

**Criminal Justice Policy Coalition
Norfolk Lifers Group**

**LIFE
WITHOUT
PAROLE
A Reconsideration**

Gordon Haas and Lloyd Fillion

*Collective Action for
Humane, Healing and Effective Criminal Justice Policy*

Acknowledgments

This paper is an outgrowth of a policy opposing Life Without Parole, adopted in 2003 by the Criminal Justice Policy Coalition. The first paragraph of the two-page policy (found at www.cjpc.org/dp_cjpc_statement.htm) reads:

The Board of the Criminal Justice Policy Coalition, after several years' consideration, is endorsing Life With the Possibility of Parole after 25 Years (LWPPA25) as the appropriate maximum sentence to be given to those convicted of any crime, including first-degree murder. Currently the Commonwealth imposes the sentence of Life Without Parole (LWOP) as the maximum sentence for those convicted of first-degree murder. The CJPC opposes LWOP as it does the Death Penalty, viewing both sentences as antithetical to a criminal justice policy based on restorative principles.

(adopted May 23, 2003)

Consideration of this punishment certainly did not begin with that policy on that date. There are many individuals within the Commonwealth who individually concur that the maximum sentence of natural life is wrongheaded; those individuals are found within the legal profession and among criminologists as well as among the general citizenry. This paper intends to expand upon that policy and perhaps provide a vehicle for discussion and reconsideration.

There are a number of individuals who gave valuable comments and guidance to this paper: board members of the two sponsoring organizations, in particular the late Peg Erlanger, John Currie, Eric Tennen, Dr. Jenifer Drew and Dirk Greineder. In addition, staff of The Sentencing Project in Washington, D.C. provided critical guidance and input: Marc Mauer, Executive Director, Dr. Ashley Nellis, Research Analyst, and Nicole Porter, State Advocacy Coordinator. Research Analyst Stephanie Geary and Director of Information Technology David Quinlan of the MA Board of Parole graciously extended great assistance in compiling and providing certain statistics on paroled lifers in the Commonwealth. The government documents staff of the Boston Public Library was always generous with their assistance in providing court cases and state documents. Tom Neumeier and David Jefferson provided invaluable help with overcoming computer glitches and layout. To all these individuals the authors are indebted. Of course, any errors are the responsibility of the authors alone.

About the Authors

Gordon Haas has served as chair of the Norfolk Lifers Group at MCI-Norfolk for a number of years. In addition to this project, he is the author of an annual publication *A Study of Parole Board Decisions for Lifers in 2009* (April, 2010) now in its 4th edition and available from The Norfolk Lifers Group, P.O. Box 43, Norfolk, MA 02056-0043. (Lifers' Group Inc. P.O. Box 269, No. Quincy, MA 02171, \$7.50 to cover postage and handling).

Lloyd Fillion is a former board member of the Criminal Justice Policy Coalition and of the Massachusetts Citizens Against the Death Penalty. His background includes several decades of work with the former National Committee Against Repressive Legislation, a civil liberties organization focused on first amendment freedom of speech issues. He has written analyses of the several Geoghan reports as well as of several other CJ reports issued by the Commonwealth.

About the Organizations

The **Criminal Justice Policy Coalition**, established in 1996, is a member-based, non-profit organization dedicated to the advancement of effective, just, and humane criminal justice policy in Massachusetts. It seeks to accomplish this by expanding the public discourse on criminal justice, promoting dialogue and cooperation among diverse stakeholders, and building support for policies that better protect our communities, promote accountability and change for offenders, and provide restitution to victims. It holds occasional networking meetings on a variety of criminal justice issues, sponsors public forums and conferences, organizes legislative action, and provides support and coordination to groups engaged in advocacy. CJPC advocates the adoption of evidence based practices in sentencing, incarceration, probation and parole to implement practices which are proven to reduce recidivism and focus scarce resources on those most in need of supervision and support.

Since its founding in 1974, the **Norfolk Lifers Group** (MCI-Norfolk, P.O. Box 43, Norfolk, MA 02056-0043) has been continuously active in efforts directed at reforming penal and rehabilitative programs with the goal of reducing recidivism. It provides education programs for all inmates geared toward peace building and reconciliation, institutes programs for strengthening family ties, provides help to prisoners with medical issues, and hosts seminars regarding current legislative efforts impacting public safety. It also assists long-term prisoners with their preparation for parole hearings. The Lifers Group had constructed hundreds of wooden toys for the Toys for Tots program, established a Reading for the Blind Program, and hosted fund raising races for local charities until all such programs were eliminated by the Weld administration under its getting-tough-on-crime and returning prisoners to the joys-of-breaking-rocks philosophy.

Dedication

This work is dedicated to the late Peg Erlanger. Peg was a member of the CJPC board for the better part of the first decade of this century. In addition, she was intimately involved with the Alternatives to Violence Project at the national and international levels. Peg was firmly convinced of the need to eliminate Life Without Parole and helped guide this project through many phone calls and emails with one of the authors, as well as using her position as CJPC chair to ensure that the organization remained supportive. Her dedication to moving beyond retributive justice provides continued inspiration for the board.

PREFACE

In Massachusetts, the maximum penalty for murder is life in prison without the possibility of a parole (hereinafter LWOP). Often, when murder is discussed, the most heinous or bizarre murders take center stage, as if their perpetrators, the Charles Mansons* or Ted Bundys**, are representative of all those serving life sentences. The nearly one thousand men and women serving LWOP in Massachusetts, however, include those who were juveniles at the time of the murder, those who participated in a joint enterprise in which another person committed the actual murder, as well as some who have served decades in prison and who no longer pose a threat to society by reason of rehabilitation and/or age. A considerable number of these thousand individuals both recognize and are repentant of the suffering they have caused, and have done the difficult work needed to transform themselves into, and become agents of, constructive change for others.

There should be no gainsaying that any killing of a human being is horrendous.*** As with all killing, murder, the unlawful taking of a life, sows pain and suffering much beyond the immediate victim or victims. A murder rips through, and often rips apart, close families and friends of the victim, and most often does the same to the murderer's family and friends. Murders also impact less close associates of the victim and of the offender as well; murder destroys a part of the social fabric of the broader community.

It is impossible to deny these impacts. Nothing can absolve the murderer of the responsibility for the consequences of this act, as nothing can reverse that loss of life. All

* Charles Manson was the leader of a cult, which brutally murdered 7 persons over a two night period at two residences in greater Los Angeles in 1969. While technically eligible for parole, Manson has been denied each time he has appeared before the California Parole Board. en.wikipedia.org/wiki/Charles_Manson; accessed 1.3.10.

** Ted Bundy was a serial killer who is thought to have murdered at least 30 women over the course of 5 years between 1974 and 1978. en.wikipedia.org/wiki/Ted_Bundy; accessed 1.3.10.

*** Assisted suicides- occasionally called "mercy killings"- are exempted from this statement; they have a unique complexity and are well outside the considerations of this paper.

affected survivors are forced to come to terms with the murder, its consequences, and suffer the voids which murder creates. This process can take years, often a lifetime.

That said, life is not frozen at the point of a murder. People move on, struggling to self-mend, perhaps even those who perceive themselves as to be frozen by that act. The community is better served by recognizing that movement and embracing such healing in perpetrators and their families and friends as it intends to do in the families, friends and associates of the victims. It is in that healing that the community's social fabric can be rewoven.

There is substantive literature* addressing the devastation of murder and the impact on survivors. This paper only intends to address one aspect immediately impacting certain individuals—the murderers—as well as the community, which aspect has not received such attention: the punishment of life-without-parole.

This paper argues for the introduction of a parole hearing after twenty-five years of incarceration for those sentenced to LWOP as a way to recognize the healing which can occur in all people, even those who have committed murder.

* In addition to the scholarly sources of analyses regarding this work of healing are first person accounts, several of which are listed in the bibliography of the website for Murder Victims Families for Human Rights (www.willsworld.com/~mvfhr/bibliogr.htm; accessed 1.3.10)

PART 1: INTRODUCTION

Everyone serving a Life Without Parole sentence in Massachusetts, after twenty-five years should be afforded an opportunity to demonstrate both a rehabilitated character and a low public safety risk through access to a parole hearing and, where appropriate, parole. Presently, those serving LWOP have no opportunity for parole. Allowing a parole possibility after twenty-five years, as put forth in this paper, can be achieved without endangering public safety. The authors would agree with Burl Cain, Warden of the Louisiana State Prison in Angola, “Prison should be a place for predators and not dying old men. Some people should die in prison, but everyone should get a hearing.”^{1*}

The sentence of LWOP, an increasing phenomenon in the United States, contributes to this country having the highest per capita rate of incarceration in the world,² with 5% of the world’s population and 25% of its prisoners. According to one national study, of the 140,610 prisoners sentenced to life imprisonment^{**} in this country in 2008, 41,095, or 29%,³ were serving LWOP, an increase from 26.3% in 2003,⁴ and from 17.8% in 1992.⁵ In Massachusetts, as of January 1, 2008, 51% of all lifers were serving LWOP (917 out of 1785).⁶ This was close to twice the national average. In addition, the percentage of the total prison population serving LWOP sentences in Massachusetts in 2008 was 8.7%, the third highest percentage of the forty-eight states reporting data.⁷ The national average was 2.8%.^{8***}

* As noted in the Preface, even Charles Manson is eligible for parole. However, since 1978 he has applied 11 times and continuously been denied by the CA Board of Parole. His next parole date occurs in 2012.

