased public and private resources are being devoted to support the so-called “reentry” of persons leaving correctional facilities. The reforms gained momentum as the target of their redress came to be identified as “mass incarceration,” a phenomenon characterized by the highest rate of imprisonment in the world, long, often mandatory sentences, prison overcrowding, strict police surveillance, and the privatization of essential criminal justice functions, all disproportionately impacting racial minorities and the poor.³⁹

There were also changes in the political environment in Pennsylvania. Democrat Tom Wolf became governor in 2015; as of August 2018, he has granted two commutations. Mike Stack, a Democrat who became Lt. Governor in 2015, was strongly in favor of increased commutations. Unlike Wolf, however, he was not renominated in 2018.

Lifers Inc. saw an opportunity to seek reform of harsh LWOP sentences by means of either legislation or increased use of the governor’s executive power of commutation. It concluded that the case for expanded parole eligibility would be best advanced by tying “out-of-control prison spending by the state under the false premise of public safety” with “inadequate funding for basic and secondary education.” A reduction in tax revenue devoted to corrections through the release of “meritorious life-sentenced inmates” would free up money to increase expenditures for education. Analysis of the so-called “School-to-Prison Pipeline” suggests that there is a direct relationship between increased expenditures for

³⁶ CAL. PENAL CODE §§ 667(e)(2)(c), 1170.126 (2017).

³⁷ U.S. Dep’t of Justice, Office of the Pardon Attorney, Clemency Initiative (update 5/10/2018), at <https://www.justice.gov/pardon/clemency-initiative> (last visited Aug. 23, 2018).

³⁸ *Id.*

³⁹ Two of the most widely respected treatments of mass incarceration are Michelle Alexander’s book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) and Ava DuVernay’s documentary *13th* (Forward Movement, LLC 2016).

education, particularly early primary education, and reductions in crime rates.⁴⁰ The Lifers reasoned that it is better to spend money on the front end, to keep young people in school and to educate them, than to spend money on the back end, to warehouse them in jails and prisons. A lifer who could be safely released and gainfully employed on the outside should not be a burden to the state when the costs of housing such a person in a PDOC facility might be put to more productive use.

In June 2016, Jason Dawkins of Philadelphia introduced in the Pennsylvania House of Representatives a bill that would make all lifers *eligible to be considered for parole after serving 15 years*.⁴¹ Republicans control both houses of the Pennsylvania General Assembly⁴² and represent constituencies in the vast middle

⁴⁰ Stephanie Stullich et al., State and Local Expenditures on Corrections and Education: A Brief from the U.S. Department of Education, Policy and Program Studies Service 13 (July 2016), at <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>. The brief concluded that “[r]educing incarceration rates and redirecting some of the funds currently spent on corrections in order to make investments in education that we know work . . . could provide a more positive and potentially more effective approach to both reducing crime and increasing opportunity among at-risk youth, particularly if in the PK–12 context the redirected funds are focused on high-poverty schools . . .” (Citations omitted.)

⁴¹ H.B. 2135, Gen. Assemb., Reg. Sess. 2015-2016 (Pa. 2016) (amending 61 PA. CON. STAT. ANN. § 6137). The bill was reintroduced in 2017. H.D. 293, Gen. Assemb., Reg. Sess. 2017-2018 (amending 61 PA. CON. STAT. ANN. § 6137).

The 15-year minimum term for parole consideration for persons sentenced to life was first used in the 1913 amendment of the federal parole act. The Attorney General at the time, George Wickersham, stated in a letter reprinted in the Congressional Record that “[t]his period would seem to be amply sufficient to impress upon the prisoner the seriousness of his crime and to act as a deterrent to others, while at the same time not being long enough to prevent his release until the period when his mental and physical powers are so deteriorated that he can not (sic) be of any value in the community.” 62 CONG. REC. 1704 (1913).

A proposed revision of the Model Penal Code would have given persons sentenced to long determinate sentences the right of review after 15 years. The “second look” assessment was needed where “the public mood that produced a particularly harsh sentence has mellowed or the overall legal environment has changed.” “The second motivation [for the proposal] was normative, and focuse[d] more on the circumstances of the particular prisoner than on the external environment.”

⁴² As of August 2018, of the 203 seats in the House of Representatives, 120 are held by Republicans and 82 by Democrats. Of the 50 seats in the Senate, 33 are held by Republicans and 16 by Democrats. There is one vacancy in each chamber. See https://ballotpedia.org/Pennsylvania_General_Assembly (last visited Aug. 23, 2018).

of the state, between Philadelphia and Pittsburgh, where correctional institutions represent important sources of employment.⁴³ Passage of the bill will require an extensive lobbying campaign. Given that the governorship was then held by a Democrat, the Lifers reasoned that an educational campaign directed at increasing executive commutations would likely yield immediate results for existing lifers and serve to educate citizens and legislators about the lifer population and the harshness of LWOP sentences. This approach might also build support for the legislative effort. Ergo, the decision was made to concentrate on commutation in the video.

B. Economic Rationality versus Moral Reasoning: The Choice of Emphasis

There were two sets of arguments that support increased parole eligibility for those serving LWOP sentences. One emphasizes the immorality of imposing what amounts to death by incarceration on thousands of persons, few if any of whom will be given the opportunity to prove that they have changed and after years in prison present a small threat to the safety of their fellow citizens. The other focuses on the fiscal reality of spending millions of dollars to house an aging population of low-risk lifers when the funds might be more efficiently used to meet pressing needs.⁴⁴ The video producers had to decide whether both sets of

⁴³ Samantha Melamed, *Can the Rural Economy Survive the Era of Decarceration?*, PHILA. INQUIRER, June 7, 2018, at <http://www2.philly.com/philly/news/pennsylvania/prison-industrial-complex-rural-pennsylvania-economy-philadelphia-incarceration-huntingdon-smithfield-20180607.html>.

