ABOUT TIME:

How Long and Life Sentences Fuel Mass Incarceration in Washington State

---

A Report for ACLU of Washington

ACLU Washington

February 2020

ABOUT TIME:

How Long and Life Sentences
Fuel Mass Incarceration in Washington State

A Report for ACLU of Washington

Katherine Beckett
Professor
Department of Law, Societies & Justice
S. Frank Miyamoto Professor of Sociology
University of Washington

Heather D. Evans
Lecturer
Department of Sociology
Disability Studies Program
University of Washington

Contents

LIST OF TABLES

LIST OF FIGURES

ACKNOWLEDGMENTS

This report was a collaborative endeavor, and we are grateful for the support, feedback, and inspiration of many. To the people at the Washington State Reformatory: you teach, by example, the value and meaning of redemption, and we are deeply grateful for the opportunity to know and work alongside you. To those of you who shared your personal stories with us or with ACLU of Washington attorneys: thank you. Your generosity, perseverance, and courage are deeply appreciated. We are thankful for the support of our colleagues at the University of Washington who value and support publicly engaged scholarship. Special thanks to Steve and to Joel, who put up with many weekend work sessions and whose questions and observations were invariably helpful. Thanks also to Patty Glynn for early assistance with the compilation of the dataset, and to Jaime Hawk and Michele Storms for shepherding the report to completion. Finally, we appreciate the support of the Vital Funds Project, which made this project possible. The sentencing data were provided by the Washington State Caseload Forecast Council under data and licensing agreement 2018-00

PART I: INTRODUCTION

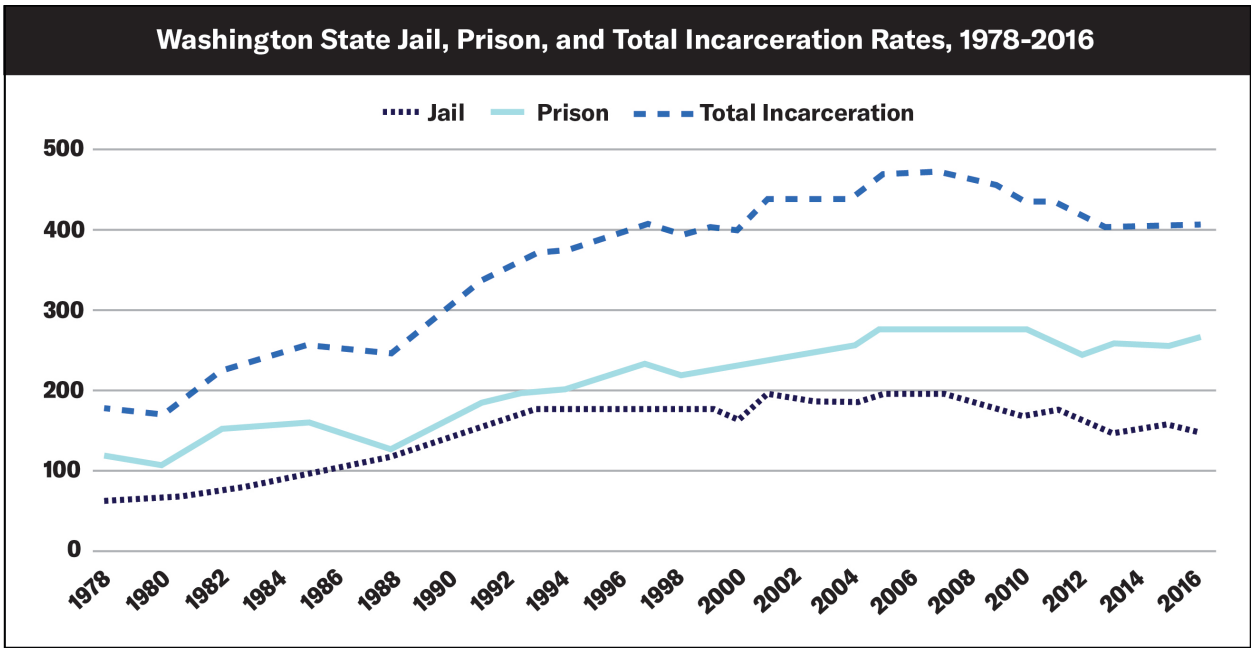
Washington's prison and jail populations have grown substantially, and the total incarceration rate has more than doubled, since the 1980s. By 2016, Washington's incarceration rate was more than three times higher than the average rate of the more than 30 Organization for Economic Co-operation and Development (OECD) countries.[1] The number of people living behind bars in Washington State is thus exceptional in both historical and comparative terms.

This report shows that the increase in incarceration in Washington State was not an inevitable response to rising crime rates. Rather, the growth of the state's prison population stems in large part from the proliferation of long and life sentences. The widespread imposition of long and life sentences sets Washington State apart from other democratic societies and is an inefficient and expensive way to protect public safety. This trend also raises important concerns about fairness and justice, including the disproportionate imposition of long and life sentences on black and Native people as well as on adolescents and young adults.

Rising levels of incarceration and the proliferation of long and life sentences are not unique to Washington State. The U.S. incarceration rate began an unprecedented ascent in the late 1970s. This trend continued through 2007, when 760 of every 100,000 U.S. residents – nearly 1 in 100 adults – lived behind bars.[2] The scale of confinement now sharply differentiates the United States from comparable countries, where incarceration rates range from a low of 41 in Japan to a high of 288 in Turkey.[3] By 2016, the U.S. incarceration rate had fallen by 14 percent to reach 655 per 100,000 residents.[4] Despite this modest decline, the United States remains home to the world's largest prison population.[5]

In Washington State, too, the incarceration rate is quite high relative to other democractic countries. From 1978 to 2016, the jail incarceration rate, the imprisonment rate, and the total incarceration rate more than doubled (see Figure 1). The size of the state's prison population nearly quadrupled in size during this time period, reaching 19,225 in September of 2019.[6] Moreover, Washington is one of only eight U.S. states in which the prison population grew throughout most of the 2010s.[7]

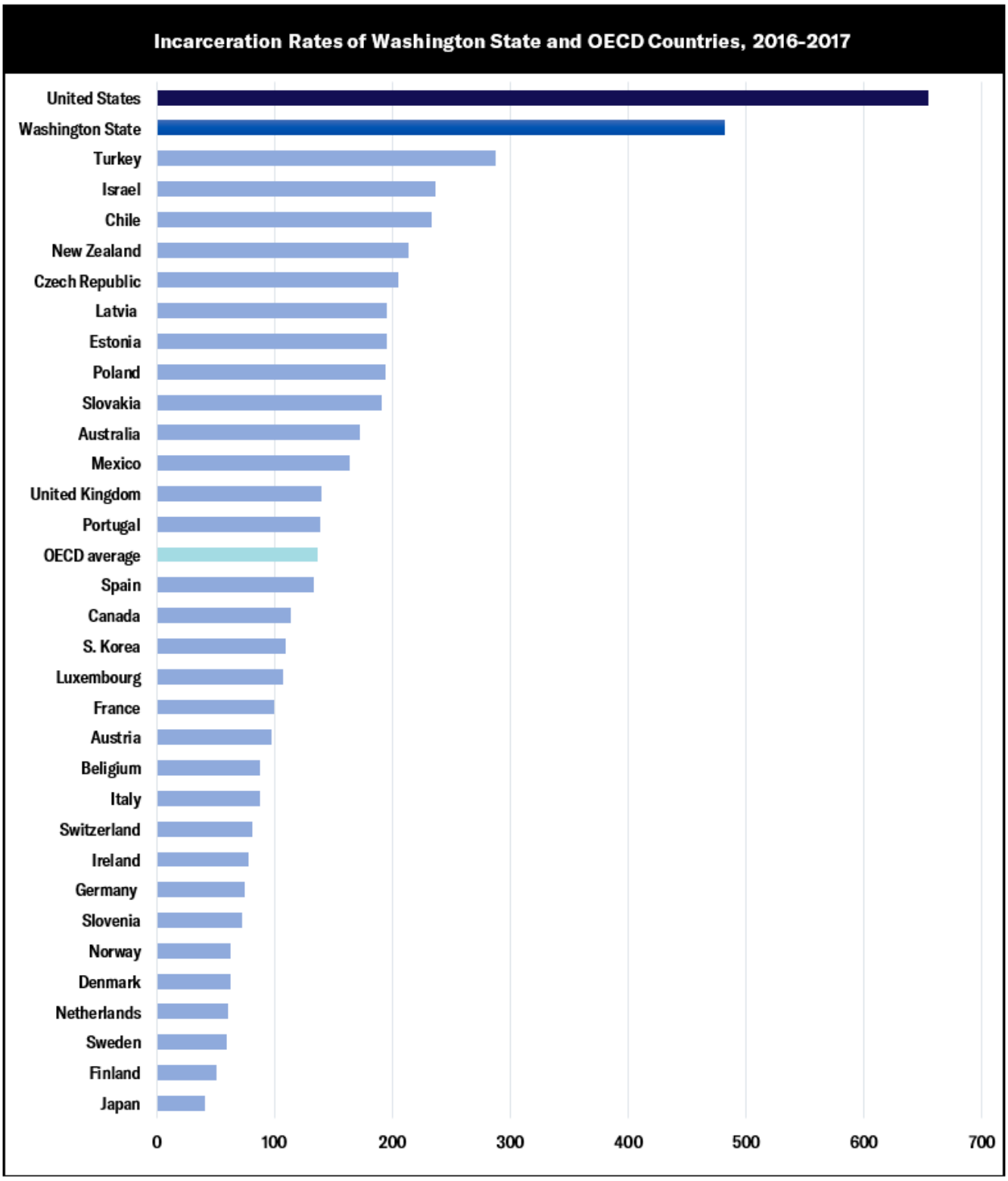
Figure 1.



Sources: Data for all years other than 2016 taken from the Prison Policy Initiative (data retrieved May 7, 2019 from https://www.prisonpolicy.org/reports/jailsovertime_table_4.html); 2016 total incarceration data are taken from *The Bureau of Justice Statistics, Correctional Populations in the United States*, 2016, Appendix Table A1. The 2016 imprisonment rate was calculated using Washington State Department of Corrections (DOC) data from July 2016 (retrieved on May 7, 2019 from https://www.doc.wa.gov/docs/publications/reports/400-RE002-1806.pdf); the jail incarceration rate was calculated by subtracting the imprisonment rate from the total incarceration rate.
Notes: Rates are measured per 100,000 residents. The figures shown here include people in state prisons and local jails, but not federal prisons, in Washington State.

By 2016, Washington's incarceration rate was more than three times higher than the average rate found in Organization for Economic Co-operation and Development (OECD) countries (see Figure 2).[8] In fact, only seven countries in the world have higher incarceration rates than Washington State.[9] The extensive use of prisons and jails in Washington is thus unprecedented in both historical and comparative terms. If people under community supervision are also included, the reach of the criminal justice system in Washington is even greater. In 2016, more than one in every 50 adult Washington residents was under some form of correctional supervision.[10]

Figure 2.



Source: Roy Walmsley, *World Prison Population List* (London: Institute for Criminal Policy Research, 2018, 12th edition). Rates are measured per 100,000 residents. The figures shown here for Washington State include people in local jails, state prisons, and federal prisons in the state.

This report shows that the proliferation of long and life sentences has been an important driver of the growth of Washington's prison population. According to the "iron law of prison populations," the number of people in prison is determined by two factors: the number of people admitted to prison and how long they stay behind bars.[11] In Washington State, parole has been largely abolished and the capacity of most prisoners to earn time off of their confinement sentence through the accumulation of "good time" credits has been curtailed.[12] As a result, length of stay is largely determined by prisoners' sentences – and sentences have increased dramatically. In fact, average sentence length, maximum sentence length, and the number of long (10-20 year), very long (20-40 year) and life (LWOP—life without parole—and 40 or more year) sentences have all grown significantly in recent decades.[13] This trend has persisted in recent years, even as crime rates continued to fall and many other states successfully reduced their prison populations. By contrast, in Washington, average sentence length for felony convictions that resulted in a prison sentence increased 12 percent from 2007 to 2017, and the prison population continued to expand.[14]

As a result of key shifts in state sentencing policy, many prisoners are spending longer and longer periods of time in prison and a growing number of these prisoners will die behind bars. This trend is likely to persist[15] and has been very costly. Spending on corrections more than tripled between 1985 and 2017. In 2017, Washington spent more than $1 billion (5 percent) of its general funds on corrections,[16] and the state will need to spend significant additional monies to expand prison capacity in order to accommodate recent and expected growth. The Council of State Governments estimates that preventing future growth and prison construction could allow the state to avoid spending up to $291 million, including $193 million in construction costs and $98 million in operating costs that would otherwise be needed to accommodate forecasted growth.[17]

The widespread imposition of long and life sentences in the United States and Washington State is unusual. In most democratic nations, sentences longer than ten years remain quite rare; in the United States, they have become commonplace.[18] As Michael Tonry, a leading legal scholar whose work focuses on criminal sentencing, writes:

> *In many countries, the maximum sentence that can be imposed for any single offense is 12, 15, or 20 years. LWOPs are unconstitutional in European countries…. In most other developed countries, a one- or two-year sentence is long and 25- or 200-year sentences are impossible and unimaginable.*[19]

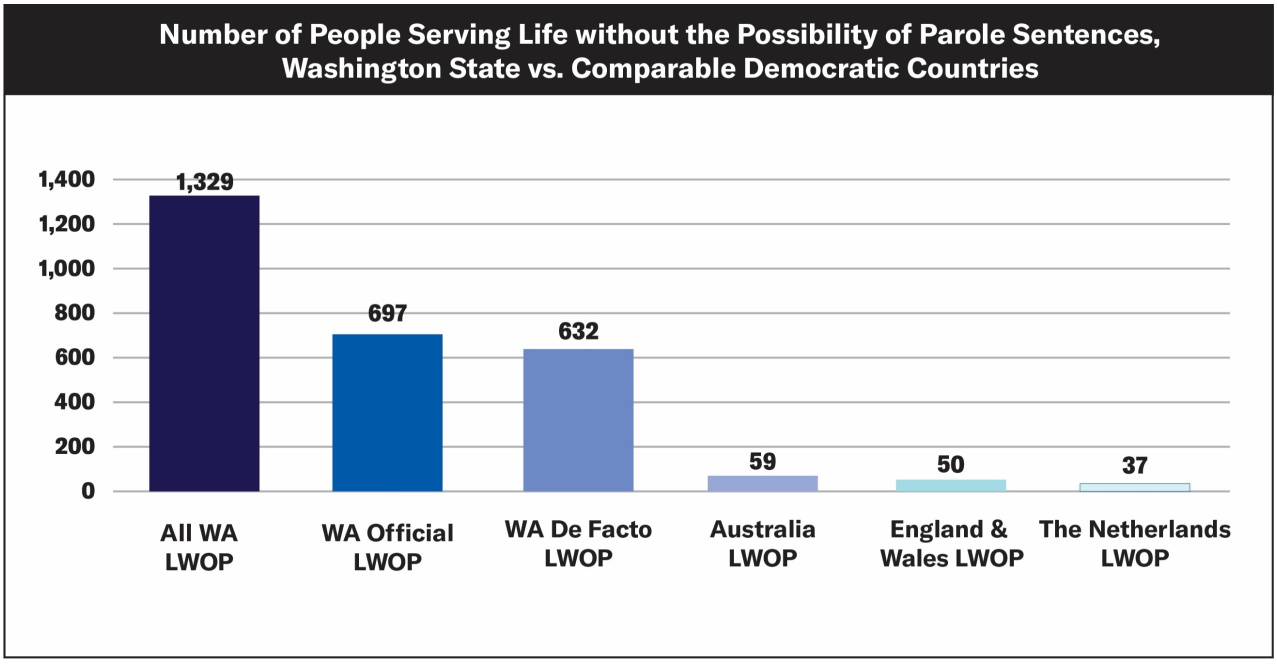
Life sentences, and especially life without the possibility of parole (LWOP) sentences, are now common in the United States but non-existent or very rare in most other

democratic countries. In fact, only twenty percent of the worlds' countries even allow for the imposition of LWOPs; those that do allow them use them quite rarely.[20] This is because LWOP sentences presume at the time of sentencing that a defendant will *never* mature and can *never* be safely returned to their community. Because this presumption denies people the opportunity to demonstrate their maturation and transformation, LWOPs are considered to be a human rights violation by leading authorities.[21] For this reason, some countries, including Germany, France and Italy, have declared LWOP sentences to be unconstitutional.[22]

By contrast, 49 of the 50 U.S. states, including Washington, allow LWOP sentences to be imposed – and impose them frequently.[23] As of March 2019, Washington State prisons housed 697 people serving official LWOP sentences.[24] Data from 2015 indicate that another 632 people were serving "de facto" or "virtual" LWOP sentences at that time – sentences that are so long that those serving them are expected to die in prison.[25]

As Figure 3 shows, the number of people serving LWOP sentences in Washington State is far greater than those found in other democratic countries with much larger populations. For example, LWOP does not exist in Canada, where the most severe criminal penalty is life *with* parole eligibility at twenty-five years.[26] While LWOP does exist in Australia, England and Wales, and the Netherlands, the number of people serving such sentences in those countries is dwarfed by the number serving them in Washington State.