** Sentences of life imprisonment may vary state by state and may include either LWOP or a sentence of life with a possibility of parole after a prisoner has served a prescribed number of years, e.g., 15, 25 or 40. Massachusetts has LWOP and Life with the possibility of parole after 15 years.

*** The source for the comparisons regarding life sentences and LWOP, *No Exit: The Expanding Use of Life Sentences in America*, does not acknowledge the difficulty of comparing states with a death penalty to those without a death penalty.

Massachusetts relies solely upon the sentence of LWOP for first-degree murder convictions.* The number of those serving LWOP in the Commonwealth has risen from 170 at the beginning of 1977⁹ to 938 at the beginning of 2009,¹⁰ an increase of 552%. In 1977, there were only 3 prisoners serving LWOP (170) for every 4 prisoners serving life with a chance of parole (223);¹¹ by 2009 this ratio had changed to more than one for one (938 vs. 852).¹² This was the third year in a row in Massachusetts that the number of lifers serving LWOP exceeded the number serving life with the possibility of parole.

The over five-fold increase in the number of prisoners serving LWOP in Massachusetts from 1977 to 2009 cannot be accounted for by a concomitant increase in the murder rate. Rather, the murder rate in Massachusetts decreased slightly from 1977 (.003% of the population of 5,782,000) to 2008 (.002% of the population of 6,449,755).¹³ In addition, the murder rate per population remained relatively consistent (.002%) from 1999 to 2008.¹⁴ Yet, the number of lifers serving LWOP increased 37% (683 to 938) in that period, while the rate of lifers serving second-degree sentences, i.e. with a parole possibility after fifteen years, hardly increased at all (850 to 868).¹⁵ What does appear to be occurring is that, without an opportunity for parole, the number of lifers serving LWOP entering the prison system is greatly outpacing the number dying in prison.**

*First-degree murder convictions require a finding of malice aforethought and premeditation or extreme atrocity or cruelty. Second-degree murder convictions require malice aforethought but not premeditation. Both first and second-degree murder convictions require the presence of intent. An individual, either alone or part of a joint venture to commit a felony punishable by life in prison such as armed robbery, during which a homicide occurs, must only be found to have the intent to commit the underlying felony in order to be convicted of first-degree murder. See the section on felony murder for a more thorough discussion. Those convicted of first-degree murder have no parole eligibility, i.e. LWOP. Those convicted of second-degree murder have parole eligibility after serving fifteen years.

**The Lifers' Group at MCI-Norfolk has, based on reports from fellow prisoners and media accounts, compiled a list of 170 names of prisoners serving life sentences who had died while incarcerated. This list, current as of June 1, 2010, is neither exhaustive nor distinguishes between those lifers who were serving LWOP and those who were serving second-degree sentences when they died. Specific years in which most of these lifers died and at which institutions are also unknown. Given that the names have come from the memories of lifers still incarcerated, it is estimated by the Lifers' Group that at least 80% of the names on the list have died within the past twenty-five years. The Department of Correction has been unable to provide the numbers of lifers who have died while incarcerated, whether serving LWOP or Life with the Possibility of Parole.

When a person is sentenced to LWOP, the decision has been made that the person is no longer fit to remain in society and that exclusion must continue no matter how much the person may change. LWOP ignores the obvious fact that over time some prisoners no longer pose a threat to harm others. They can be released on parole without endangering public safety and can constructively contribute to the welfare of the entire community. Merely warehousing human beings until they die is not a solution to criminal justice issues: not socially, not morally, not criminologically and certainly not fiscally. In suggesting Life with the Possibility of Parole after 25 Years as a replacement for the present LWOP sentence, the authors of this paper do acknowledge that some prisoners may remain unchanged and thus too dangerous to be let out of prison. But such decisions should be carefully measured after twenty-five years or more of incarceration, not at the time of sentencing immediately following a trial where the adversarial nature of that system least provides for reflection by both sides and a reasoned judgment.

In a Massachusetts poll conducted in 2005 by the Crime and Justice Institute of Boston, MA, two-thirds of the respondents favored the Commonwealth focusing on prevention and rehabilitation, rather than longer sentences or more prisons.¹⁶ While not having been specifically asked about life sentences, it is clear that a significant majority of the respondents no longer viewed the retributive model as representing an effective criminal justice system.

It should be noted that any lifer released on parole would be subject to parole for life. This is not an easy condition. Lifetime parole is not the freedom that most citizens enjoy. Parole may be quite intense, with unannounced visits, required routine check-ins, limitations on travel, social connections, living accommodations and work, curfews, abstinence from social stimulants such as alcohol, and possible required counseling, as well as the ever present possibility of a return to prison for even technical violations.¹⁷

The last sections of this paper focus on two subsets of those sentenced to life: juveniles, and those convicted of felony-murder. Among those currently serving LWOP are a considerable number of juveniles who were involved in some manner in the

commission of a murder or of a violent felony during which a life had been taken. Presently there are at least fifty-seven prisoners in Massachusetts serving LWOP who were under seventeen years of age at the time of their offenses.¹⁸ Supreme Court Justice Arthur M. Kennedy observed in *Roper v. Simmons*, a case banning the execution of juveniles, that juveniles are not fully matured, lack restraint, and are more susceptible to negative influences, including peer pressure.¹⁹

The felony murder doctrine raises another significant problem in the use of LWOP sentences. Of the over 40,000 prisoners serving LWOP, there are those including some juveniles, who have caused the death of a victim during a crime without any intention of doing so, and yet are presumed to have had such an intent. The result is that these prisoners are serving LWOP sentences.* For this reason, the felony murder doctrine is under attack in many states, some of which have eliminated it entirely, others of which have modified it so severely in practice that it has ceased to function.

In addition, there are prisoners serving LWOP in Massachusetts who have never actually killed anyone. They have been sentenced for the remainder of their lives because they had been convicted as joint venturers or co-conspirators in a crime in which someone else took a human life with or without prior intent. An ironic anomaly is that the one perceived to be most culpable in the crime, the actual “shooter”*** of the victim, may be allowed to plead guilty to second-degree murder. Thus, in such cases in Massachusetts, the actual perpetrator has a parole hearing after fifteen years and may be released back into society at some point. Allowing an actual shooter to plead guilty to a life sentence with a parole possibility may seem illogical. The reasons, however, are varied. A prosecutor may not want to risk a trial and a possible “not guilty” verdict. Allowing plea bargains saves the Commonwealth the expense of trials. Or, some shooters may be rewarded with a plea bargain to a lower offense for testifying against co-defendants.

*The actual number is not available from the Massachusetts Department of Correction.

***“[S]hooter” is used throughout this paper to refer to the person who actually did the killing, whether by gun, knife, choking or other means.

Affording possible relief to prisoners who, after twenty-five years of incarceration, can demonstrate rehabilitation, including the ability to rejoin the larger society without risk to public safety, is sound criminal justice policy. Such prisoners should be afforded the opportunity to appear before the Parole Board for consideration of release under supervision. The decision whether or not such a prisoner should be released would, of course, lie in the hands of that agency. It is time for the citizens of Massachusetts to embark upon a serious and extensive reflection on this waste of human and fiscal resources inherent in the present sole sentencing structure of LWOP.

Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.²⁰

In summary, it remains our contention that it will be safe to offer even first-degree murderers the *possibility* (not the assurance) of parole, providing they can satisfy the Parole Board that they may be released with little likelihood of endangering public safety, after 25 years of successful rehabilitation.

1. “Serving Life, With No Chance of Redemption”, Adam Liptak, The New York Times (October 5, 2007), at A-18.
2. www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal last modified 3/18/10; (accessed 10/20/10).
3. *No Exit: The Expanding Use of Life Sentences in America*, Ashley Nellis and Ryan S. King, The Sentencing Project (July, 2009) at 3.
4. *The Meaning of “Life”: Long Prison Sentences in Context*, Marc Mauer, Ryan S. King, and Malcolm Young, The Sentencing Project (May 2004), at 3.
5. *Id.* Table 3, at 11.
6. *Inmate Statistics*, January 1, 2008. Massachusetts Department of Correction. Pamela J. McLaughlin, Rhiana Kohl; (May, 2008) at 20, Table 23.
7. *No Exit: The Expanding Use of Life Sentences in America* Table 2. The two states with higher percentages than Massachusetts were LA (10.9%) and PA (9.4%). IL did not provide usable data and UT did not report data; the federal government data was included.
8. *Id.*
9. *A Description of the Residents of Massachusetts Correctional Institutions on January 1, 1977*, Massachusetts Department of Correction, Metzler (August, 1977), at 41.
10. *Inmate Statistics*, January 1, 2009 Massachusetts Department of Correction, Research & Planning Division. (May, 2009), at 17, Table 15. (Hereinafter “*Inmate Statistics 2009*”)
11. *A Description of the Residents of Massachusetts Correctional Institutions on January 1, 1977*. *Supra.*
12. *Inmate Statistics 2009*, *supra* at 17.
13. FBI Uniform Crime Report provided total population and numbers of reported murders in Massachusetts. The murder rates were calculated by the authors of this report.
14. *Id.*
15. *Inmate Statistics 2009 supra* at 17 (Table 16); statistics for 1999 from *Inmate Statistics, January 1, 2008*, Massachusetts Department of Correction, McLaughlin (October 2008) at 30.
16. *Rethinking Justice in Massachusetts – Public Attitudes Toward Crime and Punishment*, Crime and Justice Institute (2005), at 4.
17. The MA Parole Board website provides a broad sense of its mission. The list of sanctions is derived from www.mass.gov/Eeops/docs/pb/grad_sanctions_grid.pdf, accessed 9/26/09.
18. *Until They Die a Natural Death: Youth Sentence to Life Without Parole*. Massachusetts Children’s Law Center of Massachusetts. (September. 2009) at 4.
19. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).
20. *Graham v. Florida*, 130 S.Ct. 2011 (2010). In *Graham*, the Supreme Court found a life without parole sentence for juveniles convicted of non-homicides to be unconstitutional.