⁴⁴ See Heather Habes, *Paying for Graying: How California Can More Effectively Manage Its Growing Elderly Inmate Population*, 20 S.CAL. INTERDISC. J. 395 (2011) (advocating release and separate accommodations and facilities for the elderly as a means of reducing prison overcrowding and costs). *But cf.* Kelly Porcella, Note, *The Past Coming Back to Haunt Them: The Prosecution and Sentencing of Once Deadly But Now Elderly Criminals*, 81 ST. JOHN'S L. REV. 369 (2007) (exploring how age and sympathy for the elderly impact sentencing decisions involving older defendants while arguing that retributive and utilitarian justifications for punishment do not justify lenient sentences for elderly defendants who evaded punishment for crimes committed when they were younger). Applying cost-benefit analysis in connection with the imposition of extended sentences like LWOP and virtual death is not a novel idea. See *U.S. v. Craig*, 703 F.3d 1001, 1002 (7th Cir. 2012) (concurring by Judge Richard Posner urging that judges consider the “social costs of imprisonment . . . compared with the benefits of imprisonment to society” when imposing de facto life sentences). For a review of the scholarly literature on the cost-benefit analysis of

arguments could be advanced in one video and if so, whether one set should be given priority over the other.

In the letter requesting the assistance of the Docs Program with the production of a DVD, the Lifers asserted their belief that “a social and economic message concerning the hidden cost to house the state’s life-sentenced inmate population at the expense of basic and secondary funding will resonate with the citizens of the Commonwealth.”⁴⁵ In an accompanying presentation, the organization estimated that the cost of housing the life-sentenced population, which comprises roughly 10% of the total, was roughly 10% of the DOC’s \$2 billion budget or \$200 million. Furthermore, over half the lifer population is 50 years of age or older, the rate of recidivism of previously released lifers is roughly 1%, and the incidence of reoffending tends to decline with age. The Lifers envisioned that the proposed DVD would “convey a compelling narrative about the failure of the state pardons system to provide a release mechanism for meritorious life-sentenced inmate who have paid their debt to society.” Should it not be “politically salable to provide commutation” to such inmates, the Lifers argued that the Commonwealth should “take a hard look at the cost of housing elderly life-sentenced prisoners who present meritorious applications for commutations” and consider “parole eligibility” as “a fiscally responsible, safe, governmental option” by which to increase resources for education.

Penn Political Science Professor Marie Gottschalk who is interviewed in the film has argued against relying too heavily on cost savings as a justification for life sentence reform:

Framing this issue as primarily an economic one will not sustain the political momentum needed over the long term to drastically reduce the prison population and bring about the release of large numbers of lifers and the demise of LWOP. Furthermore, premising calls for penal reform largely on dollars-and-cents logic obscures the fact that a successful decarceration will cost money. Persons reentering

incarceration, see Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 *STAN. L. REV.* xxx (forthcoming 2019).

⁴⁵ Letter from Kevin S. Nines, President of Lifers Inc. & Gary L. Kretchmar, Chairman of Ways and Means Comm. to Professor Regina Austin (June 23, 2015).

society after prison need significant educational, vocational, housing, medical, and economic support.⁴⁶

In her recorded interview Professor Gottschalk further stated that “[w]e’re only going to save money when we start closing facilities and reducing the number of people who work in corrections.” That, of course, increases the political stakes of reform as it impacts the welfare of unionized correctional officers and rural communities that benefit from hosting correctional facilities populated by urban residents.⁴⁷

Michael Romano, a lawyer who headed Stanford Law’s Three Strikes Project, expressed similar views in a phone conversation with the author. He said that “[p]ollsters indicated that the financial argument (that the cost of incarceration exceeds the benefit derived from imprisoning nonviolent offenders guilty of non-serious crimes) was not as powerful as anticipated. It did not move anyone like an intense focus on the lives of one or two prisoners and their families.”⁴⁸

Washington pardon attorney Margaret Love and her co-author Professor Cecelia Klingele approach the issue from the other direction; they write that “[u]nless sentence reduction mechanisms are justified by a normative theory that legitimizes the decision to reduce an otherwise determinate term of punishment, they are unlikely to be politically sustainable.”⁴⁹

Rather than choose one category of arguments over the other, “Second Looks, Second Chances” includes arguments based on the economics of life-time incarceration and risk-of-crime statistics as well as the immorality of LWOP

⁴⁶ Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, ANN. REV. LAW SOC. SCI., Nov. 2013, at 353, 376.

⁴⁷ See Melamed, *supra* note 43 (describing both the burdens on urban families visiting their incarcerated loved ones in distant facilities and the concerns of rural counties about the loss of economic benefits raised by proposals to cut costs through the shutdown of prisons).

⁴⁸ Regina Austin, “*The Return*”: *Resentencing, Reentry Support, and a Criminal Defense Lawyer’s Evolving Roles*, DOCS&THELAW BLOG (June 21, 2016), <https://www.law.upenn.edu/live/news/6282-the-return-resentencing-reentry-support-and-a/news/documentaries-news.php#sthash.dmvttic5.dpbs>. Romano appears in the documentary “The Return” which follows several persons released after the sentencing reform.

⁴⁹ Margaret Colgate Love & Cecelia Klingele, *First Thoughts about “Second Look” and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 868 (2011).

sentences to build a case in support of greater parole eligibility for lifers. Smoothly melding data into the narrative or storytelling portions of the documentary presented a challenge. The case for commutation based on the numbers is largely made with animated graphics accompanied by a distinct electronic guitar theme, while the normative arguments are developed in interviews, supported by art work and documentary stills, and backed by a soundtrack of ambient piano music.