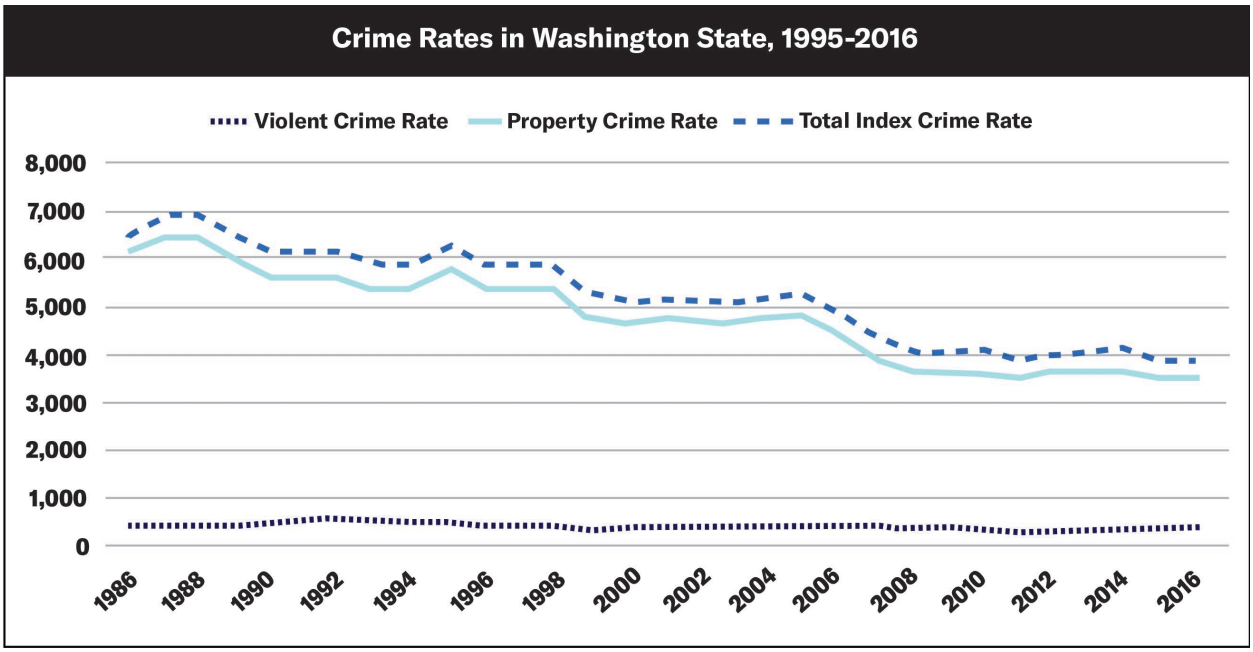
Figure 3.



Sources: Figures for Australia, England and Wales and The Netherlands are for 2010-2011 and are taken from Center for Law and Global Justice, University of San Francisco Law School, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 2012, p. 25. Washington State figures regarding official and virtual LWOPs are based on DOC data for March 31, 2019 and June 30, 2015 respectively.

The proliferation of long and life sentences in Washington State has not been a response to rising crime rates. In fact, Washington's crime rates have fallen steadily for decades. More specifically, the violent crime rate peaked in 1992, while the property crime rate reached its high point in 1988 (see Figure 4). As of 2016, the violent and property crime rates had fallen by 46 and 43 percent, respectively, since their apex several decades ago.[27]

Figure 4.



Source: Crime rate data were taken from the FBI's Uniform Crime Reports (UCR). Data for 1986-2014 were accessed via the UCR online data analysis tool, available at http://www.ucrdatatool.gov/. Data for 2015 and 2016 were accessed via UCR Annual Reports, available at https://www.fbi.gov/services/cjis/ucr/publications (see Table 5 for 2015 and Table 3 for 2016).
Notes: Rates are calculated per 100,000 residents. These data include crimes classified by the FBI as index offenses (murder, rape, aggravated assault, robbery, arson, burglary, theft and motor vehicle theft) known to the police. The first four of these offenses are considered violent; the latter four are property crimes.

Despite this notable drop in crime rates, sentences have become lengthier and the number of long and life sentences imposed by Washington's Superior Courts more than quadrupled during this period.[28] In 2019, 41.5 percent of all people in Washington's prisons were serving a sentence of ten or more years, and 17 percent were serving a life sentence.[29]

The routine imposition of long and life sentences is a short-sighted, ineffective, and inhumane approach to public safety. Comparative research shows that many countries that have far lower incarceration rates and rarely impose long and life sentences have enjoyed recent crime declines similar to that which has occurred in the United States. In fact, crime fell as much in countries without harsh criminal justice policies as in those with them.[30] Similarly, studies of state-level variation

within the United States show that prison populations can be reduced without imperiling public safety. In fact, states that decreased their imprisonment rates the most have also enjoyed the *largest* drops in crime.[31] For these and other reasons, the National Research Council recently concluded that "statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime."[32]

In 2019,

41.5%

of all people in Washington's prisons were serving a sentence of ten or more years, and

17%

were serving a life sentence

This report focuses on the causes and consequences of the proliferation of long and life sentences in Washington, for several reasons. First, long and life sentences have an especially pronounced impact on the size of the prison population. Second, they are extremely costly. And third, long, and life sentences raise particularly important questions about efficacy, fairness, and justice. These concerns include the racially disparate imposition of long and life sentences; their imposition in cases involving adolescent and young adult defendants; the failure of the current policy regime to meet victim needs; the unnecessary and costly incarceration of growing numbers of elderly and physically frail prisoners; and the fact that the widespread imposition of very long and life sentences is an expensive yet inefficient way to protect public safety.

The sentencing trends described in this report are based on an analysis of state sentencing data provided by the Washington State Caseload Forecast Council. These data include all felony sentences issued by Washington State Superior Courts from January 1, 1986 through June 30, 2017. In order to avoid distorting findings pertaining to longitudinal trends, we do not include data from the first half of 2017 when describing trends over time. We focus on three categories of sentences: long sentences (10-19.99 years); very long sentences (20-39.99 years); and life sentences, which include life without the possibility of parole (LWOP) and virtual life sentences. Following the U.S. Sentencing Commission, we define virtual life sentences as those that impose forty or more years of prison time, meaning that those who are serving them can typically be expected to die behind bars.[33]

Part II of this report provides a brief overview of changes to Washington State's sentencing framework since 1984, when the Sentencing Reform Act (SRA) was enacted. One of the most important features of the SRA was the abolition of parole for most prisoners. Today, only prisoners who were a) sentenced prior to 1984; b)

sentenced to life without parole for an offense they committed prior to the age of 18; or c) sentenced under the Determinate Plus Sentencing statute have the opportunity to go before the Indeterminate Sentencing Review Board (ISRB) to make a case for their discretionary release (see Appendix B for more information about this statute). All other Washington State prisoners are denied the opportunity to be considered for release by the ISRB as a result of the SRA's near-abolition of parole. Relatedly, the SRA notably de-emphasized rehabilitation as a penal goal, emphasizing instead retribution (i.e. "just-desserts") and incapacitation (i.e. the physical separation of prisoners from the non-prison community).

In addition, the legislature has adopted a number of measures that enhance sentence length since the enactment of the SRA. Many of these measures increased the weighting of prior offenses in the calculation of offender scores, which has the effect of increasing recommended sentencing ranges. The legislature also enacted the nation's first "three-strikes" law and a variety of weapons enhancements in the 1990s. These and other legislative changes help explain why long and life sentences proliferated even as crime rates fell. At the same time, the legislature reduced opportunities for most prisoners to earn good time credits, which means that incarcerated people are serving a greater portion of their sentence behind bars than was previously the case.

Part III presents empirical data regarding the proliferation of long and life sentences in Washington State. These data show that average and maximum sentence lengths have increased substantially for all offense types. The findings also show that the number of long, very long, and life sentences imposed in 2016 was more than four times greater than in 1986. As noted previously, this notable increase in the imposition of long and life sentences occurred over decades characterized by dramatically falling crime rates.

Part IV assesses the specific impact of particular statutory changes on the proliferation of long and life sentences. These analyses show that key legislative developments, including the Persistent Offender Accountability Act (i.e., the three-strikes law), the Hard Time for Armed Crime Act (i.e., weapons enhancements), and especially changes to the rules that govern the calculation of offender scores contributed substantially to the growth of long and life sentences. These statutory changes also appear to have indirectly fueled this trend by enhancing prosecutorial leverage in plea negotiations, and by enabling the imposition of extraordinarily long sentences in cases in which defendants exercise their constitutional right to trial by

jury. The growth of this "trial penalty" is also an important driver of the growth of long and life sentences.

Part V offers a critique of the inefficacy and inhumanity of the proliferation of long and life sentences. Studies show that these policies are extraordinarily costly but provide little, if any, public safety benefit. The more sparing use of prisons, combined with enhanced crime prevention efforts, expanded rehabilitative programming in prisons, and the development of restorative justice based alternatives to incarceration are a more promising means of protecting public safety and meeting victim needs. This section also explores a number of concerns about fairness and justice raised by the increased imposition of long and life sentences, including their disporportionate impact on defendants of color and people who were children or young adults when they committed their crime.

Part VI describes the tranformation and maturation of a number of people currently serving very long or life sentences in Washington State. These biographical accounts serve several purposes. First, they help to contextualize the very serious violence that occurred in these cases. Consistent with criminological research, these stories show that inter-personal violence does not occur in a vacuum or because people are "born evil." Instead, the childhoods of people who are convicted of violent crimes are characterized by extreme poverty, trauma, family separation, and a lack of parental supervision. The existence of these circumstances does not mean that people should not be held accountable for harm they cause. But the existence of these circumstances does show that people who commit acts of serious violence are human beings who made poor decisions, typically at a young age, after having experienced significant trauma. These stories also powerfully challenge the presumption that people who commit serious crimes, including aggravated murder, are incapable of growth and maturation. In fact, in all of these cases (and many others), the people who committed serious harm have worked tirelessly to make amends and improve the lives of others. They do this despite the fact that these efforts will not enable them to earn time off of their sentence or lead to an opportunity to present a case for their release to a parole board. The stories presented in Part VI of this report thus underscore our shared responsibility for the prevention of violence and remind us of the possibility of redemption no matter the crime of conviction.

Finally, Part VII describes a number of policy reforms that have the potential to significantly reduce the number of long and life sentences imposed, to safely enhance release options for those currently serving such sentences, and to dramatically expand prisoners' capacity to reduce their length of stay by engaging in rehabilitative programming. While the need for comprehensive sentencing reform is clear, we also

recommend that the legislature act in the short term to create meaningful release opportunities for prisoners who pose little danger to the public, bring state policy in line with recent research on brain development, reduce the number of older adults and elderly people who are living behind bars, encourage and reward prisoners' participation in rehabilitative programs, and enhance fairness and justice in Washington State.

PART II: WASHINGTON STATE SENTENCING LAW AND POLICY SINCE 1984

The policy structure that governs criminal sentencing in Washington State has undergone dramatic revision over the past four decades. This process began with the Sentencing Reform Act (SRA), which was enacted in 1984. The SRA demoted rehabilitation as a penal goal and elevated instead "just-desserts" (i.e. retribution) and the incapacitation (i.e. separation) of dangerous people as the primary goals of sentencing policy.[34]

Consistent with this demotion of rehabilitation, the legislature abolished parole for those sentenced after the enactment of the SRA. Prior to 1984, sentences imposed for felonies in Washington were largely indeterminate, meaning that courts had a great deal of latitude in deciding whether to impose a prison sentence and in setting the number of years of confinement that were imposed. Most sentences were fairly open-ended: The Board of Prison Terms and Paroles decided whether and when to release a prisoner within the sentencing range determined by the judge. This approach reflected the view that many prisoners are capable of maturation and rehabilitation, and that the Parole Board rather than the sentencing judge was in the best position to determine when a prisoner was safe to release.[35]

Throughout the 1970s, concern mounted that the state's indeterminate sentencing framework yielded inconsistent outcomes that showed little relationship to the severity of the crime.[36] For some, the possibility that race and ethnicity influenced sentencing outcomes and parole decisions was also a concern. In addition, doubts about the efficacy of rehabilitative programs became widespread during this time.[37] As a result, many came to believe that criminal sentences should primarily reflect the severity of the crime, and seek principally to incapacitate and hold law-breakers accountable rather than encourage rehabilitation.[38] In Washington State, the idea that rehabilitation was a failed endeavor, and that punishment should be oriented instead toward consistency, retribution, and incapacitation, culminated in the passage of the Sentencing Reform Act.

The Sentencing Reform Act

In 1981, the Washington State Legislature adopted the Sentencing Reform Act (SRA). The SRA, in turn, established the Sentencing Guidelines Commission, which recommended a determinate sentencing system for adult felonies. The SRA took effect July 1, 1984 and abolished parole release for defendants sentenced after this date. The primary goal of the new sentencing system was to ensure that defendants who commit similar crimes and have similar criminal histories receive similar sentences.[39] Under the SRA, sentences are meant to be largely determined by the seriousness of the offense and by the defendant's criminal record (as measured by their offender score). The primary goal of the SRA, then, was to enhance fairness and predictability across similar cases.