PART 2: A BRIEF HISTORY OF LWOP

In the eyes of most every developed nation, the United States has traveled a path regarding punishment from acclaimed enlightenment to its antithesis in the two centuries since the country's founding. As the eighteenth century turned into the nineteenth, the United States "asserted its moral leadership in the world for the first time, and did so with regard to criminal punishment."¹ As viewed by James Q. Whitman, Ford Foundation Professor of Comparative and Foreign Law at Yale University, that clearly is no longer the case: "Far from serving as a model for the world contemporary America is widely viewed with horror."² Michael Tonry, a recognized expert on comparative punishment, noted in 1998 that punishment in the United States was "vastly harsher than in any other country to which the United States would ordinarily be compared."³ According to Vivian Stern, Secretary General of Peace Reform International, incarceration in the United States baffles Western Europeans because in industrialized nations other than the United States the focus is on rehabilitation, rather than simply punishment.⁴ As Timothy J. Flanagan, professor of Criminal Justice and Dean of the College of Criminal Justice at Sam Houston State University in Huntsville, Texas, observed: "First, America uses incarceration as a response to crime at a higher rate than virtually any other nation... . Second, the United States uses long-term incarceration more frequently than other democratic nations."⁵

...American mass incarceration is not what social scientists call "evidence based." It is not a policy designed to achieve certain, practical, utilitarian ends that can then be weighed and evaluated from time to time to determine if it is performing as intended. Rather, it is a moral policy whose purpose is to satisfy certain passions that have grown more and more brutal over the years. The important thing about moralism of this sort is that it is its own justification. For true believers, it is something that everyone should endorse regardless of the consequences.⁶

As of January 1, 2006, there were slightly more than 1.5 million prisoners held in federal and state prisons and nearly 750,000 prisoners incarcerated in local jails.⁷ The number of incarcerated persons in the United States exceeds that of every other country.⁸ A review of the incarceration rates reveals that once again the United States leads the world at 737 per 100,000. In comparison, Russia and Cuba, the next highest, have rates of 607 and 487 per 100,000 respectively, while Western European nations vary from 78 to 145 per 100,000.⁹

With the large number of those imprisoned in the United States comes the dramatic cost of incarcerating them, particularly on the state level. As noted in a report published by The Pew Center on the States in March 2009, corrections “was the fastest expanding segment of state budgets, and over the past two decades its growth as a share of state expenditures has been second only to Medicaid. State corrections costs now top \$50 billion annually and consume one in every 15 discretionary dollars.”¹⁰

*The remarkable rise in corrections spending wasn't fate or even the natural consequence of spikes in crime. It was the result of state policy choices that sent more people to prison and kept them there longer. The sentencing and release laws passed in the 1980s and 1990s put so many more people behind bars that last year [2008] the incarcerated population reached 2.3 million and, for the first time, one in 100 adults was in prison or jail.*¹¹

Insofar as LWOP sentencing is concerned, significant changes have also occurred in the past three decades.

*In the 1950's and 1960's, nearly all prisoners were eligible for parole release early in their terms. Most sentencing laws and punishment practices were predicated on the idea that harsh mandatory sentences served no valid purpose, that decisions affecting offenders' liberty should be insulated as much as possible from punitive public attitudes, and that a primary purpose of imprisonment was to rehabilitate prisoners.*¹²

*“*The Prison Count, 2010*”, Pew Center on the States, April, 2010, gives a figure of 1,612,181 on 1/1/10, but excludes those prisoners held in jails. That report indicates the combined Federal and State prison populations declined in 2009 for the first time in 38 years.

LWOP was also not the intent when life sentences became the law in individual states. Rather,

The life sentence was developed as an indeterminate sentence; that is, as a term of imprisonment without a prescribed duration at the time of sentencing [e.g., 25 years to life] Indeterminate sentencing is based on the premise that in the face of good conduct and evidence of rehabilitative efforts while incarcerated (participation in counseling or drug programming, obtaining education or work skills), offenders can and should be released from prison.¹³

LWOP sentences, however, began proliferating after 1984. The federal government, which had reduced parole eligibility for lifers* to ten years in 1976, reversed course and eliminated parole in 1987.¹⁴ By 1990, thirty states had adopted LWOP statutes. By 2005, that number had increased to forty-nine, including the District of Columbia. Presently, only Alaska (a non-death penalty state) has not adopted the sentence of LWOP.¹⁵ Nationwide, in 1993, 20% of prisoners serving a life sentence had no chance for parole. By 2004, that percentage had increased to 28%.¹⁶ In Massachusetts as of 2009, 52% of all lifers were serving LWOP.¹⁷ While those in Massachusetts serving second-degree life sentences are eligible for parole after fifteen years, virtually all first-degree lifers die in prison. To be sure, there is a commutation process which permits LWOP sentences to be reduced to a specific number of years. Petitions for such relief, however, have rarely been successful. Since 1987, there have been only four such commutations. The last one was in 1997 for Joseph Salvati, who had been wrongfully convicted.**

The overall sentencing picture in the United States changed radically in the last quarter of the twentieth century, not only for LWOP, but for all types of sentences. The news media's heavy emphasis on crime and politicians being rewarded for playing the

* In Massachusetts, "lifers" refer to those who are sentenced to either life with the possibility of parole after fifteen years, or to life with no possibility of parole. In other states, "lifers" may be serving sentences that include a minimum number of years before eligibility for parole, such as twenty-five years to life.

** Unfortunately, for two of Joseph Salvati's co-defendants, exoneration came too late. Louis Greco and Henry Tameleo had died in prison by the time a federal district court ruled, some thirty years after their convictions, that exculpatory evidence withheld by law enforcement authorities proved that they all had been falsely convicted.

“crime card” both contributed to a fundamental shift in policy away from rehabilitation.¹⁸ Corrections professionals and legislators also reacted as they perceived the change. They quickly came to fear that appearing “soft” on crime, e.g., opposing longer and/or mandatory sentences or supporting paroles, was tantamount to professional and/or political suicide. How tough one claimed to be on crime became a litmus test many politicians had to pass to be elected. In 1988, the specter of Willie Horton* helped to sink former Massachusetts governor Michael Dukakis’ bid for the presidency.¹⁹ Four years later, perhaps as a consequence of Dukakis’ fate, then Governor of Arkansas William Clinton rushed back to his home state in the middle of his presidential campaign to sign a death warrant for Ricky Ray Rector**, an individual widely believed to have been incompetent to stand trial, let alone understand the penalty inflicted upon him.²⁰ Robert Dole, during his 1996 presidential race, described the American criminal justice system in a tour-de-force of alliteration as a “liberal leaning laboratory of leniency.”²¹ From 1983 to 1990, California more than doubled its number of prisons from 12 to 26, something then Governor George Deukmejian highlighted as the pride of his two terms in office.²²

The shift away from rehabilitation, including mandatory minimum drug sentences, has been accompanied by increased recidivism and an explosion of prison construction, not only in California, but nationwide as well.

*...once the prison became the dominant way for states to respond to serious crime, building prisons became one of the largest and thus most politically and economically lucrative projects that tax raising and spending governments could take on.*²³

* Willie Horton was a convicted murderer who went on a crime spree during a 1986 weekend furlough, which furlough program for prisoners, instituted under a Republican governor in 1972, had been supported by Governor Dukakis as a means of rehabilitation.

** Ricky Ray Rector was a convicted murderer, who immediately after killing a police officer in 1981 attempted to commit suicide by shooting himself in the head, the result of which was the destruction of a good part of his brain. His execution took place during the critical New Hampshire primary in 1992; immediately preceding the execution he told the guards who came to take him to the execution chamber that he was saving his pecan pie dessert for later.

For “tough-on-crime” pundits and politicians in the United States, incarceration is the primary response - other than the death penalty and/or deportation - for criminal activity. While incarceration provides incapacitation for the prisoners so imprisoned, and surely provides for public safety against further criminal activity by those so held, it does not deter others not in prison from committing crimes.