Through dialogue, written exchanges, and joint decision making, Lifers Inc. influenced the extent to which its vision would be fully reflected in the edited advocacy video. By and large the video reflects the findings and views of Lifers Inc. whose members were adamant about emphasizing the resource allocation and public safety arguments to be made in support of commutations and greater parole eligibility for lifers. The research undertaken by the Parole Eligibility Education Committee is reflected in the White Paper which is available on the Lifers' website. Thus, the viewer has access to the Lifers' analysis and can assess how far the video might diverge from it.⁵⁰

C. Avoiding Divide and Conquer by Focusing on Lifers 50 or 55 Years of Age and Older with 25 or More Years Served

Lifers who are female or Hispanic males are not represented among those speaking in the video, although there was a desire to include them. Engaging groups of incarcerated persons in the pre-production planning and post-production vetting of a short advocacy video is not a simple task. Because of PDOC restrictions on recording facility residents, the video relies on interviews with commuted lifers. The last women to have their life sentences commuted in Pennsylvania obtained such relief prior to 1995; as far as we know they have not been involved in prison reform and reentry activities since. We have been unable

⁵⁰ Works visualizing crime and punishment that are produced by persons involved in the process may reflect the biases of the artists and researchers with whom they work. Verbal or written clarification of the work product by the participants is especially important. See Luc Pauwels, *Key Methods of Visual Criminology: An Overview of Different Approaches and Their Affordances*, in HANDBOOK OF VISUAL CRIMINOLOGY, *supra* note 12, at xx.

to identify the last Latino to be awarded commutation prior to 2018.⁵¹ The Program hopes to do more advocacy work in collaboration with other groups of lifers and commutes associated with PDOC facilities beyond Graterford.

Lifers are not a monolithic group. Conversations with the members of the Education Committee and attendees at Lifers Inc. events suggest that there are many categories of lifers who differ according to the nature of the crimes for which they were convicted and the circumstances surrounding their involvement, as well as their prospects for successfully partitioning for commutation. In retrospect, the sentences of some of these classes of lifers either were unjust when they were imposed or seem much less just now than they likely did at the time of sentencing. The circumstances may not warrant resentencing hearings en masse but do offer additional justifications for entertaining second look petitions from a wider spectrum of the life-sentenced population.

The group of lifers most likely to be commuted are persons who were convicted under the accessory or felony murder statute (2nd degree murder) which applies to homicides “committed while defendant was engaged as a principal or an accomplice in the perpetuation of a felony.”⁵² The enumerated felonies are “robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.” Conviction carries a mandatory minimum sentence of LWOP.⁵³ The possibility that the statute may produce murder convictions based on questionable blameworthiness has long made felony murder statutes a matter of heated debate among criminal law scholars and legislators.⁵⁴ Bills to eliminate felony murder have been introduced in the Pennsylvania General Assembly.⁵⁵ It is

⁵¹ Students in the Visual Legal Advocacy seminar produced a video on juvenile lifers that featured the sister of a young Latino man sentenced to life for second-degree or felony murder as a juvenile; he will be resentenced. *See Children Given One Strike: A Lifetime Without Redemption*, YOUTUBE, <https://www.youtube.com/watch?v=gsZ1gpPZEIU> (last visited July 20, 2018).

⁵² See 18 Pa. Cons. Stat. § 2502 (2017).

⁵³ See 18 PA. CONS. STAT. § 1102(b) (2017).

⁵⁴ See, e.g., David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend Upon the Particular Rule in Issue?*, 32 HAR. J.L. & PUB. POL'Y 1155 (2009); James J. Tomkovicz, *The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429

⁵⁵ Bills to eliminate accessory or felony murder were introduced by State Senator Bryan Leach in 2016 and 2017. See H.B. 1138, Gen. Assemb., Reg. Sess. 2015-2016 (Pa. 2016) (amending 18 PA.

unsurprising that persons serving LWOP for second degree murder have been able to get a second look through the commutation process. They did not themselves actually commit the murder. Proof that they intended to commit murder may have been lacking. They may not even have been aware of the risk of death their weapon-wielding co-defendant(s) posed to the victim. In some cases, they received harsher sentences than such co-defendant(s).

There are other categories of lifers, however, who would seem to deserve a chance at commutation because the nature of their crimes or the circumstances under which they acted would be considered mitigating now but were not so when they were convicted. Consider the following:

a. Women whose experience of domestic violence impacted the crimes for which they were convicted and sentenced, but whose victimization was not considered prior to sentencing;⁵⁶

b. Veterans whose experience of war-related post-traumatic stress disorder (PTSD) impacted the crimes for which they were convicted and sentenced, but whose disability was not considered prior to sentencing;⁵⁷

c. Persons who were barely adults (ages 18-24) and whose brains (like those of juveniles) were not fully developed when they committed the crimes for which they were convicted and sentenced to LWOP (Note: As a result of U.S. Supreme Court rulings mandating the resentencing of lifers convicted of crimes

CONS. STAT. § 2502(b)); H.B. 293, Gen. Assemb., Reg. Sess. 2017-2018 (Pa. 2017) (amending 18 PA. CONS. STAT. § 2502 (b)). He wrote the following in announcing his bill: “[T]he felony murder statute . . . imprisons for life people who do not kill or intend to kill anyone. Such an unjustified punishment undermines the effectiveness of our justice system and the public’s faith in it. Furthermore, paying to imprison someone for life, despite a lack of intent to kill anyone, is a bad deal for taxpayers, as it’s enormously costly but does not make the public safer.”