This sentencing framework diminished judicial discretion and de-emphasized rehabilitation as a penal goal. In fact, under the SRA, "sentences intended to rehabilitate offenders were restricted to a defined class of first-time, nonviolent offenders."[40] Under the SRA, discretionary power shifted from judges to legislators, as the legislature classifies offenses by their perceived seriousness, sets the rules regarding the calculation of offender scores, and specifies sentencing ranges for various offense categories in determining penal outcomes. The SRA also enhanced the power of prosecutors whose charging decisions became more consequential for sentencing outcomes.[41] Although the legislature did adopt prosecutorial guidelines regarding charging standards and plea bargains, these prosecutorial guidelines are advisory rather than mandatory.[42]

The architects of the SRA did not originally seek to lengthen sentences, and under the SRA, prisoners retained the right to earn up to one-third off of their confinement sentence through good behavior in most cases. However, Section 3 of the SRA did make LWOP the automatic sentence for aggravated murder convictions unless the State choose to pursue, and the judge or jury imposed, a sentence of death. This provision is consistent with legislation enacted in 1977, but marked a dramatic change from past practice. Prior to 1975, prisoners serving life sentences were eligible for sentence review after twenty years minus one-third of that time if they earned good time credits.[43] In other words, prior to 1975, people in Washington State who were convicted of the most serious crimes were potentially eligible for release after serving a little over thirteen years in prison. By contrast, since 1975, only LWOP or death sentences are authorized in aggravated murder cases. (See Appendix C for

more information about the case characteristics that are meant to differentiate aggravated first degree murder from non-aggravated first degree murder). This policy shift was an important first step in the normalization and expansion of LWOP sentences in Washington State.

Deconstructing Aggravated Murder

The legal history of aggravated first-degree murder – considered the most serious offense – is closely bound up with the death penalty in Washington State.[44] In 1975, the legislature abolished a long-standing statute that gave juries the right to decide between life and death sentences in first-degree murder cases. Later that year, the voters approved Initiative 316, which imposed an automatic, mandatory death penalty for aggravated first-degree murder.[45] This statute was over-turned in 1977 by the Washington State Supreme Court. In response, the legislature amended the statute to specify that either a sentence of death or life without the possibility of parole would be imposed upon conviction of aggravated first-degree murder.[46]

This statute originally identified seven aggravating circumstances that ostensibly differentiate aggravated from non-aggravated first-degree murder. Today, RCW 10.95.020 identifies fourteen circumstances that, in theory, meaningfully distinguish aggravated first-degree homicide from non-aggravated first-degree homicide (see Appendix C for a complete list of these aggravating circumstances). This legal distinction is consequential: people convicted of non-aggravated first-degree murder could not receive a sentence of death and typically do not receive LWOP.[47] By contrast, those who are convicted of aggravated first-degree murder must receive one of these two sentences and can therefore expect to die in prison.[48] Furthermore, people serving LWOPs must spend the first five years of their sentence in close custody[49] and, in most facilities, are considered the lowest priority for programming.

The imposition of different sentences for aggravated and non-aggravated first-degree murder rests on the idea that the former is notably and consistently more heinous than the latter, and that people who are convicted of it are less redeemable than those convicted of non-aggravated homicide. This sentencing approach also assumes that the existence of any of the fourteen aggravating circumstances establishes that the defendant is inherently more culpable than those convicted of non-aggravated murder and therefore constitutes a permanent danger to society.

In fact, the legal distinction between aggravated and non-aggravated murder does not meaningfully differentiate the most severe offenses from those that are slightly less severe. For example, under the

Washington statute, a murder resulting from the discharge of the firearm from a motor vehicle (or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both) meets the legal definition of aggravated murder. Yet there is no reason to believe that shootings perpetrated by people in vehicles are inherently more serious than those that take place in a home, an office, or on a sidewalk. Nor does the statute enable prediction of whether a defendant is capable of maturation and transformation. Prosecutors have no means of determining at the time of charging which defendants will eventually mature and become safe to release and which will not.

Moreover, prosecutors exercise a great deal of discretion when deciding whether to charge a defendant with aggravated murder, and this discretion may be influenced by a wide array of circumstances other than severity of the crime or the culpability of the defendant. A few examples are illustrative.

On May 19, 1992, 14-year-old Jeremiah Bourgeois shot and killed Tecle Ghebremichale, 41 years old, who had previously testified against Bourgeois' older brother in juvenile court. Jeremiah became the second youngest person in the state to be convicted of aggravated murder and was sentenced to life without the possibility of parole. While incarcerated, Mr. Bourgeois earned a paralegal certificate, wrote legal briefs for other inmates, worked toward a bachelor's degree, and published in a variety of outlets, including The Ohio State Journal of Criminal Law. Clearly, Mr. Bourgeois is not the same person he was when he committed his crime at the age of 14, and there was no basis for the assumption implicit in his LWOP sentence that he was incapable of growth and transformation.[50]

In 1985, 20-year-old Arthur Longworth was convicted of aggravated murder; he is currently serving life without the possibility of parole in Washington State for killing 25-year-old Cynthia Nelson. About the crime, he says, "It's a horror and… I don't forgive myself for it."[51] *Throughout his childhood, Art had been subjected to horrendous abuse at the hands of his parents as well as in the foster care and juvenile detention systems. By age 16, Art had been discharged from state custody and was living on the streets, as he was at the time of his crime. Now aged 54, Art has become a teacher, an activist, and an award-winning writer.*

In both of these examples, growth and transformation have clearly occurred. Moreover, mitigating circumstances – extreme youth and a history of severe abuse in both the home and the foster care system – clearly existed, yet prosecutors nonetheless decided to pursue aggravated murder convictions and life without the possibility of parole sentences in these cases. Conversely, in some cases in which aggravating circumstances exist, prosecutors elect not to charge the defendant with aggravated murder.

For example, in 2014, 32-year-old Thomasdihn Bowman was convicted of first-degree homicide after killing 43-year-old wine steward, Yancy Noll, at an intersection in the Roosevelt neighborhood of Seattle.

According to prosecutors, Bowman shot Noll from his vehicle.[52] RCW 10.95.020 identifies shooting from a motor vehicle as an aggravating circumstance when the killing meets the definition of first-degree homicide. Yet the prosecution sought, and the jury returned, a conviction for non-aggravated, first-degree murder, and Bowman received a 29-year prison sentence for this offense.[53] While 29 years is a very long sentence, it is not LWOP.

In 2015, Jose Gonzalez-Leos was also convicted of first-degree homicide for killing the mother of his ex-girlfriend, 46-year-old Nga Nguyen. In the charging documents, prosecutors alleged that Gonzalez-Leos committed first-degree homicide in the course of committing Burglary 1.[54] RCW 10.95.020 identifies first-degree homicide committed in the course of, furtherance of, or in immediate flight from a number of crimes, including burglary in the first degree, as an aggravated circumstance. Nevertheless, Gonzalez-Leos was charged with, and convicted of, (non-aggravated) first-degree murder. He received a 26 and one half-year sentence.[55]

The point of these latter two examples is not that prosecutors inappropriately under-charged the defendants in these cases; attorneys may well have had valid reasons for charging these defendants with non-aggravated first-degree murder. Rather, the point is that similar reasons exist in a host of other cases, cases in which the defendants were nevertheless charged with, and convicted of, aggravated murder, and under present law cannot be considered for release.[56]

Together, these examples demonstrate that although the state's aggravated murder statute draws a consequential line between those deemed worthy of consideration for release and those who are not, this line is largely arbitrary and does not reflect either the severity of the crime or the ability of the defendant to mature. The widespread imposition of LWOP sentences for aggravated murder as well as other crimes denies far too many the possibility of redemption and consideration of the possibility that they may someday be safe to release.

The Sentencing Guidelines Commission continues to advise the legislature regarding adjustments to the sentencing structure, and the legislature often modifies criminal sentences. In fact, the legislature has revised the Sentencing Reform Act every year since it was implemented. The near-abolition of parole meant that the legislature had much more control over how long prisoners spent behind bars.[57] While the SRA did not generally increase sentence length, the legislature subsequently enacted a myriad of statutes that did just that. According to the Sentencing Guidelines Commission, "these changes have taken numerous forms, but their cumulative effect has been to increase the severity of felony sentences in Washington."[58] The result was

the creation of a system in which many more defendants receive long and life sentences, but relatively few prisoners have the opportunity to earn good time credits or demonstrate evidence of their maturation to a parole board. These statutory developments are described below.

The Persistent Offender Accountability Act: Three – or Two – Strikes and You're Out

In 1993, Washington became the first state in the nation to adopt a "three strikes" law, under which courts must sentence "persistent offenders" to life in prison without the possibility of parole (LWOP).[59] The Persistent Offender Accountability Act (POAA) was adopted pursuant to Initiative 593, which was supported in 1992 by 76 percent of voters.[60] The law specifies that mandatory life sentences, without the possibility of parole or reduction by good time, are to be imposed upon a third conviction of offenses designated by the legislature as "most serious."

The POAA thus defines a "persistent offender" as a person who has been convicted of any "most serious offense" and who has previously been convicted on at least two separate occasions, in any state, of an offense that under Washington law would be "most serious."[61] "Most serious offenses" include all Class A felonies and a number of Class B felonies. Criminal solicitation of, or criminal conspiracy to commit, a Class A felony, any Class B felony with a finding of sexual motivation not otherwise included, any felony with a deadly weapon finding, and any attempt to commit a strike offense also constitute "most serious offenses."[62]

In 1996, the Legislature expanded the definition of "persistent offender" to include "Two-Strike Sex Offenders" who also receive a mandatory LWOP sentence. Defendants with two separate convictions of specified sex offenses qualify as a persistent sex offender under this provision.[63] In 1997, the legislature broadened the list of offenses that qualify as strikes under the "Two Strikes" law. The specific offenses that trigger "Two Strikes" sentences are enumerated in the "persistent offender" definition in RCW 9.94A.030(38)(b). A defendant who is convicted of one of these offenses and has at least one previous conviction for one of these offenses must be sentenced to life in prison without the possibility of release.

Advocates of persistent offender laws generally argue that such measures will drastically reduce crime, either by incapacitating repeat offenders or by deterring those who might otherwise commit such crimes. However, research does not support these claims. For example, studies comparing crime trends in states that passed two and three strike laws with trends in states that did not do so find no statistically

significant difference attributable to the enactment of persistent offender laws. Instead, crime rates fell by similar margins in both groups of states.[64] More recent studies similarly find "no credible statistical evidence that passage of three strikes laws reduces crime by deterring potential criminals or incapacitating repeat offenders."[65]

While research shows that mandatory sentencing laws do not achieve their intended effects, it does provide ample evidence that such laws have a variety of unintended and negative consequences.[66] As Michael Tonry explains,

> *There is no credible evidence that the enactment or implementation of such sentences has significant deterrent effects, but there is massive evidence, which has accumulated for two centuries, that mandatory minimums foster circumvention by judges, juries, and prosecutors; reduce accountability and transparency; produce injustices in many cases; and result in wide unwarranted disparities in the handling of similar cases.*[67]

There is also evidence that the enactment of mandatory minimum sentences compels many defendants, including increasing numbers of people who are factually innocent, to plead guilty rather than risk the potentially extreme consequences of going to trial.[68] As one legal expert explains, the adoption of mandatory minimum and other tough sentencing laws creates a "prosecutor-dictated plea bargain system" characterized by "inordinate pressures to enter into plea bargains" that appears to have led a significant number of defendants to plead guilty to crimes they never actually committed."[69] As illustrated in Part III of this report, harsh sentencing laws like the Persistent Offender Accountability Act may also be used to punish people, guilty and innocent alike, for exercising their constitutional right to a trial.

Auto-Decline: Sending Youth to Adult Court – and Prison

In 1994, the Washington State Legislature passed the Youth Violence Reduction Act. Under this legislation, 16 and 17 year old children charged with certain felonies are automatically "declined" in the juvenile system and sent to adult courts.[70] In 1997, the legislature revised the automatic transfer criteria, adding a number of offenses that trigger the automatic transfer of 16 and 17 year old children to the adult courts and, if convicted, to state prisons.[71]

... about

1,300 WASHINGTON YOUTH

were convicted in the adult system under the automatic decline law between 1994 and 2012

According to a study by the Washington State Institute for Public Policy (WSIPP), about 1,300 Washington youth were convicted in the adult system under the automatic decline law between 1994 and 2012. Using a number of different methods and analytic strategies, WSIPP researchers analyzed how automatic decline affected youth recidivism rates. The results show that recidivism rates are *higher* for youth who are automatically transferred to the adult system than for otherwise similar youth who are retained in the juvenile system:

> *… we compared recidivism rates of youth who were automatically declined after the 1994 law with youth who would have been declined had the law existed prior to that time. We employed numerous tests, all of which demonstrate that recidivism is higher for youth who are automatically declined jurisdiction in the juvenile court. These findings are similar to other rigorous evaluations conducted nationally by other researchers.*[72]

Transferring youth to the adult system thus undermines public safety, according to WSIPP. At the same time, there is abundant evidence that incarcerating adolescents in general, and especially in adult prisons, is harmful to their well-being. For example, one study found that, "Compared with offenders confined in juvenile facilities, juveniles in adult prison are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and almost twice as likely to be attacked with a weapon by inmates and beaten by staff."[73] Auto-decline laws thus subject troubled adolescents to harsher conditions of confinement. This exacerbates the

already-high level of trauma with which these young people contend, and also undermines public safety. [74]

In March of 2018, the Washington legislature enacted, and the Governor signed, Senate Bill 6160. This legislation removes five offenses from the list of crimes that automatically trigger youths' transfer to the adult courts, but also extends juvenile jurisdiction over children convicted of those crimes until they reach the age of 25.[75] Thus, while children convicted of these five offenses are no longer automatically transferred to the adult system, they are now likely to spend significantly longer behind bars for those offenses.[76] Because confinement in juvenile institutions has also been shown to be damaging to children, and because many will now spend more time behind bars, it is unlikely that this legislation will improve either the well-being of young adults or public safety.

The Hard Time for Armed Crime Act

In 1995, Washington voters approved Initiative 159, paving the way for the Hard Time for Armed Crime Act (HTACA). This Act requires that people convicted of a felony committed while armed with firearms and other weapons receive a sentence enhancement that adds time to the base sentence for the underlying offense. All felony offenses (other than firearm offenses) are eligible for a weapon finding and enhancement.

The length of the sentence enhancement depends upon the type of weapon(s) involved and the seriousness of the crime(s) committed. Under RCW 9.94A.533, the following enhancements may be imposed for each charge or count: Class A firearms – 60 months; Class B firearms – 36 months; Class C firearms – 18 months. Enhancements for other non-firearm weapons are as follows: Class A – 24 months; Class B – 12 months; Class C – 6 months.

Over the years, the legislature has enacted many other sentence enhancements as well. These are described in Appendix D. Sentence enhancements, including those imposed under HTACA, must be served consecutively and without time reductions for good behavior. (See Appendix E for a description of the statutory rules that govern whether sentences are to be served consecutively or concurrently.)

Like two- and three-strike laws, supporters promote sentence enhancements as a means of enhancing deterrence and incapacitation, thereby improving public safety. Yet a recent evaluation concluded that weapons enhancements are not a cost-effective means of reducing violent crime.[77] Moreover, long sentences do not deter more than

short ones, and mandatory sentences have not been shown to reduce crime or improve public safety.[78] Empirical research thus fails to provide support for the idea that weapons enhancements improve public safety. What is clear, however, is that these enhancements have added very significant amounts of confinement time to the sentences of some prisoners.