*Today, it is widely agreed that deterrence is more a function of a sanction's certainty and swiftness than its severity. This means that the 36th month of a 3-year prison term costs taxpayers just as much as the first month, but its value as a deterrent is far less.*²⁴

According to Marc Mauer of The Sentencing Project, public safety, concern for victims, fiscal costs, and prospects for rehabilitation should determine prison sentences. But present policies of mandatory sentencing have “...resulted in lengthier periods of incarceration than are necessary to achieve public safety goals.”²⁵ This conclusion applies equally well to LWOP sentences. Mauer adds that “... increasingly longer incarceration of lifers is not necessarily the most efficient use of public safety funds.”²⁶

Incarceration Costs in Massachusetts

During the past two decades, Massachusetts has also emphasized both more and longer prison sentences as well as increased mandatory minimum terms. As a result, incarceration rates have more than tripled since 1980.²⁷ Yet empirical evidence shows no significant correlation between increased use of incarceration and decreased crime rates. In one review of data concerning violent crimes from six disparate states, between 1980 and 1996 increases in crime rates accounted for only 12% of the rise in those states' prison populations, while harsher sentencing policies accounted for the other 88%.²⁸ A meta-analysis of literature of the last quarter of the twentieth century reviewing the correlation of severity of sentence to crime levels suggests that scholars consistently find no lessening of crime accompanies increased sentence severity.²⁹

In Massachusetts, the costs of building and of maintaining prison systems have been rising dramatically. Presently, the annual expenditures of the Department of Correction (DOC) and Sheriffs' departments exceed \$1.4 billion.³⁰ As a result, more of

the taxpayers' state tax burden is spent on incarceration than on higher education.³¹ This spending disparity between corrections and higher education is not new. The Massachusetts Taxpayers Foundation reported that in 2004, state spending for corrections would exceed that for higher education for the first time.³² And Massachusetts is not unique. Michigan spends \$2 billion for prisons and \$1.9 billion on state aid to public universities and community colleges.³³ Joining Massachusetts and Michigan are Connecticut, Delaware, Oregon and Vermont where the costs of corrections exceed those spent on higher education, according to the National Association of State Budget Officers and the Public Safety Performance Project.³⁴

The daily cost per inmate in Massachusetts is \$131.16, a yearly rate of slightly over \$47,500.³⁵ This daily cost is the second highest of the thirty-seven states reporting data to the Pew Center on The States.* Only California, at \$134.83 per day, exceeds the daily rate for Massachusetts. In further contrast is the nationwide average in 2008 of \$78.95, a yearly rate in excess of \$28,800.³⁶ The daily rate in 2008 that Massachusetts spent on a prisoner on parole was \$7.12, which is a ratio of the cost of one day in prison equaling over 2 weeks (18 days) on parole.³⁷ For every dollar spent on prisons in Massachusetts, four cents (\$.04) was spent on parole.

Instituting a parole possibility after twenty-five years for those serving LWOP would not empty Massachusetts' prisons of dangerous lifers. The number of lifers who might rejoin society after twenty-five or more years of incarceration would depend entirely on their being able to meet criteria set by the Parole Board for release under continued community supervision. From a fiscal perspective, however, there were 938 prisoners serving LWOP in Massachusetts as of January 2009. The state will pay in excess of \$47,500 annually for each to remain in prison until his or her death, whether he or she continues to pose a threat to public safety or not.³⁸ For those serving LWOP who are elderly, the annual expense for each has been estimated to be as much as \$69,000, as of 2004.³⁹ Assuming that departments of correction are not immune to rising health care costs, which, according to the Center for Medicare and Medicaid, increased more than

* The following states did not report daily cost rates: AZ, CT, FL, HI, KA, NV, NJ, NY, SC, WA, WV, and WI.

6% each year from 2005 through 2007, it is not unreasonable to estimate that the \$69,000 annual expense for an elderly person in 2009 now exceeds \$80,000.^{40**}

*Extended sentences for older prisoners also raise the cost of incarceration because older prisoners have triple the health care costs of younger inmates. Keeping older prisoners in jail imposes high costs on those individuals their families, and taxpayers. But it provides little community wide benefit.*⁴¹

Massachusetts, as well as all other states and the federal government, is confronting a problem defined by Marie Gottschalk, Associate Professor of Political Science at the University of Pennsylvania, as: "...the burden of caring for large numbers of geriatric prisoners with expensive chronic and debilitating illnesses."⁴² Elderly prisoners also present issues not applicable to the average younger prisoner.

*The elderly have more chronic health problems. They require expensive medication and often fill all available bed space in small hospital or infirmary facilities. They often require housing that is accessible to the physically handicapped and need specialized recreation, education, and work programs. The elderly require greater protection from victimization from other inmates and place additional psychological strains on other inmates and prison staff.*⁴³

As Ronald Tate, spokesperson for the Alabama DOC, opined: "In time, corrections departments could be running old age homes for toothless and bedridden inmates who in all probability would not, could not, hurt anyone ever again."⁴⁴ Within the Commonwealth, the Massachusetts DOC has established two separate units, one at MCI - Shirley Medium and the other at MCI- Norfolk's recently renovated second floor in the Hospital Services Unit, for permanent housing and treating terminally or chronically ill prisoners.

^{**} The authors are unaware of any studies that provide a comparable cost for elderly parolees. Any such factor would need to recognize that some parolees would be cared for by family member providing in-kind assistance, while others would rely on social security and/or funded retirement plans, in addition to government assistance.

David Fathi, former director of the United States Division of Human Rights Watch, in a December 24, 2009 commentary entitled *Nursing homes with razor wire* in the *Los Angeles Times*, stated:

The main justification for incarceration is to protect public safety. But it's hard to see the public safety rationale for keeping so many elderly people in prison.

It's even harder to understand the economic justification. Incarceration is expensive – about \$24,000 per year for the average prisoner, according to a 2008 Pew Center on the States report. Keeping someone over 55 locked up costs about three times as much. Given that criminal behavior drops off dramatically with advancing age, this is a major investment for very little return.⁴⁵*

Massachusetts houses a higher percentage of older prisoners than the fifty states' average or the federal prison populations. This is demonstrated in the following table which consists of data provided in the American Journal of Public Health (AJPH),⁴⁶ the Bureau of Justice Statistics (BJS),⁴⁷ and the Massachusetts DOC.⁴⁸

Ages	AJPH State Average (%)	AJPH Federal (%)	BJS Federal (%)	MA DOC (%)
13-35	53.4	50.1	53.7	43.5
36-50	38.0	38.8	36.4	40.5
50+	8.6	11.1	8.9	16.0

From 1997 to 2009, the number of prisoners in Massachusetts over age 65 has nearly doubled (from 123 to 245). The number of prisoners aged 60 and over has increased by 84.4% (283 to 472) from 1/1/2000 to 1/1/2009.⁴⁹ And, the number of prisoners aged 40 to 64 has increased 29.5% (from 3,131 to 4,055).⁵⁰ How many of those

* This cost references national averages. In the 2009 Pew Center study - *One in 31...* - cited on page 10 of this report, the annual cost for Massachusetts was calculated as \$47,500. See Endnote 79 of this section.

prisoners aged 40 to 64 and over age 65 are serving LWOP can not be determined from Massachusetts DOC public reports. The number of prisoners serving LWOP alone has increased 34% from 1999 to 2009 (683 to 938).⁵¹ It is reasonable, therefore, to assume that the number of prisoners serving LWOP will continue to grow. Using Fathi's ratio cited above, of a prisoner over age 55 costing about three times as much as one younger, the cost to Massachusetts taxpayers would be well in excess of \$125,000 (\$47,500 times 3) in today's dollars per year of incarceration for those serving LWOP and who are over age 55.

LWOP vs. the Death Penalty

A frequent argument of some who favor LWOP is that it remains a bulwark against reintroduction of the death penalty in Massachusetts. The rationale has been relatively simple: as long as those convicted of first-degree murder are guaranteed never to leave prison, then there is no need for Massachusetts to return to state-sanctioned killing. Thus, many opponents of the death penalty may be reticent about supporting the eligibility of parole after twenty five years.

The authors of this paper respect the concerns of death penalty opponents. Nevertheless, introducing parole eligibility after twenty-five years as outlined in this report need not lead inexorably to a return of the death penalty. LWOP as now implemented in Massachusetts unnecessarily increases costs by incarcerating those who can demonstrate they are capable of living in the community without endangering public safety. Concern over reinstating the death penalty as the reason to retain LWOP in its present form sanctions imprisoning a substantial number of prisoners for natural life in order to hypothetically save a select few from execution. That trade-off needs a full debate as it raises moral, equity, and fiscal concerns.

How effective has LWOP been in reducing or eliminating the death penalty in other states?

Twenty years of experience with life-without-parole statutes shows that although they have only a small effect on reducing executions, they have doubled and tripled the length of sentences for offenders who never would have been sentenced to death or even been eligible for the death penalty.⁵²

Marie Gottschalk states that:

In promoting LWOP, abolitionists risk legitimizing a sanction that, like the death penalty, is sharply divergent with human rights and sentencing norms in other Western countries. The emphasis on LWOP as an alternative to the death penalty appears to be legitimating the greater use of this sanction for non-capital cases. This emboldens the retributive tendencies that contributed to the construction of the carceral state in the first place.⁵³

Kansas is a death penalty state. A LWOP statute was signed into law in 2004 by then Governor Kathleen Sebelius, an anti-death penalty advocate. The Republican majority in the state's legislature had supported the bill. The governor, a Democrat, had promoted the proposed statute because LWOP offered an acceptable alternative to executions. Unfortunately the result may become more far reaching. "In fact, Kansas now mandates that every defendant who is *possibly* eligible for the death penalty but is not executed must be given life without parole."(Emphasis added.)⁵⁴

Georgia has experienced the fourth highest number of executions since the U.S. Supreme Court's *Gregg v. Georgia* decision in 1976 permitted the reinstatement of capital punishment. Yet, in a poll conducted by Georgia State University in 1986, 53% of Georgian respondents favored the abolishment of the death penalty if the sentence for murder was life-with-an-option- for-parole after at least twenty-five years, coupled with some type of restitution program.⁵⁵ Similar surveys conducted in Nebraska and in New York, also in 1986, likewise found that 64 and 73% respectively of respondents in those states supported the elimination of the death penalty if it were replaced with a sentence of life-with-the-option-of-parole after at least twenty-five years and some form of restitution.⁵

Paroling a Prisoner Serving LWOP

It also must be remembered that introducing parole eligibility after twenty five years does not translate into a rush of lifers being released nor an endangerment to the community-at-large. To be approved for parole, a lifer must convince a body of trained professionals at a public hearing that release is merited, that he/she will live in accordance with the laws of society, *and* that the welfare of society will not be diminished by the granting of a parole.