⁵⁶ Across the country, there are several legal assistance projects devoted to assisting female survivors of domestic violence seeking clemency for murdering their spouses or partners. See Carol Jacobsen & Lynn D’Orio, *Defending Survivors: Case Studies of the Michigan Women’s Justice & Clemency Project*, 18 U. PA. J.L. SOC. CHANGE 1 (2015); Bridget B. Romero et al, *The Missouri Battered Women’s Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193 (2004); Jacqueline St. John & Nancy Ehrenreich, *Putting Theory into Practice: A Battered Women’s Clemency Clinic*, 8 CLINICAL L. REV. 171 (2001).

⁵⁷ See Marcia G. Shein, *Post-traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, 57-SEP Fed. Law. 42 (2010).

committed when they were 18 years old and younger,⁵⁸ some near juveniles are attacking their sentences by challenging the Court's age limitation on resentencing.⁵⁹);

d. Persons as to whom district attorneys or judges stated on the record at the time of sentencing their assumption that the persons would be released within a number of years based on the then-existing pattern of sentencing relief through commutation;⁶⁰ and

e. Persons who committed crimes for which they would receive a lighter sentence than LWOP under presently existing law, such as under the contemporary articulation of the right to self-defense.⁶¹

It is not clear how many lifers fall into these categories. Taken all together, a second look at the imposition of a sentence of life without the possibility of parole might be warranted for a wide swath of Pennsylvania's lifer population. Indeed, LWOP sentences are criticized because, unlike the death penalty, they may be imposed with little or no consideration of mitigating circumstances or grounds for mercy and have only the "theoretical possibility" of being reconsidered and reduced through executive clemency or commutation.⁶²

There is at least one remaining category of lifers that is hard to identify, but might encompass a majority of them. Accounting for the circumstances that have produced the lifer population in Pennsylvania is like eating an artichoke. Peel away the leaves and what remains is a core with a prickly center. That core is a

⁵⁸ See *supra* text accompanying notes 34 & 35.

⁵⁹ The Pennsylvania Superior Court has rejected such claims. See, e.g., *Commonwealth v. Furgess*, 149 A.3d 90 (Pa. Super. Ct. 2016); *Commonwealth v. Cintora*, 69 A.3d 759 (Pa. Super. Ct. 2013).

⁶⁰ See, e.g., *Brown v. Kelm*, No. 05-824, 2017 WL 3599774, at *1 (E.D. Pa. Aug. 21, 2017) (post-conviction relief denied where defendant delayed seeking parole until 16 years after receiving mandatory LWOP sentence at hearing where judge erroneously informed his mother that parole was a possibility after 12 or so years); *Scarborough v. Johnson*, 300 F.3d 302 (3d Cir. 2002) (conviction upheld with a dissent where defendant heard contradictory statements regarding the possibility of parole when pleading guilty to second degree homicide).

⁶¹ 18 PA. CONS. STAT. §505 (2017) (known as the "Castle Doctrine").

⁶² Evi Girling, *Sites of Crossing and Death in Punishment: The Parallel Lives, Trade-offs and Equivalences of the Death Penalty and Life Without Parole in the US*, 55 HOWARD J. CRIME & JUST. 345, 350 (2016).

fitting metaphor for the role that the phenomenon of mass incarceration, specifically racial and ethnic discrimination, has played in producing the lifer population. A Right-to-Know request to the PDOC indicates that, as of July 31, 2017, the LWOP-sentenced population in Pennsylvania was 65.10% black, 24.77% white, and 1.18% other.⁶³ Hispanics who may be black or white were 8.95% of the LWOP-sentenced population.⁶⁴

Yet, race and ethnicity were never a major topic of discussion during meetings with the Education Committee about the proposed video. Indeed, we came to understand that concentrating on some categories of lifers rather than others in the video might be divisive and disrupt the solidarity that the life-sentenced population across the PDOC system needs to wage a successful reform campaign. Given the many alternatives, Lifers Inc. strategically chose to focus attention on those who are the oldest, have served the longest, and pose the lowest risk of recidivism. The target population for their commutation campaign is persons who are 50 or more years old and have served 25 or more years of a life sentence. As of October 6, 2017, there were 1,628 persons serving life without the possibility of parole who are 50 and older and have served 25 or more years.⁶⁵

The public might be leery of commuting the sentences of 50 somethings who, based solely on their chronological age, may not seem old enough to present little or no risk of recidivism. The 2010 Vera Institute of Justice Report which addressed the question of early release for older incarcerated persons concluded that a 50-year old might be considered an “elderly prisoner” given that the stresses of life behind bars and in the world in which she or he lived prior to incarceration produce disparities between one’s physical age and one’s chronological age.⁶⁶ A legislative reform proposed in the 2005 “Report of the

⁶³ E-mail from Andrew Filkosky, Pa. Dep’t of Corr. Open Records Officer, to Regina Austin, William A. Schnader Professor, Penn Law School (Sept. 6, 2017, 10:43 EST) (on file with author).

⁶⁴ *Id.*

⁶⁵ E-mail from Andrew Filkosky, Pa. Dep’t of Corr. Open Records Officer, to Regina Austin, William A. Schnader Professor, Penn Law School (Oct. 6, 2017, 14:53 EST) (on file with author).

⁶⁶ Tina Chu, *It’s About Time: Aging Prisoners, Increasing Costs, and Geriatric Release 4-5* (Vera Institute of Justice, Apr. 2010), https://storage.googleapis.com/vera-web-assets/downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf.