Changes to the Calculation of Offender Scores

Legislative changes to the rules governing the calculation of offender scores have led to an increase in those scores. As shown later in this report, the rise in offender scores has, in turn, contributed to the increase in average sentence length and to the proliferation of long and life sentences.

Under the SRA, (pre-enhancement) sentences are determined by two factors: the seriousness of the most serious current offense (as determined by the legislature) and defendants' "offender score." The offender score is based on the number and nature of defendants' prior convictions, each of which is weighted according to rules set by the legislature. In recent decades, the legislature has modified the rules that govern the calculation of offender scores on many occasions. All but one of these modifications increased the extent to which prior convictions enhance defendants' offender scores.

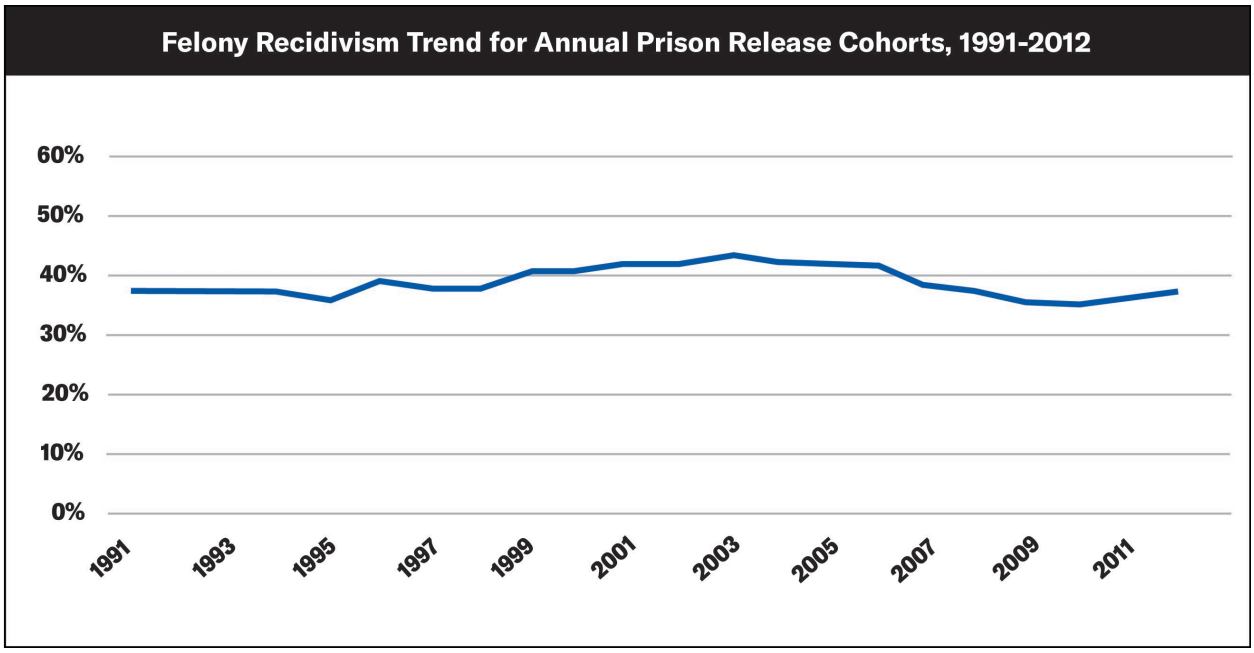
For example, in 1986, the legislature modified RCW 9.94A.525 to extend the period of time during which prior felony convictions count in the calculation of offender scores (i.e. the "wash period"). For Class A felonies, the wash period was eradicated entirely, meaning that prior convictions for Class A felonies are *always* included in the calculation of offender scores. For Class B felonies, the wash period was extended from five to ten years. Similarly, in 1999, the legislature increased the number of violent crimes that were to be triple-counted, and double-scored juvenile convictions for those offenses. Appendix F provides a list of changes to RCW 9.94A.525 that alter the weighting of prior convictions in the calculation of offender scores.

As shown in Part III of this report, average offender scores have increased notably as a result of these statutory reforms, and this trend contributed substantially to the proliferation of long and life sentences. The increase in average offender scores that has taken place does not stem from an inevitable or "natural" compounding of offender scores over time. While it is true that justice-involved peoples' offender scores will increase over the course of their system involvement, most people who are at one point in time justice-involved "age out" of criminal behavior, while other first-time offenders are just entering the system. The people who were sentenced in Superior Court in 1984, just after the SRA went into effect, would have included a

mix of people, some of whom had no prior justice-involvement, some whom were in the middle of their crime-involved years, and others who were about to "age out" of crime. The same is true today.

Absent any notable increase in crime rates and recidivism, then, there is no reason to believe that the increase in offender scores documented in the next section is inevitable. In fact, crime rates have been falling precipitously (see Figure 4 above), and the recidivism rates of former prisoners have been stable (see Figure 5 below). For these reasons, it appears that the increase in defendants' offender scores over time stems primarily from the legislative changes to the rules governing the calculation of offender scores described above and in Appendix F.

Figure 5.



Source: Data provided by Michael Hirsch, Research Associate, Washington State Institute for Public Policy (October 17, 2017).
Note: WSIPP includes new Washington State felony convictions that occur within three years of release in their recidivism data.

Restrictions on Earned Release Time

The Washington State Legislature has enacted a number of measures that enhance sentence length, contribute to the proliferation of long and life sentences, and ensure that most people serving long sentences are unable to meaningfully reduce their prison stay through good behavior and participation in rehabilitative programming. The policy rationale for this shift toward longer and life sentences is unclear, as research shows that long sentences do not deter more than short ones,[79] and that incapacitating middle aged and elderly people is an inefficient means of improving

public safety.[80] Moreover, the SRA's demotion of rehabilitation is incompatible with studies showing that many rehabilitative services do improve public safety,[81] and that the possibility of early release reduces infractions and incentivizes participation in rehabilitative programs that reduce recidivism.[82]

RCW 9.94A.728 provides that a prisoner's sentence may be reduced by "earned release time." This earned release time is allocated to prisoners for "good behavior" as determined by the relevant correctional agency. Prisoners may accumulate earned release time while serving a sentence and during their pre-sentence incarceration.

Under the Sentencing Reform Act, nearly all prisoners who avoided infractions and participated in rehabilitative programming were eligible to earn a one-third reduction in their confinement sentence.[83] This situation changed markedly in 2003, when the State Legislature passed ESSB 5990. This legislation did two things. First, it increased earned release time for good behavior for people who were convicted of certain non-violent offenses and who met other eligibility criteria. For these prisoners, the share of their sentence that could be reduced via good time credits rose from 33 percent to up to 50 percent. However, this legislation also reduced the capacity of most prisoners to earn release time. In particular, prisoners convicted of a serious violent offense or a Class A sex offense committed between July 1, 1990, and July 1, 2003, or who did not meet other eligibility criteria, were prohibited from earning release time in excess of fifteen percent. Prisoners committing these offenses on or after July 1, 2003 cannot earn release time credit in excess of ten percent. In addition, prisoners may not earn any release time for that portion of a sentence that results from any enhancements or a mandatory minimum sentence under RCW 9.94A.540.[84]

As a result of these restrictions, WSIPP reports that just 20 percent of all Washington State prisoners were eligible to earn up to 50 percent off of their sentence through "good behavior" under this statute; the capacity of many of the remaining 80 percent of prisoners to reduce their sentence was significantly curtailed.

Importantly, the 20 percent of all released prisoners who were eligible to earn up to 50 percent earned release time were therefore released early had lower recidivism rates than similar others who spent more time in prison. According to WSIPP, the expansion of earned release time for this group of prisoners resulted in a net savings to Washington State taxpayers equivalent to more than $7,000 per prisoner.[85] Nonetheless, the legislature allowed the temporary expansion of the capacity of roughly 20 percent of the state's inmates to earn time off of their sentence to lapse

after 2010. It also retained those portions of the law that restricted the capacity of other prisoners to earn time off of their sentence.[86]

The abolition of parole, combined with these restrictions on earned release, amplifies the effects of increased sentence length, and mean that many people are spending far longer in prison than was the case a few decades ago.[87] These statutory changes also mean that state sentencing policy no longer encourages many prisoners to engage in rehabilitative programming or rewards those who do.

Despite the absence of evidence indicating that long and life sentences improve public safety, such sentences have proliferated in Washington State while opportunities to earn release time and be considered for release after serving long confinement terms have been curtailed. These policies are not supported by criminological research, which shows that long and life sentences are an expensive yet inefficient means of protecting public safety and that victim needs continue to go unmet even as more people are incarcerated for longer and longer periods of time. In the following section of the report, we describe these trends in greater detail and provide additional information about the people most affected by them.

III: THE PROLIFERATION OF LONG AND LIFE SENTENCES

The policy changes described above have had a notable impact on sentencing outcomes in Washington State. Average and maximum sentence lengths for felony defendants sentenced to prison increased notably, while the number of long, very long, and life sentences grew dramatically. As was shown in Part II of this report, many statutory changes contributed to these sentencing trends, which in turn increased state prison populations. These legislative initiatives also increased the number of older and elderly adults who live behind bars despite posing little risk to public safety.

Table 1 displays the change in average sentence length from 1986 to 2016 for felony defendants who were sentenced to prison by offense category.[88] As this table shows, the average prison sentence imposed for drug, property, public order, and violent offenses increased by 25, 48, 231, and 26 percent, respectively, from 1986 to 2016. For people convicted of drug offenses, this meant, on average, five additional months behind bars; for property, public order and violent offenses, this trend resulted in the imposition of an average of 11, 28 and 18 additional months of prison time, respectively.

Table 1.

Change in Average Sentence Length (in months) for Felony Defendants Sentenced to State Prison, by Offense Category, 1986-2016						
Offense Type	*Average Sentence 1986*	*Average Sentence 1996*	*Average Sentence 2006*	*Average Sentence 2016*	*Percent Increase 1986-2016*	*Absolute Increase 1986-2016*
Drug	21	31	23	26	25%	5
Property	22	34	29	33	48%	11
Public Order	12	34	37	40	231%	28
Violent	67	95	82	84	26%	18

Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

Note: No one was sentenced to prison for a public order offense in 1986, 1987 or 1988; the figure shown here was the average sentence imposed for such offenses in 1989. Public order offenses mainly include weapons violations. See Appendix H for a list of the most common offenses that fall into these four offense categories.

The averages displayed in Table 1 mask a good deal of variation. The maximum sentence imposed in each offense category increased even more than the average sentence (see Table 2). In 1986, the maximum confinement sentence imposed for a violent crime was 999 months, more than twice as long as the average prisoner could expect to live behind bars. (A sentence of 480 months, or 40 years or more, is considered a virtual life sentence). The maximum prison sentence imposed for a violent crime increased to 1,200 months, or 100 years, in 2016. By 2006, and again in 2016, the maximum sentence for property and drug offenses also reached the virtual life sentence threshold of 480 months, or 40 years. The maximum sentence for people sentenced for a public order offenses also rose substantially in recent decades.

Table 2.

Change in Maximum Sentence Length for Felony Defendants Sentenced to State Prison (in Months), by Offense Category, 1986-2016

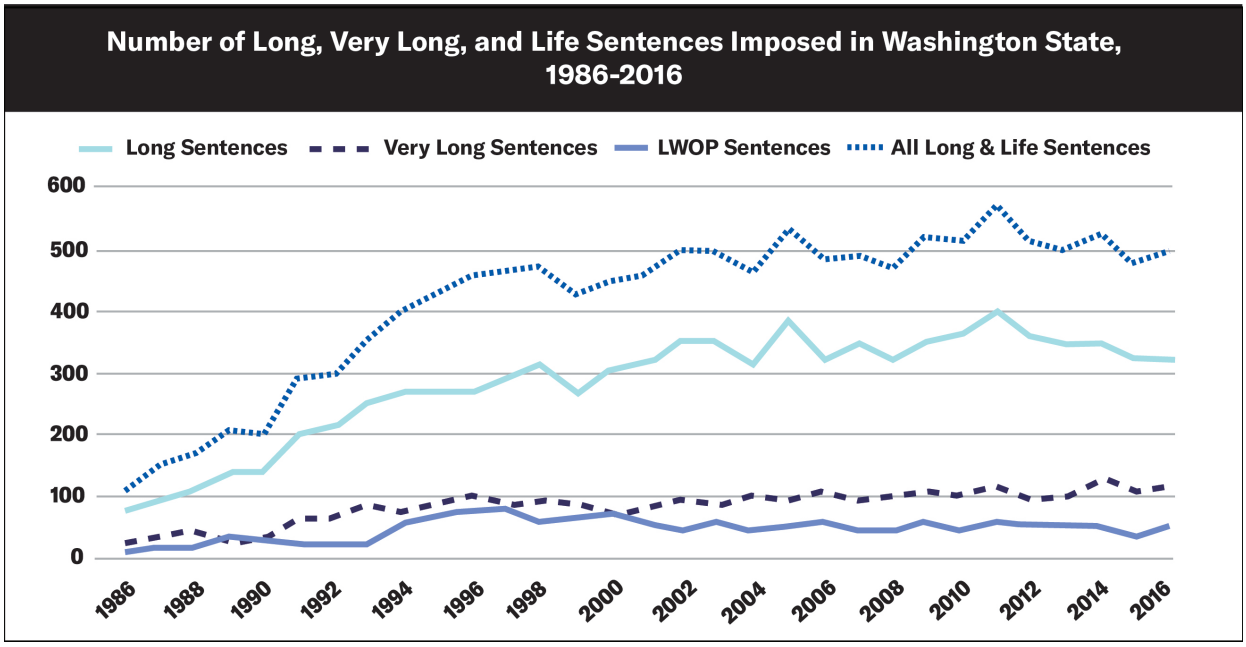
	Maximum Sentence 1986	*Maximum Sentence 1996*	*Maximum Sentence 2006*	*Maximum Sentence 2016*	*Percent Increase 1986-2016*	*Absolute Increase 1986-2016*
Drug	67	288	204	480	616%	413
Property	120	480	480	480	300%	360
Public Order	12	186	387	174	1350%	162
Violent	999	1200	1034	1200	20%	201

Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

Note: No one was sentenced to prison for a public order offense in 1986, 1987 or 1988; the figure shown for 1986 was the maximum sentence imposed for such offenses in 1989.

The number of felony defendants sentenced to long, very long, and life sentences also increased dramatically during this period (see Figure 6, below). Specifically, *the number of long sentences – defined here as a prison term of ten to twenty years – more than quadrupled; the number of defendants who received a very long sentence of twenty to forty years increased more than fivefold; and the number of LWOP (official and virtual) sentences was nearly five times higher in 2016 than in 1986.* As Figure 6 makes evident, 2016 was not an abberational year; the number of long and life sentences imposed that year was high because the frequency with which long and life sentences are imposed increased steadily over four decades.