What can be expected if a prisoner serving LWOP is given a parole hearing after twenty-five years and is approved by the Massachusetts Parole Board to rejoin society under community supervision?* Will he or she be a threat to public safety? While no one can predict the future with complete certainty, the experiences of states which have paroled lifers are instructive.

One study of 188 prisoners, paroled after their life sentences had been commuted and in the outside community for over five years by the end of 1987, found a rate of 0.53% - (one of the 188) - for repeat homicides.⁵⁷ In 1994, 79.4% of lifers released on parole nationwide were arrest-free in the three year period studied after their release. This compared to the arrest-free rate of all offenders from prison of 32.5%.⁵⁸ Note that re-arrests were not limited to convictions for new offenses. Returns for parole violations for technical reasons such as being in the wrong location, failure to report to parole officers on time, or being in a car or house where drugs were found were also included. In a study involving Michigan, 175 prisoners convicted of murder were paroled from 1937 to 1961, and not one was returned for the commission of another murder.⁵⁹ Similarly, as of 2008, not one of 440 murderers and attempted murderers, released in New York from 2004 through 2007, had been returned to prison for a new crime.⁶⁰

Massachusetts has a comparable history. From 1972 to 1987, thirty-seven commutations were granted in Massachusetts to lifers serving LWOP. Through 2008, none have been returned for the commission of another murder since release.⁶¹ The same is true for the four LWOP prisoners whose sentences have been commuted after 1987.⁶²

* By statute, M.G.L. c.127, §130, for a prisoner to receive a parole it is mandated that a majority of Parole Board members must determine that the prisoner will live in society without violating the law and that the welfare of society will not be diminished by the granting of a parole.

According to a June 2004 study by the Massachusetts Department of Correction, fifteen prisoners serving time for second-degree murder were paroled in 1998 and not one, in the three years of the study, was re-incarcerated for another murder or, for that matter, convicted of any other new crime in Massachusetts. Five were returned to prison for technical violations of the kind noted above.⁶³

What can account for the low recidivism rates for murderers? According to Jeffrey Fagan, a Columbia Law School professor and co-director of the Center for Crime, Community and Law,

*Criminologists note that many killers act impulsively in a fight or during an act of passion – as opposed to “career” criminals who rob or sell drugs as a vocation. Also, murderers usually are not released until they are at least middle-aged and older people are less likely to break the law.*⁶⁴

One reason often cited for the significantly reduced recidivism for lifers released on parole is age.

*One recent proposal to reform California’s criminal justice system noted that ‘recidivism’ rates drop significantly by the time an offender reaches thirty years of age. Likewise, the rate of recidivism among federal prisoners over the age of forty is approximately a third for that for prisoners under forty.*⁶⁵

In a 2005 report by the Pennsylvania Board of Probation and Parole, of ninety-nine commuted lifers who had been released at age 50 or older, only one had been recommitted for a new crime, a recidivism rate of 1.01%. The new crime was forgery and tampering with public records. That offender was also returned multiple times for technical parole violations.⁶⁶

Massachusetts has experienced similar patterns. Of 2,820 prisoners released in 1998, as of 2004 the recidivism rate for those less than 30 years of age was 45%. For those released when they were between 45 and 54 years of age, the recidivism rate was 23%. The recidivism rate dropped further to 19% for those 55 to 59 and to 16% for 60 to

64.⁶⁷ Thus, those who might be paroled after serving twenty-five years would be in the higher age brackets and could be expected not to return to prison, particularly when these Massachusetts' statistics are considered in light of the studies of released murderers cited earlier.

*The effective consequence of life-without-parole statutes is keeping older prisoners in jail longer. As sentencing reforms go, pushing parole eligibility beyond twenty-five years is a particularly ineffective one. Individuals out of their teens and twenties show a marked decrease in violent tendencies and an increase in their ability to reintegrate successfully into the community.*⁶⁸

Kentucky reinstated a death penalty statute on January 1, 1975, almost immediately after the U.S. Supreme Court had invalidated all extant death penalty statutes in 1972. However, the state did not execute the first person until 1997 and to date has only executed two more. In 1989, the state passed a statute allowing for a life sentence with parole possibility at 25 years. According to Dr. Deborah Wilson, Policy Advisor to the Office of the Attorney General for the Commonwealth of Kentucky in an interview conducted in 1989, Kentucky specifically had enacted its LWOP with parole eligibility after twenty-five years “to incarcerate violent murderers during their peak years of criminal activity while providing a release mechanism when these inmates no longer pose a heightened threat to society.”⁶⁹

For Liz Gaynes of the Osbourne Association, a criminal justice advocacy group in New York State, paroling violent offenders is “more a political issue than a public safety issue, given the low recidivism rates. They clearly do not endanger public safety. What they endanger is the necessity of keeping all the upstate prisons open forever.”⁷⁰ What Ms. Gaynes refers to is the proliferation of prisons in the upstate rural districts of New York State, similar to patterns in other states, and the political as well as economic fallout should some of those prisons close.

Experience with parole for Second-degree lifers

In Massachusetts, paroling any prisoner is a deliberate and measured decision rendered by the Parole Board. A survey of the rates of paroles granted to those serving second-degree life sentences, i.e., after a minimum of fifteen years had been served, indicates how prudent the Parole Board has been in approving and then supervising paroles for lifers, bearing in mind that those lifers so paroled are under supervision for the remainder of their lives.

From 2002 through 2009, the MA Parole Board conducted 884 public parole hearings – all parole hearings for lifers are public by statute – for lifers serving second-degree sentences. 299 were approved for a parole, an approval rate of 34%.

Year	# of Parole Hearings Held	# of Conditional* Paroles Granted	% of Conditional ⁷¹ Parole Granted
2002	123	38	31%
2003	101	41	40%
2004	133	59	44%
2005 ⁷²	106	33	31%
2006 ⁷³	114	35	31%
2007 ⁷⁴	109	29	27%
2008 ⁷⁵	108	29	27%
2009 ⁷⁶	90	35	39%

* Paroles are granted based upon the completion of certain requirements prior to supervised release into the community, e.g. specified periods of time in minimum security and/or pre-release facilities, successful completion of or acceptance in an approved program designed to prepare the parolee for reintegration into society.

2002-09	884	299	34%
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Beyond the approval percentages are two questions of importance to this paper. What has been the recidivism rate, the rate of paroled lifers who were returned to prison? And, for those so returned, how many were returned for technical violations of parole and how many were returned for committing a new crime? To address those questions, the Parole Board, at the request of the Criminal Justice Policy Coalition, undertook a study of the 161^{77*} second-degree lifers who had been released into society under supervision from 2000 through 2006. The years were chosen to ensure that at least three years had elapsed since a parolee's release- three years regarded by criminologists as the time frame within which any re-offenses are likely to occur. Regarding the recidivism rate for those lifers: **

* In early 2010, one second-degree murder parolee, paroled in 2006, was arrested and charged with murder. The Parole Board did not include that individual in these statistics for 2006 paroled lifers as he had been initially paroled on that murder conviction in 1992 and then been rearrested; his 2006 release was not his initial parole. The authors decided to keep the above analysis consistent with the statistics provided by the Parole Board.

** Many of those returned to prison were found to have both technical and criminal violations. For the purposes of this study, the authors listed each case according to the more serious infraction.

*** Technical violations consisted of breaking a rule, regulation or agreed upon provision of parole, without the commission of a new crime. These twenty three violations were for: not following rules (7), use of alcohol (3), tested positive for or possession of drugs (11), domestic disturbance (2).

Those not returned to prison for any reason	97	60.2%
Those returned to prison but re-released without a parole revocation	19	11.8%
Those returned to formal custody for technical reasons ***	23	14.3%
Those returned to formal custody for new convictions ****	6	3.7%
Those returned to formal custody for new arrests *****	16	9.9%
Total Number	161	100%

It is also important to consider that 116, or 72%, of the 161 parolees had not been re-incarcerated for either technical violations or new crimes. There is a cost differential for Massachusetts of \$44,900 between one year of incarceration (\$47,500) vs. one year on parole (\$2,600).⁷⁸ For the 116 parolees who did not return to prison that is a cost savings per year of over five million dollars annually.⁷⁹

LWOP serves a “one size fits all” purpose in the Massachusetts’ criminal justice system: it is both overly punitive and generic in application. Kent Scheidegger, legal director of the Criminal Justice Legal Foundation in California, claims: “For the worst of murders the appropriate sentences are life without parole and death. If they’ve gotten life without parole, they’ve gotten off easy.”⁸⁰ Mr. Scheidegger, however, fails to consider that among those serving LWOP are many who are not the “worst” and that even the “worst” at time of sentencing can and do change over time. Sentencing men and women to LWOP is far more complex than Mr. Scheidegger’s view. As expressed by Marc Mauer et al.,

*** The convictions were for Trafficking (2), Drug possession (1), Domestic Assault and Battery (1), Possession of a Firearm (1), and Breaking and Entering (1).

***** The offenses include Gun Possession (1), Breaking and Entering (1), and DUI (2) for a total of 4 arrests for non violent crimes; A&B (6), Simple assault (1), Armed Robbery (1) for a total of 7 arrests for violent crimes; and 4 arrests for drug offenses – Trafficking (1) and Possession (3).