Advisory Committee on Geriatric and Seriously Ill Inmates” of the Pennsylvania General Assembly would have created parole eligibility for lifers “who reach the age of 50 (or 45 for offenders who committed their crime before the age of 21) and serve at least 25 years of their sentence in prison.”⁶⁷ The Advisory Committee relied on data from the Pennsylvania Board of Probation and Parole which showed that “since the inception of parole in the Commonwealth, 99 commuted lifers have been released on parole at the age of 50 years or older, [only] one of whom was recommitted to prison for a new crime.”⁶⁸ In addition, every resident in the PDOC system is given an annual physical beginning at age 55, a reflection of their “geriatric status.” Thus, Lifers’ linking the case for commutation to relief especially for long-serving residents who are 50 and older and have 25 or more years is based on data from independent sources.

D. Victim’s Rights and the Expressions of Responsibility and Remorse

The survivors of homicide victims are entitled to participate in the commutation process by submitting a letter or appearing at the hearing before the Board of Pardons. Furthermore, expressions and evidence of remorse that acknowledge the victim and her or his survivors are elements of the meritoriousness a successful applicant for commutation must demonstrate.

We tried unsuccessfully to secure interviews with survivors of murder victims who work with incarcerated persons or who have family members who are lifers by tapping into networks suggested by Lifers Inc. Greater effort at directly contacting survivors seemed ill-advised in light of PDOC regulations barring communication between residents and crime victims or survivors.⁶⁹

⁶⁷ GENERAL ASSEMB. OF THE COMMONWEALTH OF PA. J. STATE GOV’T COMM’N, REP. OF THE ADVISORY COMM. ON GERIATRIC AND SERIOUSLY ILL INMATES, S. 149-2175, Reg. Sess., at 4 (2005).

⁶⁸ *Id.* The Committee Report continues: “This individual was a sex offender with mental health issues whose new criminal conviction resulted from his falsification of his criminal record on a job application to obtain a job as a custodian in a private school with minor female students.” *Id.* at 4-5. See the discussion of commuttee Reginald McFadden, text *infra* at notes 72-74.

⁶⁹ Policies of the PDOC “prohibit an inmate from having contact with the direct victim(s) of the crime he or she committed.” Correspondence with the victims of a resident’s criminal acts is forbidden without the permission of the facility manager. DEP’T OF CORR., COMMONWEALTH OF PA., PUB. NO. DC-ADM 803 § 1, INMATE MAIL AND INCOMING PUBLICATIONS PROCEDURES MANUAL (2015). Neither a resident nor a third party may contact a victim with regard to the Inmate Apology

During our meetings with the Education Committee, the subject of victim's rights and the role that remorse and acknowledgement of responsibility do or should play in the commutation process was broached. Some individuals find it difficult to admit guilt and express sorrow. The video, however, required a collective acknowledgement of the pain of survivors and an expression of contrition on the part of Lifers Inc. as an important component of the campaign to reform LWOP. The commuttee interviewees in "Second Looks, Second Chances" convey that message.

The interview footage captured the complexity of weighing victims' interests in the commutation process. Dr. Marie Gottschalk focused on the lack of data on what victims really want from the criminal justice system, i.e., counseling and medical services and support or harsher, more punitive sentencing.⁷⁰ She argues that, "because we have emphasized that victims want vengeance and that they will get closure, that's the popular narrative we have." Steve Blackburn, one of the three commuttees interviewed in the video, said that a person seeking mercy should be sincere and remorseful, but also should attempt to repay the debt by doing something in her or his community that may help another person. In an excerpt not included in the video, he also suggested that there should be a limitation on consideration of the feelings of victims' survivors in regard to the commutation decision: "[I]n a criminal case, it's not the victim versus the perpetrator. It's Commonwealth versus the criminal or accused. And this is a state matter. It's a system that makes that call. . . . [W]e cannot allow individuals' search for revenge or retribution to determine how we handle our criminal justice system."

E. Commutation as an Act of Political Courage or the Spector of "Willie Horton"

Bank or send an apology letter directly to a victim. DEP'T OF CORR., COMMONWEALTH OF PA., PUB. No. 1.2.1 § 6.B.2, VICTIM SERVICES POLICY (2014).

⁷⁰ A study conducted by the Alliance for Safety and Justice and issued in August of 2016 found that survivors of crime preferred "rehabilitation over punishment and . . . investments in crime prevention and treatment to more spending on prisons and jails." ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS VIEWS ON SAFETY AND JUSTICE 4 (2016) <http://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.

The biggest obstacle to lifers receiving second looks and second chances through greater use of the governor's commutation power is the possibility that a released individual will recidivate. Recidivism undermines commutation in general and poses a threat to the future of any politician who approved the release. Every jurisdiction has its "Willie Horton"--the lifer who was released and went on to commit horrendous crimes.⁷¹ Pennsylvania certainly does.

Reginald McFadden is Pennsylvania's "Willy Horton."⁷² A loner with a record of escape attempts and assaults, McFadden did not earn the respect of other residents during the 24 years of a life sentence he served in the Pennsylvania system. It is assumed that his commutation was a reward for his role in a prison riot. Released in 1994, solely on the basis of paperwork (there being no requirement of a face-to-face interview with the pardon board at the time), McFadden was immediately and mistakenly transported to New York, even though he was supposed to spend two years in a halfway house in Pennsylvania. In New York, he was subject to the supervision of inexperienced volunteers. Within roughly 90 days of his release, he killed two people and raped and robbed a third.