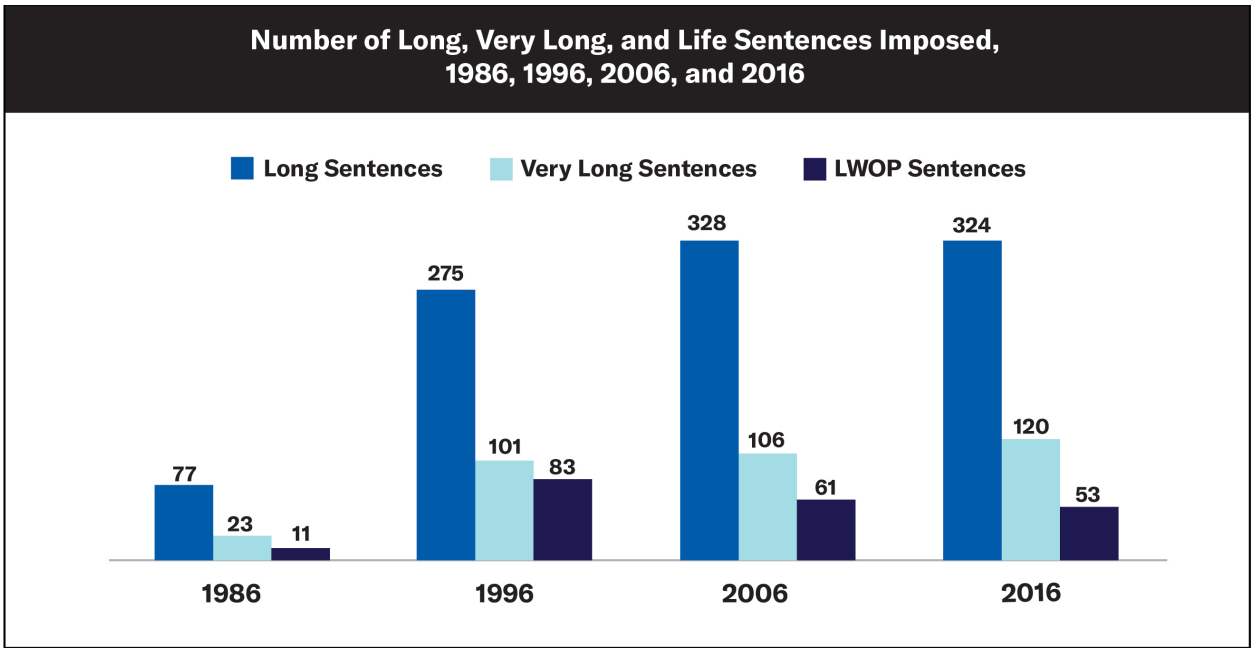
Figure 6.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: LWOP sentences include both formal and virtual LWOPs.

Although the number of virtual and official LWOP sentences imposed peaked in the late 1990s, the number of people who received an LWOP sentence in 2016 was nonetheless more than four times higher than the number imposed in 1986 (see Figure 7).

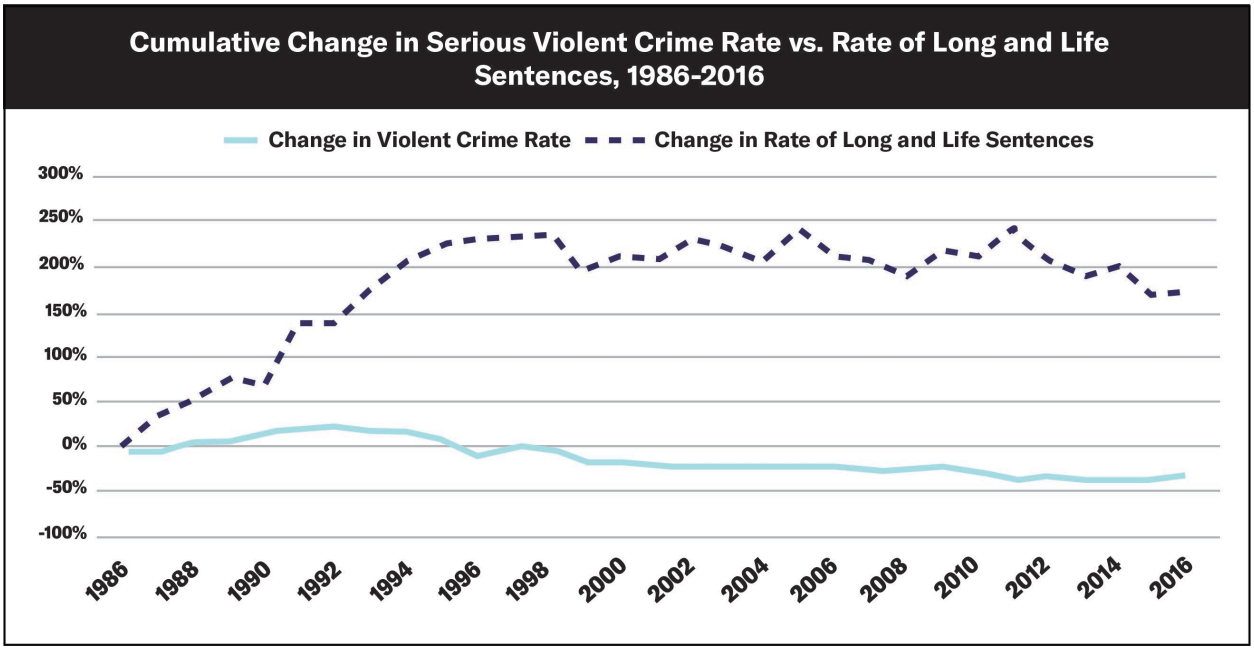
Figure 7.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: LWOP sentences include both formal and virtual LWOPs.

Paradoxically, the dramatic uptick in long and life sentences occurred at a time when crime rates were declining steadily. Figure 8 compares the cumulative change in the number of long and life sentences with the cumulative change in the number of index (serious) violent crimes known to the police in Washington State from 1986 to 2016.[89] This figure shows that the increased imposition of long prison sentences was not a response to crime trends. Specifically, *while the violent crime rate was 31 percent lower in 2016 than in 1986, the rate at which long and life sentences were imposed was 174 percent higher in 2016 than in 1986.*

Figure 8.



Source: Change in long and life sentences based on authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council. Crime data were taken from the FBI's *Uniform Crime Reports*. Data for 1986-2014 were accessed via the UCR online data analysis tool, available at http://www.ucrdatatool.gov/ Data for 2015 and 2016 were accessed via UCR Annual Reports, available at https://www.fbi.gov/services/cjis/ucr/publications (see Table 5 for 2015 and Table 3 for 2016).

In short, the number of long, very long and life sentences grew dramatically in recent decades despite falling crime rates. This trend was thus the consequence of the policy shifts described previously, and raises a number of concerns about fairness, justice and efficacy. These concerns are described below.

The Over-Representation of People of Color, Adolescents and Young Adults Among Those Serving Long and Life Sentences

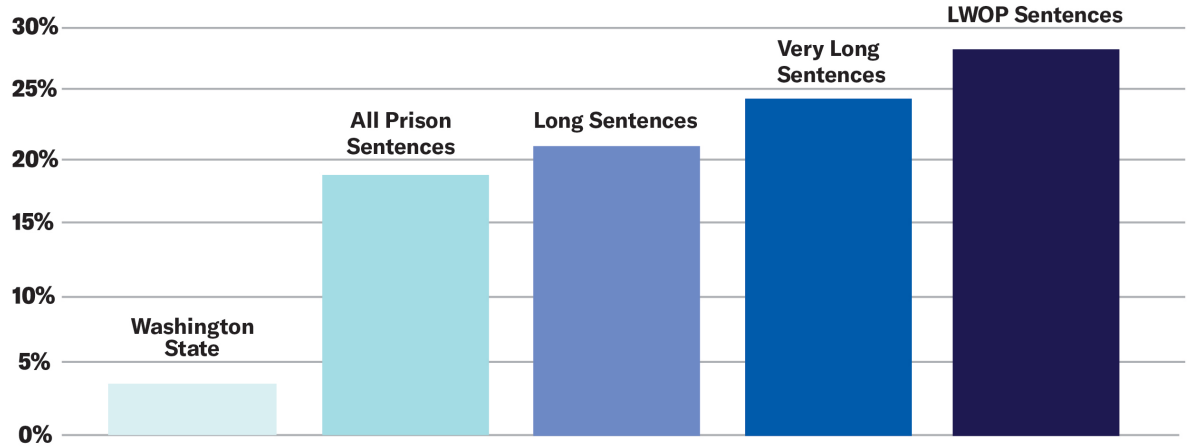
Long and life sentences are disporportionately imposed on people of color, and in particular, on black and Native American defendants. People who are identified as white, Latinx, or Asian in state sentencing data are under-represented among those who receive long and life sentences relative to their representation in the state

population. By contrast, black and Native American people are notably over-represented among those receiving long or life sentences.

Just over one (1.2) percent of the state population identifies as Native American, but 2.4 percent of those receiving long sentences, 2.5 percent of those receiving very long sentences, and 1.9 percent of those receiving life sentences are identified in the sentencing data as Native American. The degree to which black people are over-represented among those with long and life sentences is also notable, and increases as sentence length grows: an average of 3.5% of the state population identified as black through this time period, but 19% of those sentenced to prison, and 28% of those sentenced to life in prison, were black (see Figure 9). As discussed in Part V of this report, the adverse effects of prison sentences, especially long and life sentences, affect not only those serving time but also prisoners' families and communities.

Figure 9.

The Representation of Black People in Washington State, Washington State Prisons, and Among those Who Received Long and Life Sentences, January 1986 - June 2017

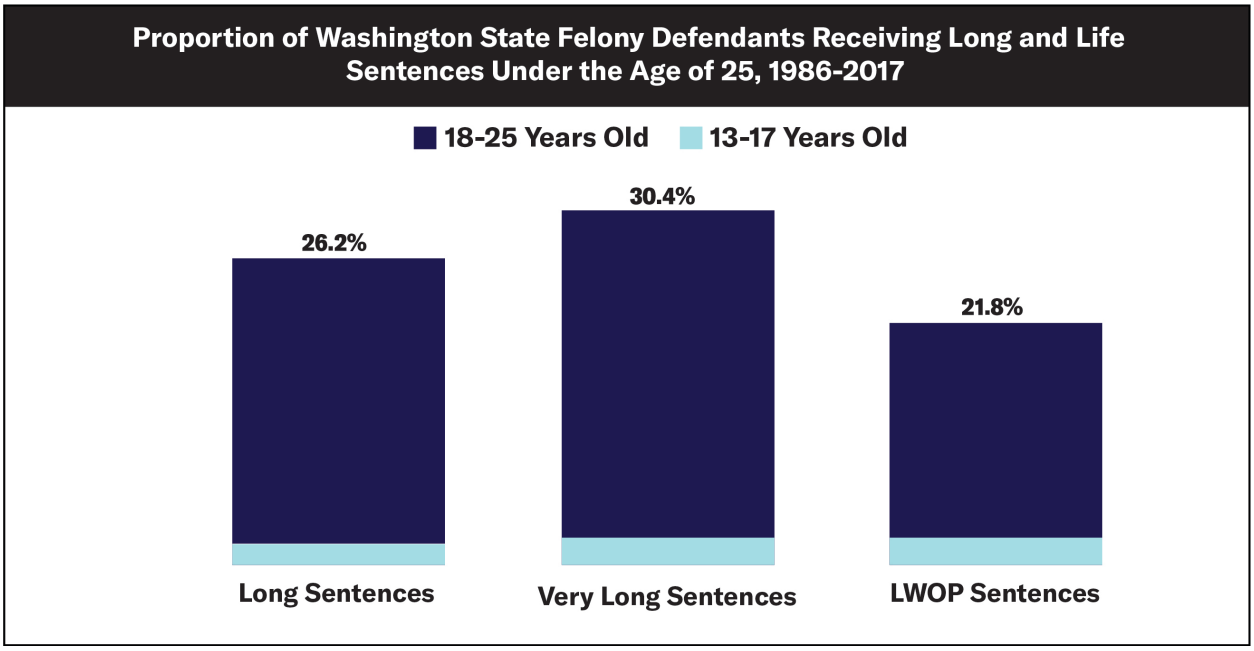


Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: LWOP sentences include both formal and virtual LWOPs.

The widespread imposition of long and life sentences on adolescents and young adults also raises concerns about fairness, particularly in light of recent research on brain development that shows that brain development is generally incomplete until people reach their mid to late 20s. Approximately one in three people sentenced to 20-40 years in prison in recent decades was aged 25 or younger at the time of their sentencing. Similarly, about one-fourth (27.9 and 24.1 percent, respectively) of all

long and life sentences have been imposed on people who were 25 or younger at the time of sentencing (see Figure 10). Because the data upon which these figures rest include information about the date of sentencing rather than the date of the underlying offense, and because there is often a substantial gap between the date on which a crime is committed and the date on which sentencing occurs, these figures underestimate the proportion of people sentenced to long and life sentences for crimes they committed while 25 or under.

Figure 10.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: LWOP sentences include both formal and virtual LWOPs. Data include the first six months of 2017.

The frequency with which long and life sentences are imposed on children and young adults in Washington State is in tension with recent studies on brain development and maturation. This body of research indicates that brain development is a gradual process, one that is not complete until people enter their mid to late 20s. This is especially true for young people who have experienced significant trauma, which is the case for the majority of people who come into contact with the criminal justice system at a young age.[90] More specifically, studies show that adolescents and young adults are more impulsive, present-oriented, susceptible to peer and other outside influences, sensitive to immediate rewards, and volatile in emotionally charged situations than older adults.[91] Imposing long and life sentences on young people is in tension with this body of evidence, which suggests that maturation is likely to occur and that young adults are highly amenable to rehabilitative programming.

The proliferation of long and life sentences has also contributed importantly to the incarceration of the elderly. *In Washington State, as of December 2018, nearly one in five (18 percent) of all state prisoners were more than 50 years old.*[92] *This trend has fueled a dramatic increase in the number of Washington State prisoners who are expected to die behind bars.* In 1999, Washington State prisons housed 359 prisoners who were serving an LWOP sentence.[93] By March 2019, that number had risen to 697. This figure does not include the other 632 prisoners who were serving virtual LWOP sentences – sentences that are so long that those serving them are expected to die in prison – as of June 2015.[94]

As discussed in Part VI of this report, the incarceration of the elderly is an expensive and ineffective approach to public safety because the risk that someone will re-offend declines dramatically with age[95] and because imprisoning older people is quite costly.[96] This trend also raises a number of important concerns about the humanity of incarcerating the elderly in circumstances that accelerate the aging process and undermine mental and physical health – particularly when the people who are confined have not had the opportunity to show that they are safe to release.

The next section explores how and why long and life sentences proliferated in the context of dramatically falling crime rates.

PART IV: EXPLAINING THE PROLIFERATION OF LONG AND LIFE SENTENCES

The proliferation of long and life sentences in Washington State stems from a series of policy changes that have increased sentence length, expanded the circumstances under which LWOP sentences may be imposed, and enhanced prosecutorial leverage in the plea bargaining process. These policy changes were described in Part II. This section of the report quantifies the extent to which these policy changes contributed to the proliferation of long and life sentences in Washington State.