*Life sentencing policies should incorporate a range of perspectives. These include the varied goals of sentencing in such cases, the harm to and needs of victims, public safety objectives, and the impact on costs and management of correctional facilities.*⁸¹

A life sentence with the possibility of parole after twenty-five years addresses all these factors: needless tax burden, indiscriminate punishment, public safety, and justice for the victims. Such a sentence can motivate offenders to seek successful rehabilitation and thereby reduce prison violence while also obviating the costs of housing, aging and progressively more infirm prisoners who no longer pose a risk to public safety. While also minimizing indiscriminate punishment, offenders would continue to be held accountable during their lifetime of supervised release.

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2. *Id.* at 252.
3. *Id.*, citing Michael Tonry, ed. *Handbook of Crime and Punishment*, Oxford: Oxford University Press (1998), at v.
4. *Comparative International Rates of Incarceration: An Examination of Causes and Trends*, Marc Mauer, The Sentencing Project (June, 2003), at 11.
5. Timothy J. Flanagan ed. *Long-Term Imprisonment- Policy, Science, and Correctional Practice*. Sage Publications, Thousand Oaks, CA.(1995), at 11.
6. Daniel Lazare. "Stars and Bars," *The Nation*. August 27/September 3, 2007, at 36.
7. *Prisoners in 2006*. Bureau of justice Statistics Bulletin, U.S. Department of Justice, December 2007. NCJ 219416. At 2 (1,570,861 prisoners under State or Federal jurisdiction) and 4 (747,529 in local jails).
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9. *Public Safety, Public Spending, Forecasting America's Prison Population 2007-2011*. A Public Safety Performance Project Report by the JFA Institute and the Pew Charitable Trust (June, 2007), at 1.
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11. *Id.*
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22. Jonathan Simon. "Rise of the Carceral State." *Punishment: The U.S. Record*, supra at 495.
23. Simon, supra at 495.
24. *One in 31:...*, supra at 20.
25. "The Meaning of Life..." , supra at 4.
26. *Id.* At 27.
27. *Prisoner Reentry in Massachusetts*, L.E. Brooks, A. L. Solomon, S. Keegan, R. Kohl. And L. Lahue, Urban Institute, Washington, D.C. (2005) at 3.
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52. "A Matter of Life and Death...", supra at 1839.
53. Gottschalk, supra at 681.
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61. Chris Black. "Horton case keeping the jail cells shut", The Boston Globe, July 8, 1990 at 67. The article is the source for the pre 1987 record. Neither the Massachusetts Department of Correction nor the Parole Board produces a published report detailing who has been returned from parole for the commission of a new crime. The source for the post 1987 record is anecdotal, i.e. from prisoners, particularly lifers, who have a strong interest in tracking the results of parole. The Lifers' Group, Inc. was founded at MCI-Norfolk in 1974 and has been in continuous operation as a prisoner-run organization. One of their concerns has been tracking lifers in the Commonwealth's prisons.
62. The source for this assertion is anecdotal, i.e. from prisoners who are acquainted with the four prisoners commuted since 1987 and who report that not one of the four has been returned for committing a homicide or other serious crime.
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64. Hill, supra.
65. "A Matter of Life and Death...", supra at 1852.

66. Report of the Advisory Committee on Geriatric and Seriously Ill Inmates, June 2005, Pennsylvania State legislature. <http://jsg.legis.state.pa.us/Inmate%20Report.html>. at 81-82. (accessed 1.16.10)
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68. “A Matter of Life and Death...” supra at 1852.
69. “Life-Without-Parole: ...”, supra at 563-564.
70. Hill, supra.
71. Percentages computed by the authors.
72. Data for 2002 through 2005 provided in a letter dated August 8, 2006 from John P. Talbot, Jr., then General Counsel for the Parole Board to the Chairman of the Lifers’ Group Inc. at MCI- Norfolk.
73. 2006 Annual Statistical Report published by the Parole Board, at 9.
74. 2007 Annual Statistical Report published by the Parole Board, at 12.
75. 2008 Annual Statistical Report published by the Parole Board, at 15
76. *A Study of Parole Board Decisions for Lifers – 2009*. Lifers’ Group, Inc., April 2010, p.4. A copy may be obtained from the Lifers’ Group Inc., P.O. Box 269, No. Quincy, MA 02171.
77. Lifers who had been released by years for a total of 161: 2000(12), 2001 (11), 2002(30), 2003 (14), 2004 (34), 2005 (36), 2006 (24). Of that 161, however, seven were returned, re-paroled and returned again. These seven repeat parolees are treated as 14 distinct parolees. The mean age of the 161 parolees at the times of their releases was 48.4, as calculated by the authors.
78. Annual rates of \$47,500 and \$2,500 are from *One in 31...* State by State Appendix, unnumbered. Yearly rates computed by authors.
79. \$5,208,400 calculated by multiplying \$44,900 by 116.
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PART 3: PARTICULAR ISSUES REGARDING LWOP

A. JUVENILES* SERVING LWOP

Sentencing juveniles to LWOP in the United States places this country at odds with practically every other country in the world. The 1989 United Nations Convention on the Rights of the Child (CRC) considered many issues regarding the treatment of children around the world. Article 37(a) in the CRC's treaty expressly addressed the sentencing of juveniles:

*Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.*¹

As of December 2008, only two countries had not ratified this prohibition on LWOP for juveniles – the United States and Somalia.²

Elizabeth Calvin, Children's Rights Advocate for the Human Rights Watch stated before the United States House Judiciary Committee on September 11, 2008:

*The decision to sentence a juvenile to life without the possibility of parole is a decision to sentence that young person to die in prison. There is no time off for good behavior, no opportunity to prove that you have become a different person, responded with remorse and chosen paths of rehabilitation. Next to the death penalty, there is no harsher condemnation, no clearer judgment by our criminal courts that this is a life to be thrown away.*³

At the beginning of 2008, despite the fact that at least 192 countries in the world had expressly rejected LWOP for juveniles,⁴ 2,388 prisoners were serving LWOP for crimes committed before they had reached the age of 18.⁵ These prisoners were incarcerated in only two countries. The United States accounted for 99.9% (2,381), while the remaining seven were imprisoned in Israel.⁶

*There is great disparity of opinion regarding what should constitute the age of maturity – of passage from juvenile to young adult. While 18 years of age is often used by society as the point of responsibility as for example for voting and/or service in the military, neurobiology, as noted later in this section, suggests that the brain is often not fully developed until the early twenties. Consequentially, for purposes of criminal responsibility, a minimum age of 21 begins to approach what science is revealing.

The use of LWOP sentences for juveniles has mushroomed in the United States in the last twenty-five years. A 2003 study conducted jointly by Amnesty International and the Human Rights Watch found that from 1962 through 1982, the total number of juveniles sentenced to LWOP in this country was thirty-two. From 1983-2003, the number of juveniles sentenced to LWOP totaled 1,636, a fifty fold increase.⁷

In November, 2007, the Center for Law and Global Justice, along with the Human Rights Law Clinic at the University of the San Francisco School of Law, published *Sentencing Our Children to Die in Prison: Global Law and Practice*. The Center made several notable findings: from 2005 to 2007, 149 juvenile offenders in the United States were sentenced to LWOP; up through 2004, 59% of all juveniles serving LWOP had received that sentence for their first ever criminal conviction; 16% were between the ages of 13 and 15 when their crimes had been committed; and 26% had been convicted for a felony murder in which they were not the “shooter” and had not even carried a weapon.⁸

Massachusetts, as of 2003, accounted for sixty out of 2,225 juveniles serving LWOP in forty two states for which data was available.⁹ According to a Human Rights Watch and Amnesty International study, the rate of juveniles aged fourteen to seventeen serving LWOP in Massachusetts was 18.5 per 100,000 youth of that age bracket in the state’s population based on the 2000-2002 U.S. Census Bureau estimates,¹⁰ as compared to the national average of 17.35 per 100,000 youth for the forty states providing data, plus the federal government.¹¹ The range of these rates varied extensively, from 109.6 for Louisiana per 100,000 to 0.6 for Indiana, .02 for Ohio, and 0.0 for Utah, Vermont and New Jersey. Massachusetts’ rate of 18.5 was the eleventh highest of the forty states reporting data.¹² This rate was higher than any other New England state (Maine not reported) and over three times higher than the next highest neighboring state of Connecticut (at 5.58/100,000). The average rate for the four New England states reporting data on juveniles serving LWOP, not including Massachusetts, was 4.41/100,000.¹³

Comparing states with populations of youth aged 14-17 between 200,000 and 400,000,* the average rate serving LWOP was 16.31. That rate would drop to 10.21 if Louisiana (109.56) were to be eliminated as the LA rate is three times higher than the next state – Missouri at 35.13. The rate for LA could be viewed as disproportionately skewing the other rates for purposes of statistical comparisons. In either case, the Massachusetts’ rate of 18.5 significantly exceeds the rates of those states in geographic proximity and also of a large majority of those states with comparable populations of juveniles. There were no correlations of the several states’ rates with levels of youth violence, nor with geography or state populations, or any other evident factor.**

In 2005, the United States Supreme Court ruled that persons who were juveniles at the times their crimes were committed could not be executed, but did not similarly bar LWOP for juveniles.¹⁷ In that decision, *Roper v. Simmons*,¹⁸ the majority of the Supreme Court based this finding on several factors including: “scientific and sociological studies...tend[ing] to confirm... [that youth possess a] lack of maturity...an underdeveloped sense of responsibility...,” “...that a youth’s character is not as well-formed as that of an adult, meaning he or she can and probably will change.”¹⁹ Justice Anthony M. Kennedy in this landmark case wrote that:

The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with

* The number of states with populations of youth between 14-17 reported as being between 200,000 and 400,000 in the study was 16 – Alabama, Arizona, Colorado, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Oklahoma, South Carolina, Tennessee, Virginia, Washington and Wisconsin. Massachusetts’ rate of 18.49 was fifth highest – Louisiana at 109.50, Missouri at 35.13, Oklahoma at 23.21, and Colorado at 18.75. The 14-17 youth population of Massachusetts was reported as 324,467 which placed Massachusetts approximately in the middle of the range. States with reported higher youth populations than Massachusetts were Indiana, Missouri, Virginia, Washington, and Wisconsin. Of those states, only Missouri had a higher rate than Massachusetts for juveniles serving LWOP.