As a member of the Board of Pardons, Lt. Governor Mark Singel had voted for McFadden's release and the latter's crime spree contributed to the failure of Singel's bid for the governorship. Tom Ridge, the winner of the election, promoted the passage of an amendment to the state's constitution requiring a unanimous vote of the Board of Pardons for commutations for lifers.⁷³ One of the most effective speakers in favor of the measure was the daughter of the sole survivor of McFadden's crimes. Now a reporter for an NPR affiliate in Maine, she

⁷¹ See *generally* DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995). William "Willie" Horton was serving an LWOP sentence in Massachusetts when he was released under a weekend furlough program and did not return. He went on to commit assault, armed robbery, and rape in Maryland. Michael Dukakis was governor of Massachusetts at the time. Though he did not create the furlough program, he was blamed for it and Horton's crimes when he ran for President of the United States in ads sponsored by an independent PAC with ties to Lee Atwater and by the campaign of George H.W. Bush. Dukakis, of course, lost the election.

⁷² See *generally* Joseph Berger, *Accused Serial Killer and 92 Days of Freedom*, N.Y. TIMES, Apr. 4, 1995, at B1 (detailing the pardon process that allowed Reginald McFadden to be released from prison to murder again).

⁷³ See note 32 *supra*.

has since made an award-winning radio documentary in which she expresses remorse about the impact her testimony had on virtually eliminating the chances for commutation for lifers in general.⁷⁴

Of course, the public might be skeptical that rehabilitation can be demonstrated when one has been incarcerated for decades. “Second Looks, Second Chances” does not explicitly address the specter of Reginald McFadden but it does attempt to show that measures have been taken to reduce the risk of commutation to the citizens of the Commonwealth. A successful candidate for commutation today must satisfy far more stringent criteria for release and navigate far more arduous procedural hurdles than existed when Reginald McFadden was released. Lifers must prove that they are “meritorious” in order to be eligible for commutation. There is no formal listing of qualification criteria. A booklet on the commutation process prepared by the PDOC contains the following statement:

The Applicant needs to identify with their (sic) problem areas of behavior and what steps have been completed to address these concerns and focus on the potential for relapse, recidivism, and public safety risk factors. The Applicant is encouraged to list completed Institutional programming, employment, conduct record and participation in activities promoting pro-social values.⁷⁵

It also appears that the candidate’s age and support from her or his victim’s survivors (or lack of community opposition) are relevant considerations.⁷⁶

In addition, the process of obtaining commutation is long and arduous.⁷⁷ A decision on an application for commutation can take 3 to 4 years. An applicant must complete an extensive application and undergo intellectual, psychological, psychiatric, medical, and religious assessments. Then she or he must pass review

⁷⁴ *20 Years Later*, THIS AMERICAN LIFE (Dec. 9, 2016), <https://www.thisamericanlife.org/radio-archives/episode/604/20-years-later>.

⁷⁵ Bureau of Treatment Services, PA Dep’t of Corrections, Board of Pardons Commutation Process and Rules 15 (August 2014 English Version).

⁷⁶ This list is derived from conversations with the Lifers Parole Eligibility Education Committee which included one member who had previously applied for commutation, had a hearing before the pardon board, and was denied in a close vote.

⁷⁷ DEP’T OF CORR., COMMONWEALTH OF PA., PUB. NO. 11.4.1, §9 CASE SUMMARY PROCEDURES MANUAL (2013).

by institutional or prison staff, the Secretary of the PDOC, the Board of Pardons, the Governor's Counsel, and ultimately the Governor. If commutation is granted, the successful applicant must spend a year or more in a community corrections or reentry facility before being released on parole.⁷⁸ A commuttee remains on parole for the rest of her or his life.⁷⁹

Finally, as Tyrone Werts asserts in "Second Looks, Second Chances," commutees recognize that if they commit crimes after being released, it will negatively impact the opportunity of others to benefit from executive relief.

Those presently serving sentences of life without the possibility of parole are bearing the burden of the mistakes made in commuting the sentence of Reginald McFadden. Without exploring exactly what they might have been, the video strives to convince viewers that given the existing mechanisms for processing applications for commutation similar mistakes are unlikely to occur in the future.

F. "The Asks" and Distribution

A good advocacy video ends with a short list of specific "asks" directed at members of the audience who want to be involved in addressing the wrongs illustrated in the video. Nearly every session with the Lifers Education Initiative Committee ended with a consideration of the actions the audience might be requested to take to advance the movement for commutation and parole. At one point the collaborators discussed asking that the PDOC specify the criteria for commutation or requesting that the Board of Pardons offer reasons for rejecting petitions. These were ultimately dropped. The video calls on the audience to petition the governor for more commutations, request that the lieutenant governor create a separate process for commutation petitions, and support legislation that will allow all lifers to come up for parole review after serving 15 years.

Lifers Inc. originally assumed that, once completed, the video would be burned to DVDs and 300 or so copies would be distributed with a brochure explaining the basis for the Initiative. Advances in cellphone technology, file sharing venues, and social media made it clear that the Lifers needed a website that explains the

⁷⁸ 61 PA. CONS. STAT. § 6137(a)(4)(i) (2017).

⁷⁹ *Id.* at § 6137(a)(4)(i), (a)(5), & (c).

Initiative, tells visitors a handful of ways to take action, contains an online petition, provides information for the press, and allows posting to social media (Facebook or Twitter). Because lifers have limited access to the internet and email, maintaining a website and connections to social media requires an intermediary. Lifers Inc. was able to hire a webmaster to perform these functions by using the grant from Bread and Roses. The Docs&theLaw Program also held a public screening of the video that included a panel discussion (also recorded) during which the Lifers' Parole Eligibility Education Initiative was discussed and copies of the Lifers' White Paper were distributed. In April 2018, the video was broadcast on PhillyCAM, Philadelphia's public access station.

The toughest audience to reach may have been the lifers at Graterford. The video had to get pass security before it could be screened for the membership or broadcast on the facility's closed-circuit television channel.