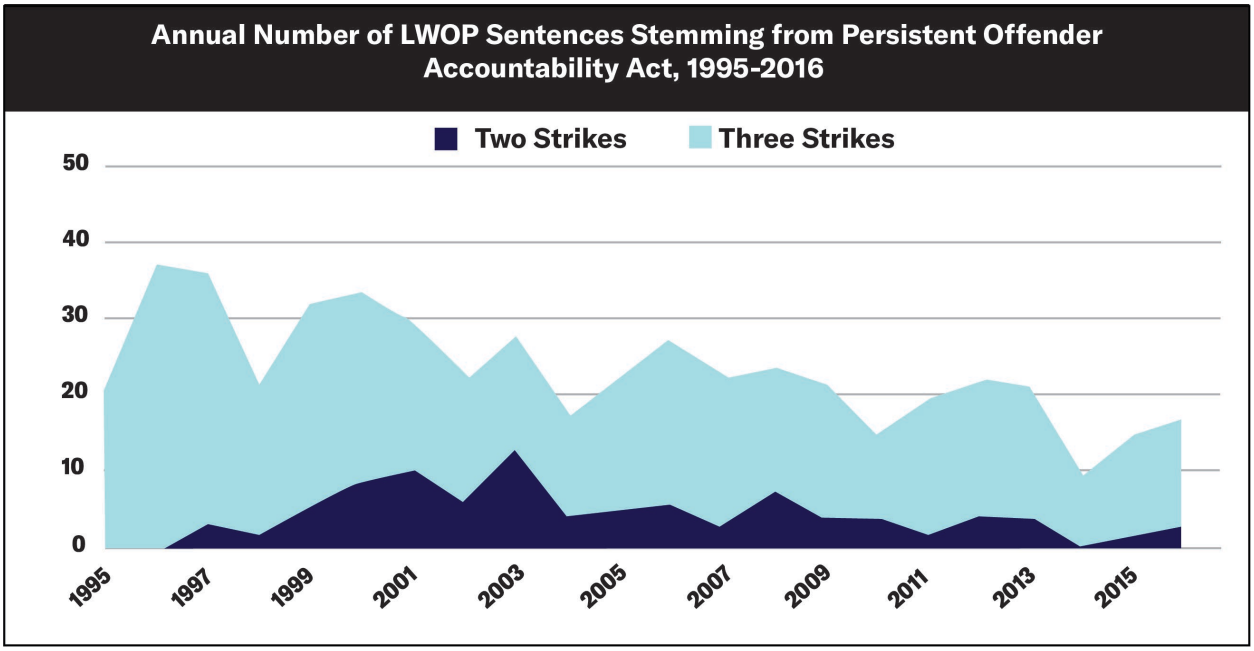
In brief, the evidence shows that changes to the rules regarding the calculation of offender scores have contributed most to the proliferation of long and life sentences. The Persistent Offender Accountability Act and the Hard Time for Armed Crime were also important drivers of this trend.[97] Together, these policies also fueled the growth of the "trial penalty." This increase in the difference between the average sentence imposed at trial versus through the plea bargain process is also an important cause of the proliferation of long and life sentences, one that raises a number of ethical concerns. These developments are described below.

Three-Strikes and the Expansion of Life Without the Possibility of Parole

LWOP sentences had already increased prior to the enactment of the SRA as a result of legislation mandating that LWOP (or the death penalty) be imposed in cases involving aggravated murder.[98] This marked a notable change from pre-1975 practice: for much of the 20th century, *all* prisoners were potentially eligible to be considered for release after serving a little over 13 years behind bars. By the late 1970s, however, this was no longer the case: anyone convicted of aggravated first degree murder was rquired to be sentenced to death or life in prison without the possibility of release. As a result of this new legislation, the number of LWOP sentences ticked gradually upward through the 1980s and early 1990s. In 1986, 11 LWOPs were imposed for aggravated murder; by 1994, just prior to the passage of the three-strikes law, that number was 57.

The enactment of the Persistent Offender Accountability Act (POAA) in 1995 notably increased the number of official LWOP sentences imposed each year, particularly in the first decade after 1995 (see Figure 11). From 1995 through June of 2017, a total of 503 official LWOPs have been imposed as a result of a two- or three- strike conviction.

Figure 11.

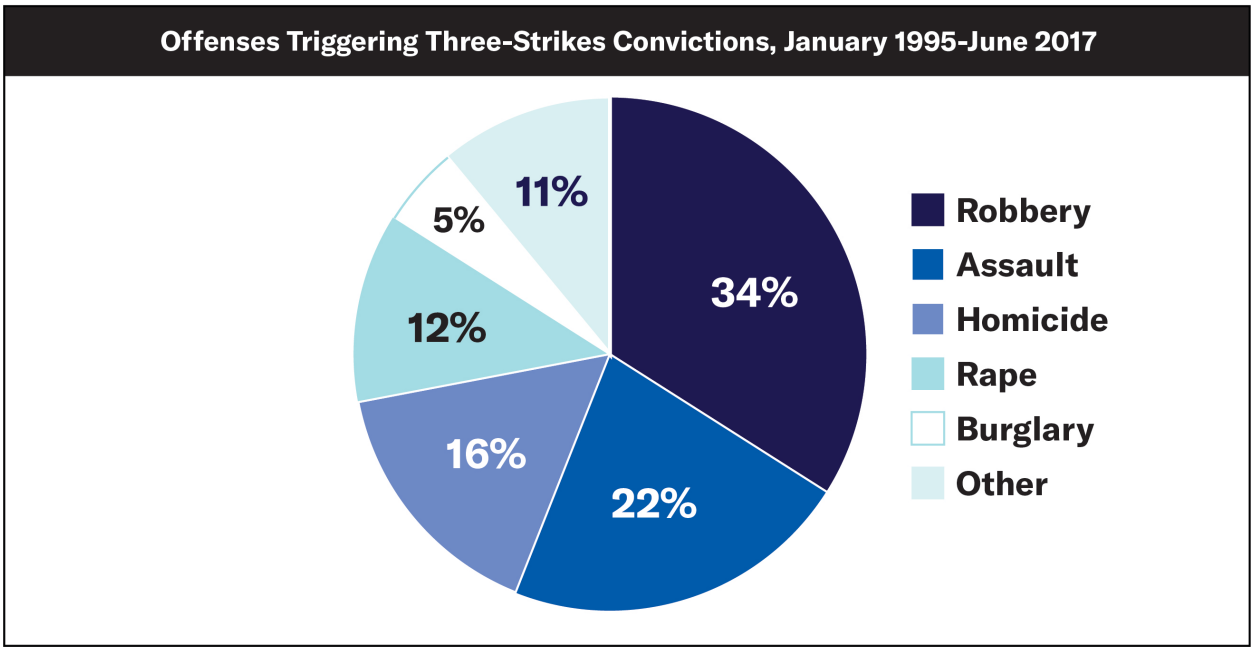


Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

While the number of two- and three-strike convictions has diminished somewhat in recent years, this statute continues to contribute to the growth of the LWOP population in Washington State. From 1995 to June 2017, 70 percent of those who received a formal LWOP sentence (which do not include virtual life sentences of 40 or more years) were sentenced under the Persistent Offender and Accountability Act. If both formal and virtual life sentences are included in these calculations, we find that 38 percent of those who received a formal or virtual life sentence between 1995 and June 2017 were sentenced under this legislation.

The most serious offenses that result in a three-strikes conviction are identified in Figure 12. This figure shows that the majority (57%) of the convictions triggering a sentence of LWOP under the three strikes provision have involved robbery or assault.[99] Burglary, rape, and homicide triggered another 5 percent, 12 percent, and 16 percent, respectively.

Figure 12.



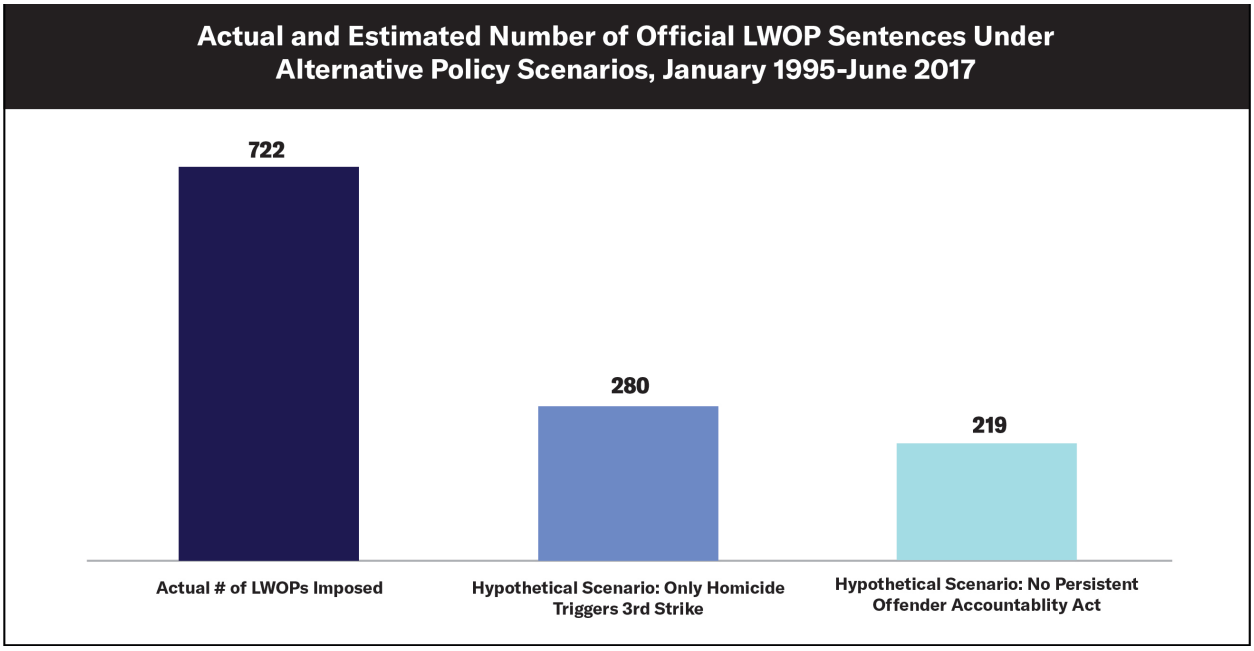
Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: Data include the first six months of 2017.

Figure 13 compares the number of official LWOPs that were actually imposed[100] with the estimated number that would have been imposed under two hypothetical policy scenarios: 1) if the POAA only applied when the third strike offense was homicide, and 2) if the POAA were not in effect at all. It is important to note that these analyses do not include the many virtual life sentences that have also been imposed in recent decades.

The counterfactual method used to generate these and the other estimates shown below is designed to isolate the impact of one causal factor (in this case, the enactment of the POAA) on a particular outcome (the number of formal LWOPs imposed), and assumes that all other dynamics remain constant. As Figure 13 reveals, the number of official LWOPs imposed would have been notably smaller if the POAA only allowed for the imposition of LWOPs if the third strike involved homicide. In this hypothetical scenario, 280 instead of 722 official LWOP sentences would have been imposed from

1995 through June of 2017. Of course, the number of official LWOPs would have even smaller if the POAA had not been enacted at all. In this scenario, there would have been 219 official LWOPs for aggravated murder only.

Figure 13.



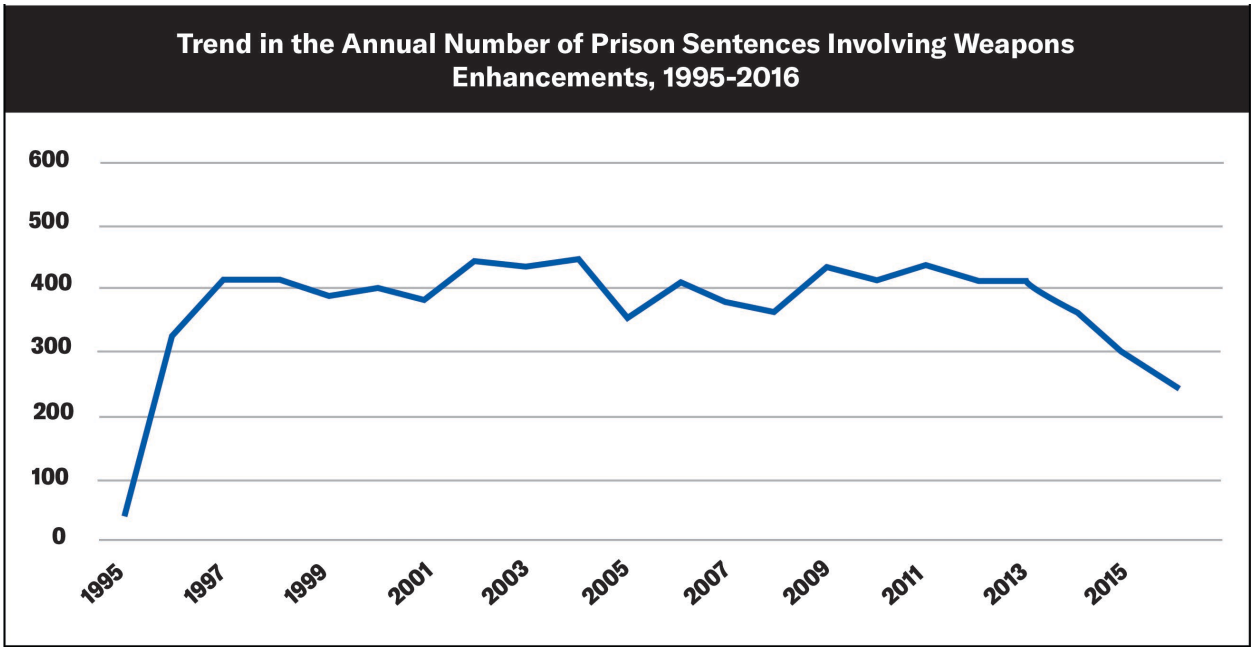
Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: Data include the first six months of 2017.

These alternative policy scenarios do not affect the number of people serving virtual life sentences of 40 or more years. As noted previously, DOC data shows that as of June 2015, Washington State prisons housed 632 people serving virtual LWOP sentences – sentences that are so long that those serving them are expected to die in prison.[101] In 2016 and the first half of 2017, the courts sentenced another 50 people to virtual life sentences.

The Hard Time for Armed Crime Act and Increased Sentence Length

The Hard Time for Armed Crime Act (HTACA) also increased the number of long and life sentences imposed. As Figure 14 shows, the HTACA led to a dramatic uptick in the number of prison sentences that include additional time for weapons enhancements. Although the imposition of weapons enhancements has declined slightly in very recent years, they remain commonplace, and were imposed in 338 cases sentenced in 2016. (Sentencing enhancements stemming from other case characteristics have likely also increased average sentence length and contributed to the growth of long and life sentences, and are described in Appendix D. However, information about these enhancements is not included in the sentencing data provided by the Caseload Forecast Council, so the impact of these policy shifts cannot be empirically assessed).