** According to one study, the absolute number of juveniles sentenced to LWOP nationally remained modest from 1962 to 1980 –averaging one to two per year. From 1980 forward, there was a steady and drastic increase in the use of that sentence to 152 such sentences awarded in 1996. This anticipated by eight years the beginning of an increase in juvenile murders of all kinds. Post 1996, the use of LWOP for juveniles dropped - to 54 in the year 2003, and then a drastic drop to 1 in 2004, the last year of data researched. Juvenile murders peaked in 1994, and then receded to pre 1980 levels by 1999.¹⁴ However, as this study does not distinguish among the several classes of murder but rather only reports the aggregate, it is not possible to correlate the rise and decline of LWOP with first-degree murders.

*those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.*²⁰

Evolving scientific evidence points to the lack of development in the brains of juveniles and the impact that retardation has upon behavior.

MRIs [magnetic resonance imaging] show that frontal lobes, specifically the prefrontal cortex, do not develop fully until the early 20s. This is the part of the brain responsible for the cognitive control of behavior, for impulse inhibition. The prefrontal cortex regulates aggression, weighs cause and effect and considers long-term consequences.^{21*}

Lawrence Steinberg, Ph.D., a psychologist at Temple University, co-author of *Rethinking Juvenile Justice* (September 2008) and author of many publications on adolescent psychology testified regarding life sentences for juveniles at a Pennsylvania Senate judiciary hearing on September 22, 2008. According to Steinberg:

[O]ver the course of adolescence, there is a gradual maturation of brain regions and systems that are responsible for self-control. These systems put the brakes on impulsive behavior. They permit us to think ahead and allow us to more judiciously weigh the rewards and costs of risky decisions before acting. However, unlike the changes in reward sensitivity or social information processing, which take place early in adolescence, the maturation of the self-control system is more gradual and not complete until the early 20s. As a consequence, middle adolescence – the period from 13 to 17 – is a period of heightened vulnerability to risky and reckless behavior, including crime and

* In a 2001 New York Times Op-Ed, Daniel Weinberger, M.D., Chief of the Clinical Brain Disorders Branch of the National Institute of Mental Health, wrote, referring to a 15 year old boy charged with shootings at the Santana High School in California:

*...the brain of a 15-year-old is not mature--particularly in an area called the prefrontal cortex, which is critical to good judgment and the suppression of impulse... . The capacity to control impulses that arise from these feelings [anger, vengeance] is a function of the prefrontal cortex. The inhibitory functions are not present at birth; it takes many years for the necessary biological processes to hone a prefrontal cortex into an effective, efficient executive. These processes are now being identified by scientific research. They involve how nerve cells communicate with each other, how they form interactive networks to handle complex computational tasks and how they respond to experience. It takes at least two decades to form a fully functional prefrontal cortex.*²²

*delinquency. The engines are running at full throttle, so to speak, but there's not yet a skilled driver behind the wheel.*²³

Deborah Yurgelien-Todd, director of neuropsychology and cognitive neuroimaging at McLean Hospital in Belmont, MA has studied the differences in the brains of adults and teenagers. The results of her work provide support for Lawrence Steinberg's assessment. In an interview for a PBS Frontline presentation, Yurgelien-Todd pointed out that:

One of the interesting outcomes of this study suggests that perhaps decision-making in teenagers is not what we thought. That is, they may not be as mature as we had originally thought. Just because they're physically mature, they may not appreciate the consequences or weigh information the same way adults do. So we may be mistaken if we think that [although] somebody looks physically mature, their brain may in fact not be mature, and not weigh in the same way....

*Certainly the data from this study would suggest that one of the things that teenagers seem to do is to respond more strongly with gut response than they do with evaluating the consequences of what they're doing. This would result in a more impulsive, more gut-oriented response in terms of behavior, so that they would be different than adults. They would be more spontaneous, and less inhibited....*²⁴

According to Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania:

*The evidence is now strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable.... Indeed, age 21 or 22 would be closer to the 'biological' age of maturity.*²⁵

In a National Institute of Mental Health study which began in 1991 and followed some 5000 children, Jay Giedd, director of the study, found that the subject brains' changes continued even through 22 *and beyond*, and particularly in the prefrontal cortex and cerebellum, the regions involved in emotional control and higher-order cognitive function.²⁶

And finally, in an Amicus Curiae brief submitted by the American Bar Association (ABA) in the *Roper v. Simmons* case, the ABA stated that it:

*...recognizes that some juvenile offenders deserve severe punishment for their crimes. However, when compared to adults, juvenile offenders' reduced capacity – in moral judgment, self-restraint and the ability to resist the influence of others – renders them less responsible and less morally culpable than adults.*²⁷

The position of Massachusetts, as with most of the United States, regarding LWOP for juveniles is clearly in opposition to virtually all other nations. Sentencing juveniles to LWOP contravenes not only standard world-wide practice as well as scientific and cognitive developmental findings, it also has failed to significantly lower the rate of juvenile crime. In 1999, for instance, 10% of all homicide offenders in the United States were younger than 18. Ten years earlier, the rate was 11%.²⁸

Sentencing juveniles to LWOP is tantamount to a living death sentence; such sentences may be the most unambiguous statement of the wastefulness of LWOP. Michigan Trial Court Judge Eugene Arthur Moore in 2000 refused to sentence a juvenile to LWOP, stressing that it was impossible at the time of sentencing to know what might or might not happen sometime in the future. Judge Moore stated: “Don’t ask the judge to look into a crystal ball today and predict five years down the road... Don’t predict today, at sentencing, whether the child will or will not be rehabilitated, but keep the options open.”²⁹

In 1989, the Nevada Supreme Court, ruling in a case of a 13 year old boy who had been sentenced to death after killing a man who had molested the boy, found that:

‘To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder.’ The judge questioned whether sentencing children to life imprisonment without parole measurably contributes to the intended objectives of retribution, deterrence, and segregation from society. As to retribution, the judge found that children do not deserve the degree of retribution represented by

*life without the possibility of parole, given their lesser culpability and greater capacity for growth, and given society's special obligation to children. The judge also concluded that the objectives of deterrence fails, given children's lesser ability to consider the ramifications of their actions, and that segregation is unjustified.*³⁰

As stated in the Executive Summary of the previously referenced *Sentencing Our Children to Die in Prison...*:

*Imposing LWOP on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and undergo dramatic personality changes as they mature from adolescence to middle-age. Experts have documented that psychologically and neurologically children cannot be expected to have achieved the same level of mental development as an adult, even when they become teenagers. They lack the same capacity as an adult to use reasoned judgment, to prevent inappropriate or harmful action generated as a result of high emotion and fear, or to understand the long-term consequences of rash actions.*³¹

Lawrence Steinberg concluded his statement in the public hearing before the Pennsylvania Senate judiciary committee considering LWOP sentences for juveniles with:

In the final analysis, there are only two only (sic) possible rationales for sentencing juveniles to life without the possibility of parole: they deserve the most severe punishment our system has the capacity to apply or that they are so likely to be dangerous for so long that we need to incarcerate them for life to protect the community. As to the first of these rationales, I believe, as the Supreme Court ruled in the juvenile death penalty case, that by virtue of their inherent immaturity, adolescents should not be exposed to punishments we reserve for the worst of the worst. And as to issue[s] of public safety, the data show very clearly that even the worst juvenile offenders are unlikely to pose much of a threat once they have reached the age of 30.

*Juveniles who commit crimes should be held responsible for their behavior, punished for their offenses, and treated in a way that protects the community. But we have the capacity to do this without locking them up for life and wasting taxpayers' dollars unnecessarily.*³²

While there are of course substantive differences between the death penalty and LWOP, the end result of both is to die in prison. For juveniles that is an especially long and needless sentence, with no opportunity to show that sufficient change has occurred such that the juvenile, now an adult, can live in and with society safely and productively, both for him/herself and for others. The authors of this paper argue, in accordance with international standards and scientific findings, that all juveniles serving LWOP sentences should be eligible for parole. Massachusetts needs to join Alaska, Colorado, Kansas, Kentucky, New Mexico, Oregon, Texas^{33*} and the District of Columbia all of which have abolished LWOP for juveniles³⁴, or, at least, the ranks of those states which have active ongoing campaigns to do so, i.e. California, Florida, Illinois, Louisiana, Michigan, Nebraska, and Washington.³⁵

This year, the California State Senate has approved a bill (SB399) which would allow a court to review life without parole sentences for juveniles after ten years in prison. The court could then reduce an individual juvenile LWOP sentence to 25 years to life, which would allow for a parole hearing after twenty-five years. The California State Assembly has yet to take up the bill. Elizabeth Calvin of Human Rights Watch notes that “One of the things that makes [SB399] different from other early release schemes is that there would be very careful consideration of each case.”³⁶ Allowing a parole hearing after twenty-five years of incarceration, as is argued for in this report, offers a similar “careful consideration” by the MA Parole Board of each individual case.