The challenge of keeping Lifers Inc. involved in the campaign to increase viewership of the video and assure its impact on the ultimate goal of increasing support of parole eligibility for lifers persists.

III. The Lessons of Visual Criminology and the Politics of Representing Incarcerated Persons

At the outset, Lifers Inc. expected that the video would focus on "the stories of one female and four male life-sentenced inmates . . . [as] told by a family member of their victim, or a family member or friend of the featured inmate." Its initial proposal also included a representative of the Prison Society who could address the failures of the commutation process and a public school advocate who could weigh in on the impact of state cuts in education spending, an area where savings from a reduction in the prison population due to commutations might be directed.

As the project developed, the voices to be featured in the video changed. The finished work includes three commuted lifers, Steve Blackburn, Tyrone Werts, and Isam Keith Smith, who are able to convey something of the lived experience of persons serving LWOP sentences in Pennsylvania at a time when commutations are virtually nonexistent; David DiGuglielmo, a former superintendent of SCI

Graterford, who elaborated on the positive impact of lifers from a corrections point of view; Dr. Kathleen Brown, an emeritus professor of Nursing at the University of Pennsylvania who assists lifers with writing commutation petitions; and Dr. Nancy Gottschalk, a professor of political science at Penn and the author of *Caught: The Prison State and the Lockdown of American Politics*.

Because of prohibitions on recording in state correctional institutions, the lifers themselves could not appear in the video as witnesses advocating their own case for commutation and increased parole eligibility. Pennsylvania Department of Corrections regulations restrict the use of recording devices in its facilities by the media.⁸⁰ With regard to capturing images of residents,

At no time will filming and/or photography of inmate faces or identifiable scars, marks, and/or tattoos, etc., be permitted. Filming and/or photography must be done in a way so that inmates cannot be recognized – meaning, but not limited to, being photographed from a distance, being blurred, of lower body area only, of feet only, from behind, etc.⁸¹

Furthermore, only the first name of specific residents may be used.⁸² Finally, all images are to be reviewed prior to the cinematographer/photographer leaving the facility.⁸³

These restrictions are purportedly justified by concerns for community sensitivities and security. The PDOC procedures expressly state that the mandate that residents not be individually identifiable is imposed “out of respect and concern for crime victims, as it is the Department’s intent that none of them shall be traumatized by seeing the image of the inmate in the news media.”⁸⁴ The

⁸⁰ See generally DEP’T OF CORR., COMMONWEALTH OF PA., PUB. NO. DC-ADM 009, NEWS MEDIA RELATIONS POLICY (2013).

⁸¹ *Id.* at C.3.e.

⁸² *Id.* at B.3.e.

⁸³ *Id.* at B.3.g.

⁸⁴ *Id.* at D.1.a. There are limits on the ability of the state to restrict speech in the name of protecting crime victims. In *Jamal v. Kane*, 105 F.Supp.3d 448 (M.D. Pa. 2015), a federal district court declared unconstitutional the Revictimization Relief Act, a measure passed by the Pennsylvania General Assembly with the intent of protecting crime victims from speech by “offenders” that “perpetuated the continuing effect of the crime.” The court concluded that a

security concern arises from the fear that recordings of some residents and not others may spawn jealousy, conflict, and violence as residents compete or jockey for “celebrity status” within the population. Both arguments are open to criticism.⁸⁵

Nonetheless, because mass media is full of negative images of “life-sentenced felons,”⁸⁶ it was imperative that “Second Looks, Second Chances,” by way of a corrective, include images that reflect the roles members of the Lifers’ Educational Committee occupy as social beings, political agents, and initiators of and collaborators in the production of the video. The scholarship on visual criminology was instructive in guaranteeing that this goal was fulfilled.

Visual criminology is a form of cultural criminology. It explores the relationship between images or representations of crime and exercises of the power to punish, control and repress.⁸⁷ Visual media are a “means through which to map the production of control.”⁸⁸ Visual criminologists, through analysis of images, “disrupt common sense assumptions that punishment is meaningfully related to

prohibition on speech by an “offender” based solely on its impact on the victim was content based and therefore an infringement of the first amendment rights of the plaintiffs who included past and former incarcerated persons, media outlets, and others who might publish statements of persons involved in the criminal justice system. The director of the Penn Program on Documentaries and the Law was among the plaintiffs. The court quoted from the Supreme Court’s opinion in *Simon & Shuster v. Members of the N.Y. State Crime Victim’s Bd.*, 502 U.S. 105 (1991), wherein “the Court observed that a state cannot restrict expression in order to limit ‘whatever mental anguish ... victims may suffer from reliving their victimization.’” 105 F.Supp.3d at 459.

⁸⁵ For criticism of the PDOC regulations restricting the photographing of individual residents, see Regina Austin, *Prison Portraits: Photographic Self-Representation in an Image Desert*, DOCS & THE LAW BLOG (Dec. 07, 2015) <https://goo.gl/ky1UZf>; Regina Austin, “Get Digi with It”: *Audiovisual Technology’s Challenge to Restrictions on Recording in Pennsylvania Prisons*, (Oct. 21, 2014) <https://goo.gl/YzHZmY>.

⁸⁶ See Bill Yousman, *Inside Oz: Hyperviolence, Race and Class Nightmares, and the Engrossing Spectacle of Terror*, 6 COMM. AND CRITICAL/CULTURAL STUDIES 265 (2009) (arguing that the HBO prison drama *Oz*, through its constant and decontextualized portrayal of prison violence, with an emphasis on the “bizarre, spectacular and sadistic,” constructed inmates, particularly those of color, as “savage, alien creatures”).