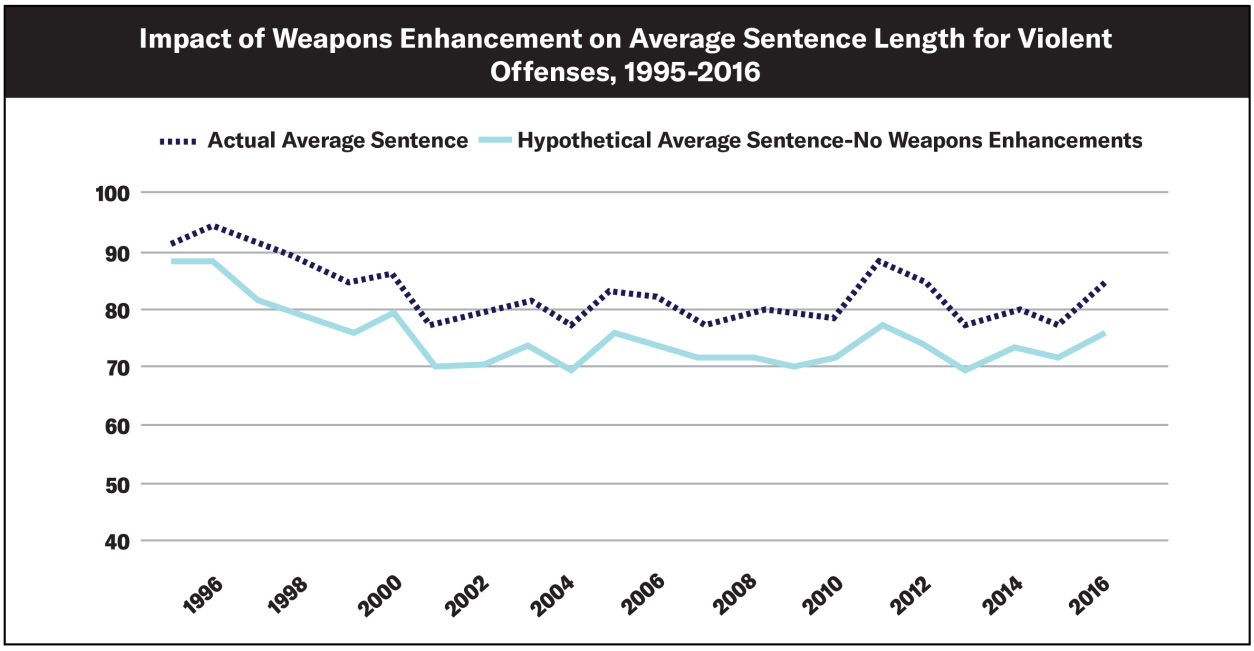
Figure 14.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

A substantial majority (more than three in four) of those who received sentence enhancements were convicted of a violent crime. Figure 15 shows the contribution of prison sentences deriving from weapons enhancements to the average sentence imposed from 1995 to 2016 for violent offenses. This average additional penalty ranged from a low of three months in 1995 to a high of eleven months in 2012. On average, sentence enhancements added an additional eight months to the sentences imposed for this category of crimes each year.

Figure 15.

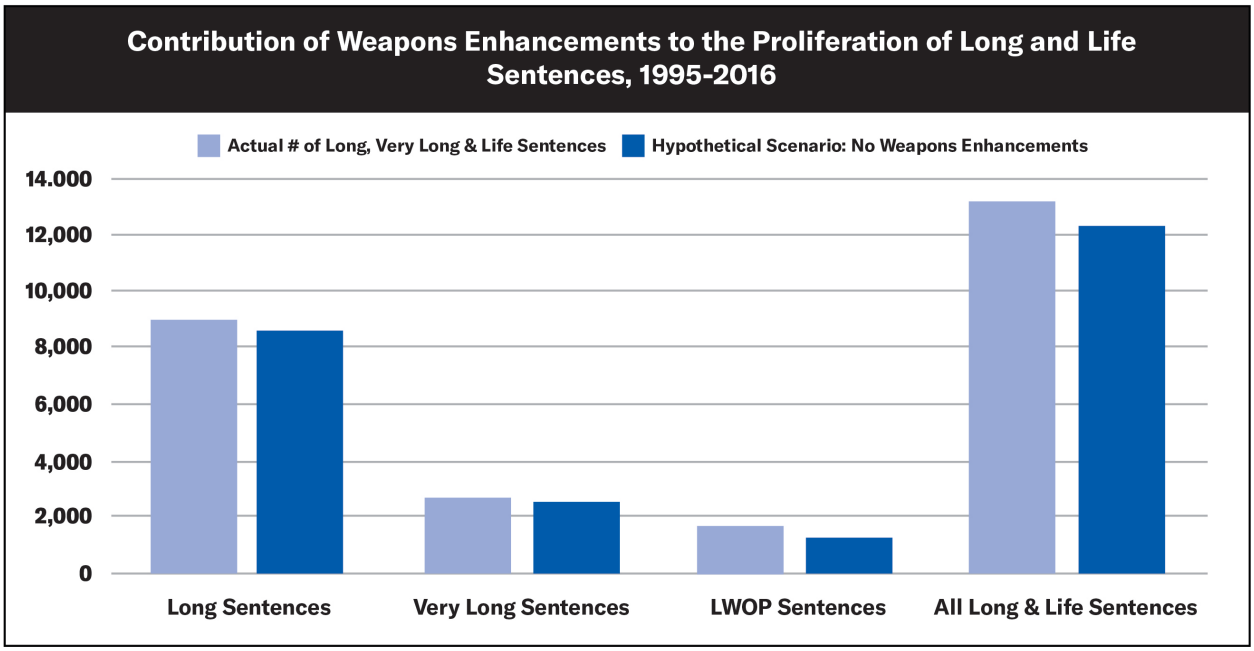


Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: Sentence lengths are measured in months.

There is significant variation within these averages. While most cases do not involve weapons enhancements, many do. From January 1995 to June 2017, 2,723 sentences were imposed that included at least sixty months (5 years) of additional confinement due to a weapons enhancement. In 2016, weapons enhancements were imposed in 338 cases; in 121 (36 percent) of these cases, the defendant received at least 60 months (five years) of additional confinement time as a result of these enhancements. Of these, nine defendants received twenty-five or more more years of additional prison time from weapons enhancements alone.

As Figure 16 shows, the imposition of additional prison time via weapons enhancements has had a notable impact on the number of long, very long, and life sentences imposed since 1995. In this figure, the hypothetical scenario is one in which weapons enhancements were not imposed and all else remains unchanged. The analysis shows that 954 fewer long and life sentences would have been imposed if weapons enhancements were unavailable and other patterns remained constant.

Figure 16.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

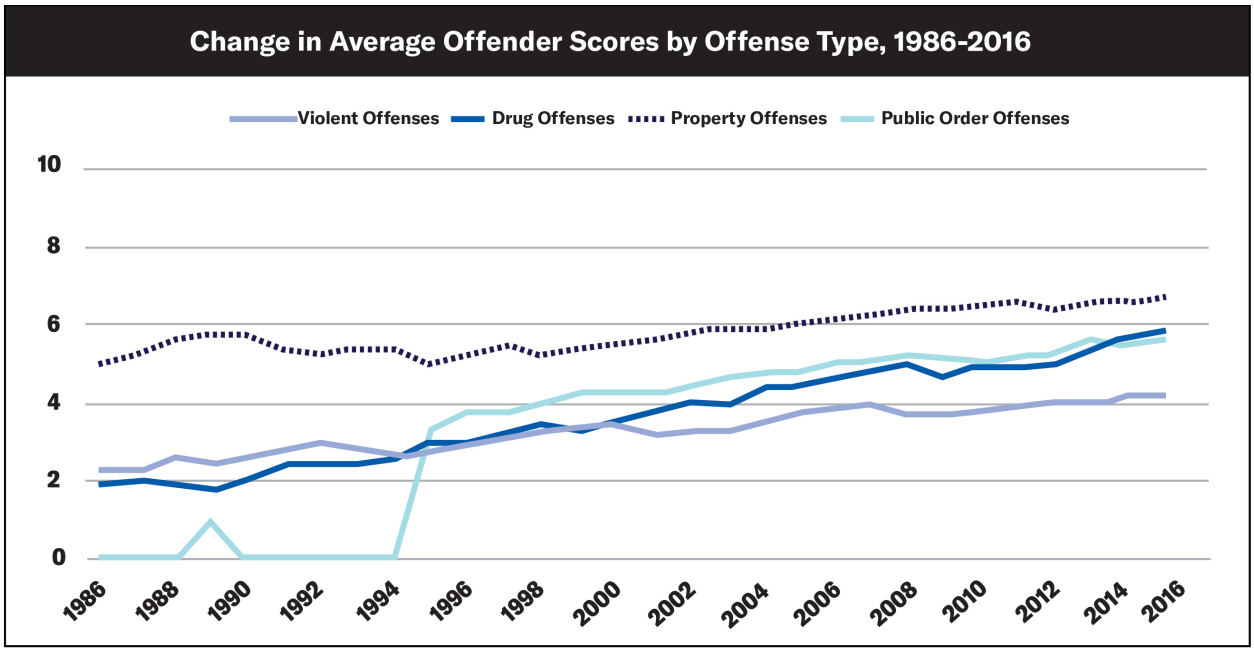
Note: LWOP sentences include both official and virtual LWOPs.

In short, sentences in some cases have been profoundly impacted by weapons enhancements, and their overall contribution to the number of long and life sentences has been notable. The increase in offender scores over this time period, discussed below, has been even more consequential.

Statutory Changes to the Calculation of Offender Scores

As Figure 17 shows, average offender scores increased across all offense categories. As discussed previously, this increase in average offender scores does not stem from an inevitable compounding of offender scores over time. Although justice-involved peoples' offender scores will increase over the course of continued involvement in the system, most people who are at one point in time justice-involved will "age out" of the system, while other first-time offenders are just entering the system. The people who were sentenced in Superior Court in 1984 after the SRA went into effect would have included a mix of people who had no prior justice-involvement, were in the middle of their crime-involved years, and were on the verge of "aging out" of crime. The same is true today.

Figure 17.

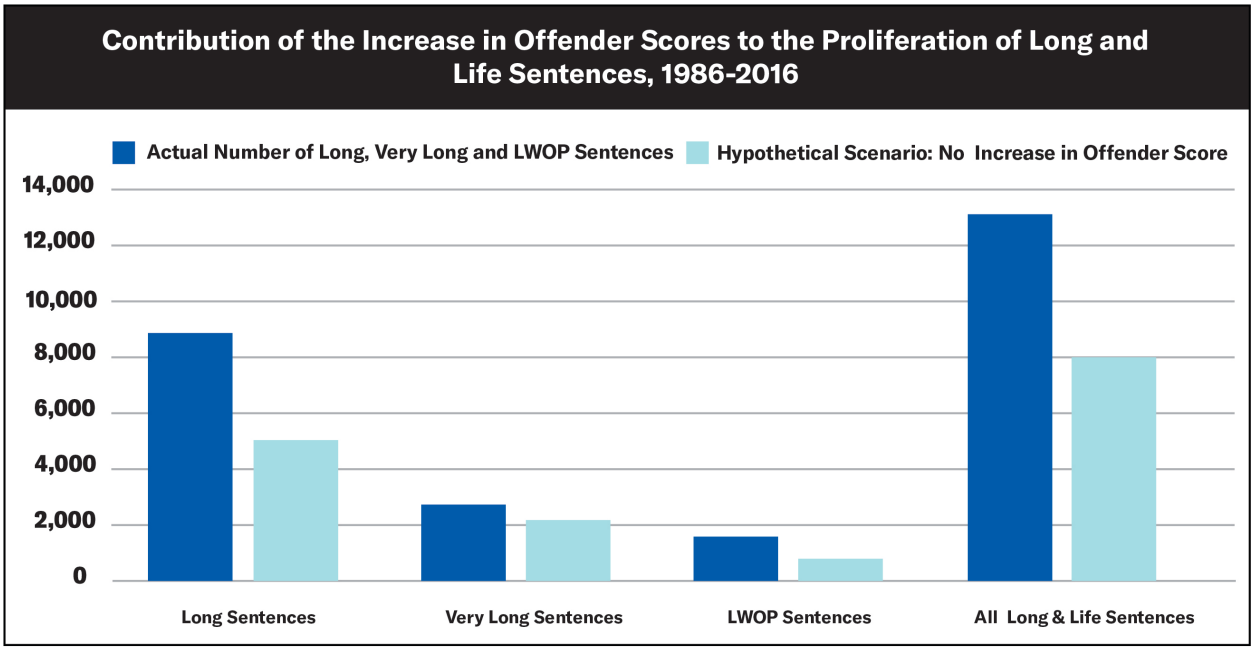


Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

These increases in average offender score do not appear to stem from changes in criminal propensities either. If the increase in offender scores among people sentenced to prison revealed something about trends in criminal behavior, we would expect to see rising crime and/or recidivism rates among that same population. Instead, crime rates fell and recidivism rates were stable during this time period (see Figures 4 and 5). The fact that these measures of crime severity did not increase suggests that rising offender scores resulted mainly from the many statutory changes to rules that govern the calculation of offender scores described in Appendix F.

Figure 18 shows that the increase in offender scores contributed meaningfully to the proliferation of long and life sentences.[102] Specifically, in the hypothetical scenario in which offender scores remained at their 1986 levels, the number of long (10-20 year) and life sentences would have been reduced by 44 and 47 percent, respectively. Because some of those who actually received a virtual life sentence (40 or more years) would have received a very long (20-40 year) sentence if offender scores did not increase, this category of sentences decreases somewhat less (by 17 percent) in this hypothetical scenario. Overall, though, *the number of long, very long, and LWOP sentences would have been reduced by 39 percent if offender scores had not increased during this period.*

Figure 18.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

Note: LWOP sentences include both formal and virtual LWOPs.

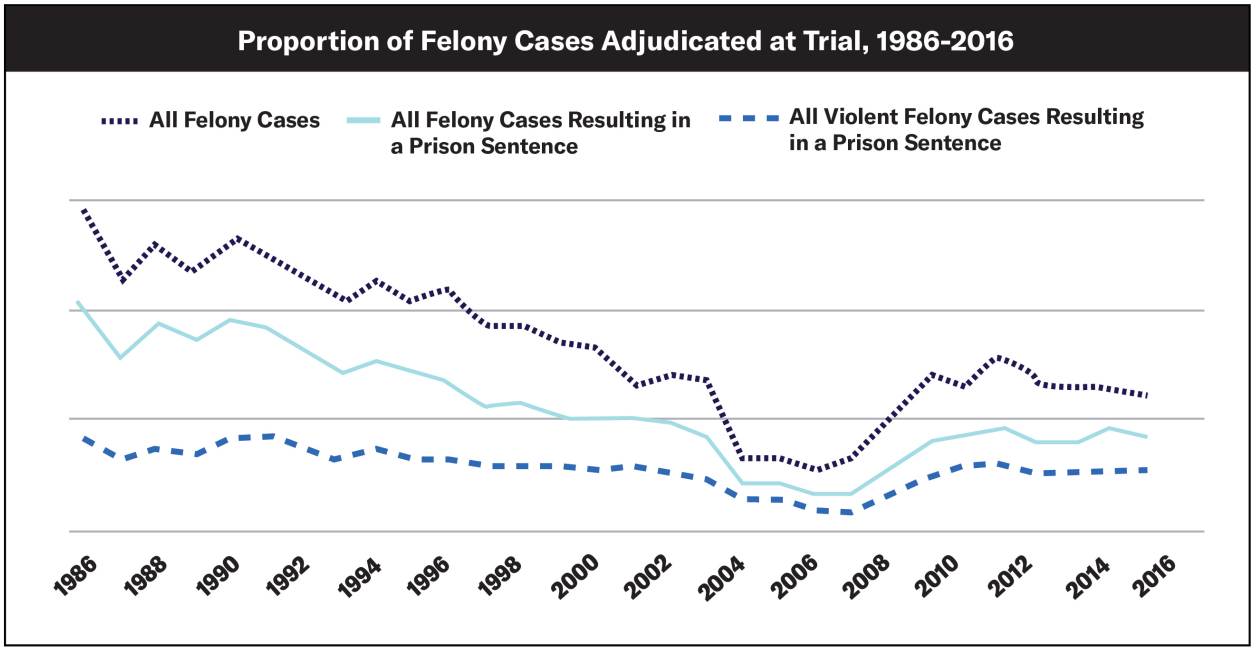
The Growth of the Trial Penalty

In addition to impacting sentencing outcomes, the Persistent Offender Accountability Act, the Hard Time For Armed Crime Act, and the statutory changes that govern the calculation of offender scores appear to have had important consequences for the criminal justice process. Many observers have noted that the enactment of mandatory minimum and other tough sentencing laws dramatically reduced the proportion of cases that go to trial.[103] Faced with the threat of increasingly long and life sentences, fewer defendants exercise their constitutional right to trial, and those who do face a

heavy price. In the federal system, for example, the share of cases adjudicated at trial plummeted from about 20 percent in the 1980s to 3 percent in recent years.[104]

A similar shift has taken place at the state level,[105] including in Washington State. Figure 19 shows the share of all felony cases, all felony cases resulting in a prison sentence, and felony cases involving violent offenses that resulted in a prison sentence that have been adjudicated at trial from 1986-2016. As this figure shows, the proportion of all cases that were adjudicated at trial declined notably across all of these categories.