⁸⁷ Michelle Brown and Eamonn Carrabine, *Introducing Visual Criminology*, in HANDBOOK OF VISUAL CRIMINOLOGY, *supra* note 12, at x.

⁸⁸ *Id.*

crime's reduction."⁸⁹ Visual criminology employs "counter-images that seek to reframe . . . discourses of punishment" and "cultivate the kinds of moral judgment and ways of seeing that are most often institutionally erased" in discussions of prisons.⁹⁰

Through the use of the paintings of Graterford lifer Charles (Zafir) Lawson⁹¹ and stills taken at SCI Graterford and SCI Laurel Highlands by documentary photographer Harvey Finkle,⁹² "Second Looks, Second Chances" includes images of lifers that contrast with what Michelle Brown refers to as "the racialized body displayed in confinement," *i.e.*, "the tired and historically objectifying stock conventional . . . quintessential carceral image."⁹³ Nonfiction documentaries and television programs set in correctional settings "routinely feature stereotypical images of prisoners who are extremely muscular, covered in tattoos, and intimidating," thereby "reinforc[ing] the myth of convicts (sic) as violent predators."⁹⁴ "The visual focus on the human-in-a-cage . . . limits our ability to grasp the social relations, historical processes and material logics that

⁸⁹ *Id.*

⁹⁰ *Id.* at 188 & 194.

⁹¹ Charles Lawson is a founder, with Ann Marie Kirk, of Art for Justice which "supports and exhibits prisoner art to promote public dialog on effective, humane ways to prevent crime, reduce levels of incarceration, and improve the criminal justice system." We received permission to use images of Charles Lawson's paintings under a license that prescribed terms regarding attribution.

⁹² With the permission and cooperation of the superintendent of SCI Graterford, Philadelphia documentary photographer Harvey Finkle captured still images of the lifers who worked on the video project and other images of life at Graterford. Under PDOC rules, he was not allowed to capture faces, identifying tattoos, or names. Consent forms were obtained from any resident who agreed to be photographed.

⁹³ Michelle Brown, *Visual Criminology and Carceral Studies: Counter-images in the Carceral Age*, 18 THEORETICAL CRIMINOLOGY 176, 185 (2014).

⁹⁴ Jeffrey Ian Ross, *Varieties of Prison Voyeurism: An Analytic/Interpretative Framework*, 95 PRISON J. 397, 406 (2015). The student-directed video "A Dignified Death: Compassionate Release in Pennsylvania" includes interviews with tattooed residents of SCI Laurel Highlands who are hospice volunteers.

productively bear on the prison regime's existence or continuation."⁹⁵ "Rarely are viewers given a glimpse of the mundane, daily reality of prison life."⁹⁶

"Second Looks, Second Chances," on the other hand, makes "visible kinships, friendships and collective organizing" that fuel the "everyday survival" of lifers and create connections to the outside world that "politicize [their] identity . . . beyond bare life."⁹⁷ The paintings by Charles Lawson reflect the emotional existence or inner pain and regret of lifers, while the photography of Harvey Finkle captures lifers in meetings, in the law library, in the classroom, at work, and in places of worship, locations where rational and moral discourse and social relations and cooperation find expression among residents within prison walls.

IV. Conclusions

"Second Looks, Second Chances for Pennsylvania Lifers: Commutation by the Numbers" covers the major justifications for increasing commutations for rehabilitated persons serving LWOP sentences. The public needs to know that life in Pennsylvania means life without the possibility of parole and that mass incarceration is being perpetuated in the Commonwealth through LWOP sentences being served by thousands of people who were imprisoned decades ago and who have little hope of ever being released. Grants of commutation are warranted by morally and factually-based objections to the enduring consequences of a past regime of overly harsh sentencing and the fiscal challenges it poses for taxpayers and future generations of Pennsylvanians. Support for a reduction of the lifer population through the commutation and parole of older, long-serving PDOC residents would be a means of ultimately freeing up state revenue for other more important programs than corrections. The possibility of commutation also serves an important penal function in terms of creating incentives for lifers to contribute to sustaining the quality of life within Pennsylvania's penal institutions. Furthermore, commutations as effectuated by

⁹⁵ Brett Story, "Humanizing" *Prison Cinema: The Prison in Twelve Landscapes and the Politics of Abolition Imagery*, in HANDBOOK OF VISUAL CRIMINOLOGY, *supra* note 12, at xxx. Brett Story is the director of the documentary THE PRISON IN TWELVE LANDSCAPES (Oh Ratface Films 2016).

⁹⁶ *Id.*

⁹⁷ Brown, *supra* note 93, at 180, 187.

the high standards and rigorous process overseen by the PDOC, the Board of Pardons, and the Governor's Office reduce the risk to the citizens of the Commonwealth from the release of rehabilitated lifers who are subject to a lifetime of parole.

The video also makes the case for increased commutation and parole eligibility in that it shows members of Lifers Inc. to be thoughtful active agents working to assert a presence in the legal and social debates about their lives and their representation in visual media, all while operating within the constraints of the tightly controlled world of a maximum security prison. The video provides images that reflect the positive engagement and involvement of Graterford's lifers (present and commuted) with each other and with outsiders, images that run counter to mass media representations of the residents of male state maximum security penal institutions. By focusing on the service, educational, and civic activities of Lifers Inc., "Second Looks, Second Chances" attempts to provide a more multifaceted understanding of the mercilessness of death by incarceration. If the video fails as the best proof of the quality of the collaborators that produced it, this "backstory" hopefully establishes the role of Lifers Inc. in bringing the video into fruition.⁹⁸

⁹⁸ Pauwels, *supra* note 50.