Figure 19.

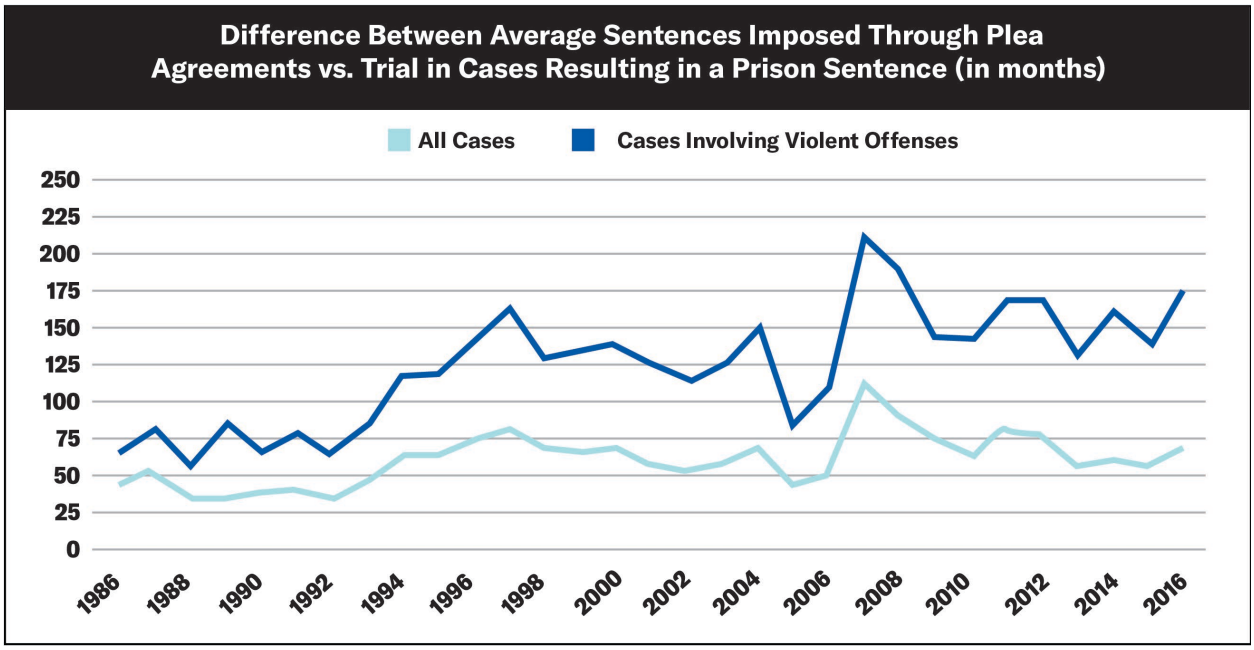


Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

In this context, the difference between the average sentence imposed via plea agreements versus those imposed at trial grew notably. For example, for all felony cases that resulted in a prison sentence, the "trial penalty" in 1986 was 46 months. This means that on average, people who were convicted at trial received sentences that were 46 months longer than those who pled guilty. This gap peaked in 2007 at 113 months. By 2016, the "trial penalty" was 65 months, nearly five and one half years. The trial penalty is much larger in cases involving violent offenses. For this category of cases, the gap between the average prison sentence for violent crimes

adjudicated via a plea agreement versus trial was 64 months in 1986. By 2016, that gap had increased to 174 months, or fourteen and a half years, a 172 percent increase (see Figure 20).

Figure 20.



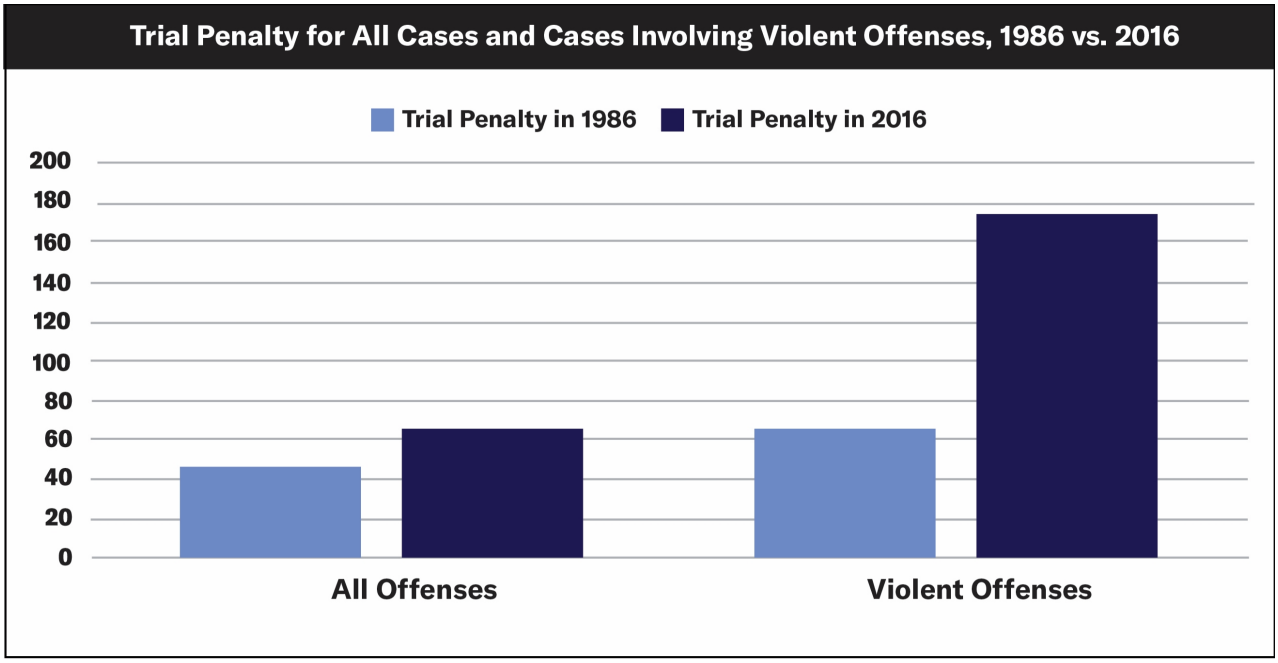
Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.

In short, it is clear that the gap between the sentences imposed via plea bargains and those imposed at trial grew substantially as the legislature enacted tough sentencing laws; this trend has been especially pronounced in cases involving violent crime. In 2016, on average, defendants charged with a violent offense who exercised their right to a trial could expect to receive a sentence that includes an additional fourteen and one-half years of confinement.

The trial penalty grew because average sentence length grew more dramatically in cases adjudicated at trial than in those resolved through a plea agreement from 1986 to 2016. Specifically, for cases involving all offense types, average sentence length for cases resolved through plea agreements increased by 11 percent, while those adjudicated at trial increased by 29 percent. For cases involving violent crimes, average sentence length for cases resolved through plea agreements increased by 30 percent, while those adjudicated at trial increased by 111 percent during this time period.

This illustrates an increase in the trial penalty, especially in cases involving violent offenses (see Figure 21).

Figure 21.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: These data are shown in months.

Table 3 provides more detailed, offense-specific information regarding the growth of the trial penalty. As this table shows, the trial penalty increased for serious violent offenses; its growth thus appears to be indicative of a widespread trend in which the penalties imposed at trial grew far more than the penalties imposed through plea bargains.

Table 3.

Increase in Trial Penalty for Specific Violent Offenses, 1986-88 vs. 2014-16			
	Increase in Average Sentence: Trial	*Increase in Average Sentence: Plea*	*Increase in Average Trial Penalty*
Homicide 1	177 (51%)	38 (12%)	139 (383%)
Homicide 2	140 (71%)	66 (41%)	74 (205%)
Rape 1	174 (176%)	88 (131%)	85 (274%)
Rape 2	120 (299%)	98 (286%)	22 (372%)
Assault 1	219 (179%)	57 (54%)	161 (992%)
Assault 2	48 (163%)	13 (69%)	28 (469%)
Robbery 1	91 (115%)	9 (14%)	82 (480%)
Robbery 2	22 (89%)	7 (31%)	15 (532%)

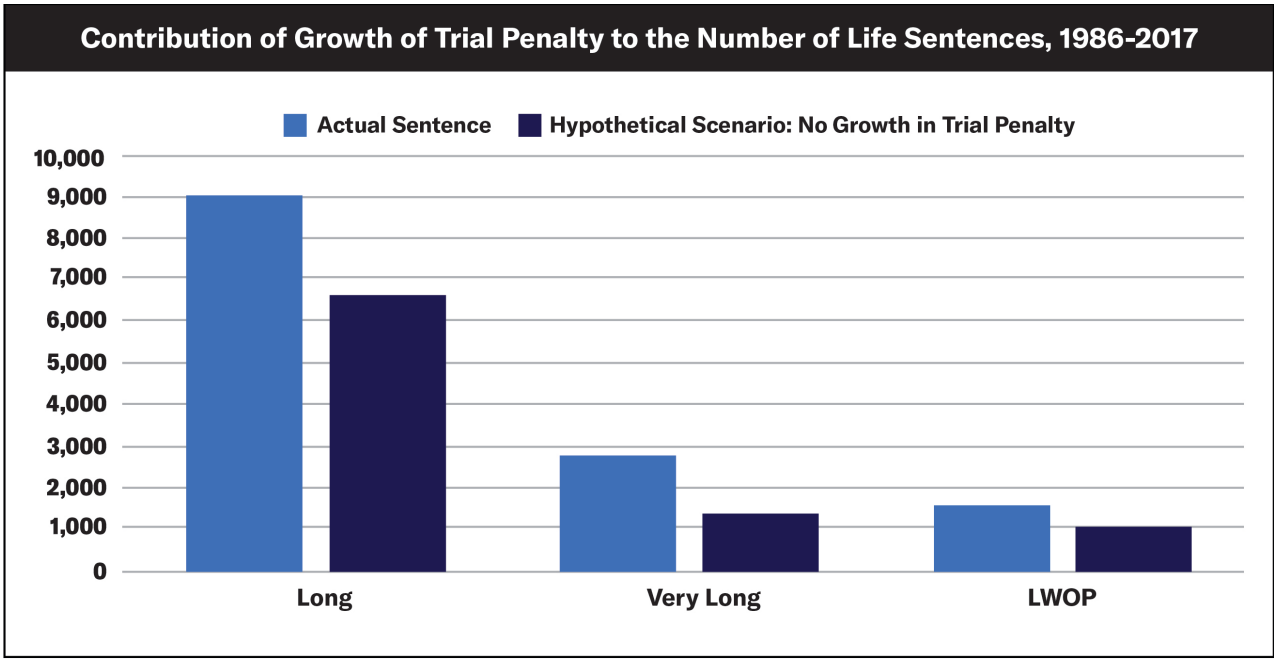
Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: Changes in average sentence length and trial penalty are shown in months. The data upon which the calculations presented here are shown in Appendix I, Table I1.

The gap between the average sentence imposed through plea bargains and the average sentence imposed at trial may reflect, in part, the fact that people with higher offender scores are facing longer sentences and thus have a greater incentive to go to trial. To control for this potential selection bias, the data presented in Table I2 in Appendix I show the average sentence imposed in 1986-88 versus those imposed in 2015-17 for specific offenses and specific offender scores. As this table shows, the difference between the average sentence imposed at trial and through plea deals for specific offenses in cases involving identical offender scores also grew over time in the majority of instances.

The evidence thus indicates that the gap between sentences imposed at trial and those reached through plea deals has grown substantially. Below, Figure 22 shows that the growth of the trial penalty had a notable impact on the number of long, very long, and LWOP sentences imposed. Specifically, the figure shows how many of these sentences would have been avoided if the trial penalty remained at its 1986 level and all else

remained unchanged. The results show that holding the trial penalty constant would reduce the number of long, very long and LWOP sentences by 27 percent, 47 percent, and 33 percent, respectively.

Figure 22.



Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: LWOP sentences include both formal and virtual LWOPs. Data include the first six months of 2017.

Summary

A number of policy changes fueled the proliferation of long and life sentences in Washington State. These policy changes include the Persistent Offender Accountability Act, the Hard Time for Armed Crime Act, and myriad changes to the rules that govern the calculation of offender scores. These policy changes directly increased the imposition of long and life sentences. They also enhanced prosecutorial leverage in plea negotations. In this context, the trial penalty – that is, the difference between average sentences imposed via plea bargains and those imposed at trial – grew substantially, particularly in cases involving violent crimes.

Table 4 summarizes the results of the counter-factual analyses presented above, and compares how reversing each of these policy shifts would impact the imposition of long, very long, and life sentences (assuming all else remained constant). As this table shows, reversing the increase in the average offender score and the growth of the trial penalty would most substantially reduce long and life sentences. Removing weapons enhancements would also have had a notable impact, while repealing the Persistent

Offender Accountability Act would significantly reduce the number of LWOP sentences imposed.

Table 4.

Comparison of Impact of Various Policy Changes on Proliferation of Long and Life Sentences, 1986-2015				
	Impact on Number of Long Sentences	*Impact on Number of Very Long Sentences*	*Impact on LWOP Sentences*	*Impact on All Long and Life Sentences*
No Increase in Offender Score	-44% (-3,877)	-17% (-456)	-47.1% (-735)	-39% (-5,068)
No Increase in Trial Penalty	-26.9% (-2,279)	-47.2% (1,199)	-32.7% (-493)	-32% (-4,181)
No Weapons Enhancements	-6.1% (-447)	-8.3% (-181)	-25% (-326)	-8.8% (-954)
No Persistent Offender Accountability Act	Unknown	Unknown	-69.7% (-503)	Unknown

Source: Authors' analysis of Washington State Superior Court Sentencing data provided by the Washington State Caseload Forecast Council.
Note: LWOP sentences include both official and virtual LWOPs.

In sum, the proliferation of long and life sentences in Washington State over the past four decades does not stem from increases in crime or recidivism rates. Instead, *the adoption of a range of changes to sentencing policies enabled the imposition of much longer sentences and increased the gap between the sentences imposed at trial and those imposed via plea agreements.* The next section of this report shows that reliance on long and life sentences is an ineffective and costly way of protecting public safety. It also explores the fiscal, social, and human costs associated with the proliferation of long and life sentences.