* Texas still provides for LWOP for juveniles for certain sexual offenses under Government Code §508.145(a), though it has eliminated LWOP for capital felonies at Government Code §508.145(b), which allows for consideration of parole after 40 calendar years without consideration of good time.

1. *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990. At <http://www1.umn.edu/humanrts/instrtree/k2crc.htm>, accessed January 25, 2009.
2. Child Rights Information Center, <http://www.crin.org/resources/treaties/CRC.asp?catName=International+Treatie>, accessed January 25, 2009.
3. Written testimony of Elizabeth Calvin, Children’s Rights Advocate, Human Rights Watch, in support of H.R. 4300, the “Juvenile Justice Accountability and Improvement Act of 2007” submitted to the House Judiciary Committee, Subcommittee on Crime, Terrorism, and Homeland Security. Washington, D.C. at 1. September 11, 2008.
4. *The Rest of their Lives- Life Without Parole for Child Offenders in the United States*, Human Rights Watch and Amnesty International (2005), at 99.
5. *Sentencing Our Children to Die in Prison*, The Center for Law and Global Justice, (November, 2007) at *i*.
www.scribd.com/doc/2074105/Sentencing-Our-Children-to-Die-in-Prison-Univ-of-San-Francisco-School-of-Law
6. *Ibid*. See also *id.* at 9 where the authors point out that the actual number of juveniles imprisoned for LWOP in Israel may vary from one to seven and “[i]t is still unclear how many of the seven youths given life sentences are ineligible for parole.” For the purposes of the instant report, the authors have assumed all seven are serving LWOP which is consistent with the data presented in *Sentencing Our Children to Die in Prison* at *i* and facing page.
7. *The Rest of Their Lives...*, *supra* at 31. The totals for 1962 through 1982 and from 1983 through 2003 are calculations from the individual yearly totals presented in Figure 3 at 31. The amount of the increase was calculated from those totals.
8. *Sentencing Our Children to Die...*, *supra* at 4.
9. *The Rest of Their Lives...*, *supra* at 35.
10. *Id.* at 36. See Figure 6.
11. *Id.* at 124.
12. *Id.* at 36. While Virginia is listed as having a rate of 132.9 at the table at Appendix D (p.123-124), this figure is not credible, particularly compared to Vermont. The authors reviewed Census data from the U.S. Census website and discovered that the table reversed the 13-17 population data for those two states, which then also inflated VA’s percentage reflecting the ratio of LWOP youth to total population, and also the youth LWOP rate per 100,000. Virginia’s rate (48/3.82883) is therefore 12.5 per 100,000, as is correctly represented on page 36. Census data accessed on January 12, 2009 at <http://www.census.gov/popest/states/asrh/SC-EST2007-02.html>
13. *Id.* at 36.
14. *Id.* at 31, 32.
15. *Until They Die A Natural Death: Youth Sentenced to Life Without Parole in Massachusetts*, Children’s Law Center of Massachusetts, Inc. (September 2009) at 16. www.clcm.org/untiltheydie.pdf, accessed 8/15/10.
16. M.G.L. c. 265 §2 and c. 119. § 74.
17. In 2010, the Supreme Court ruled in *Graham v. Florida* [560U.S. ____ (2010)] that LWOP was not a constitutionally valid sentence to be given to any prisoner who, as a juvenile, had committed a non-homicide crime. The Court left unanswered the question of whether LWOP was a constitutionally valid sentence for a conviction of murder when committed as a juvenile.
18. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005).
19. *Id.*, at 1183, 1195
20. *Id.* at 570.
21. “Discarded Lives: Children Sentenced to Life Without Parole”, John Hubner, Amnesty Magazine, Amnesty International, (Spring, 2006) at 20.
22. “A Brain Too Young For Good Judgment”, Daniel R. Weinberger, M.D., The New York Times, March 10, 2001, at A 13.
23. Written testimony of Lawrence Steinberg, Ph.D. submitted to the Pennsylvania Senate Judiciary Committee, Public Hearing on Juvenile Lifers, held at Harrisburg, PA. September 22, 2008.
24. Interview with PBS Frontline, *Inside the Teen Brain*, online at www.pbs.org/wgbh/pages/frontline/shows/teenbrain/.

25. “Adolescent Brain Development and Legal Culpability”. American Bar Association, Criminal Justice Section. Juvenile Justice Center, Spring, 2003. On line at: www.abanet.org/org/crimjust/joujus/joudp.html.
26. “What Is It About 20-Somethings?” Robin Marantz Henig. New York Times Sunday Magazine, August 18, 2010. www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html?pagewanted=5&_r=1&ref=magazine at 4,5. (Accessed 8/22/10)
27. Amicus Curiae brief submitted by the American Bar Association in *Roper v. Simmons*, at www.abanet.org/crimjust/juvjus/simmons/aba.pdf at 3.
28. “Adolescent Brain Development...” supra at 109.
29. *The Rest of Their Lives...*, supra at 92.
30. Alison M. Smith. *Juvenile Justice: Life Without Parole Sentences*. Congressional Research Service, September 14, 2009. P.13. www.crsd.gov R40818, quoting *Naovarath v. State*, 779 P.2d 944, 947 (1989).
31. *Sentencing our Children to Die...*, supra at iii.
32. Written testimony of Lawrence Steinberg, Ph.D., supra. at 3.
33. www.statutes.legis.state.tx.us/Docs/GV/htm/GV.508.htm#508.145
34. *Sentencing our Children to Die...*, supra at 5, except TX, see endnote 33.
35. *Winter 2009 Update of the Juvenile Life Without Parole Project*. The Children’s Law Center of Massachusetts.
P.O. Box 710, 298 Union Street, Lynn, MA 01903 (monahon@clcm.org, accessed Spring, 2009) at 1.
36. “Bill would let juvenile criminals seek leniency” at www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/08/17/BA_0IIEVAVL.DTL (accessed 9/10/10)

B. FELONY MURDER/JOINT VENTURE

LWOP is the only sentence available in Massachusetts for first-degree murder convictions.* The primary differences between first-degree and second-degree murder - a conviction for which there is parole possibility after fifteen years - are deliberate premeditation and/or extreme atrocity or cruelty in cases of first-degree murder. To secure a conviction at trial for first-degree murder in Massachusetts, prosecutors are required to prove and juries are required to find, beyond a reasonable doubt, that a murder was committed with “deliberately premeditated malice aforethought, or with extreme atrocity or cruelty...”.¹ It is incumbent upon prosecutors to present proof to a jury that leads twelve citizens to reach the decision that a defendant premeditated a murder and thus was guilty of first-degree murder, the penalty being the most severe in Massachusetts, LWOP.

There is, however, one exception in Massachusetts to requiring proof and a finding by a jury that a defendant acted out of a specific state of mind to take someone’s life. That exception is felony murder. This doctrine mandates that every death occurring during the commission, or attempted commission of, a felony carrying a maximum punishment of life in prison with a parole possibility,^{1**} be treated as first-degree murder. The penalty is LWOP.

Whether or not defendants are charged under the felony murder doctrine lies in the hands of prosecutors. Once a prosecutor opts to do so and the defendant(s) is/are brought to trial, the jury is instructed by the presiding judge that, should they find the defendant(s) guilty of the underlying felony, they have no choice but to find the

*The U.S. Supreme Court has ruled in two cases that the death penalty is unconstitutional for felony murder, where the petitioner was not a major participant in the felony murder and had not acted with reckless indifference to life. *Enmund v. Florida* 458 U.S. 782 (1982), as extended by *Tison v. Arizona* 481 U.S. 137 (1987).

c.265, §1 **Murder Defined: “Murder committed ...in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first-degree.” The crimes which carry life sentences with the possibility of parole are for the most part bodily crimes. Examples of such life sentence crimes, with their Massachusetts General Laws chapter (c) and section (§) citations, are: armed assault with a deadly weapon in a dwelling (c.265, §18A), armed robbery (c. 265,§17), rape (c.265, §22), kidnapping for the purposes of extortion (c.265, §26), poisoning (c.265, §28), and assault of child with intent to commit rape(c.265, §24B).

defendant(s) also guilty of first-degree murder since the death had ensued during the commission of an underlying felony punishable by life in prison. What is missing in felony murder cases is any consideration or decision by the jury as to whether premeditated malice aforethought or the intent to kill existed in relation to the death which arose during the commission of that underlying felony. In fact, in cases with multiple defendants, prosecutors need not even prove who the principal actor in the crime was. It is sufficient for all the defendants to be found by a jury to have shared the intent and participated in the underlying felony for all to be convicted of first-degree murder under the felony murder doctrine. If convicted, all are sentenced to LWOP regardless of who actually “pulled the trigger” to effect the murder.

The felony murder doctrine has long been controversial because, as was previously noted, prosecutors are neither required to prove, nor the juries required to find, deliberately premeditated malice* aforethought, or extreme atrocity or cruelty, to secure a first-degree murder conviction. Under the felony murder doctrine, as applied in Massachusetts, proving the intent to commit the underlying felony substitutes for the requirement of proving that the taking of a life resulted from deliberately premeditated malice aforethought, or extreme atrocity or cruelty.²

The malice which plays a part in the commission of the felony is transferred by law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice, and a homicide with malice is common law murder. The state is thus relieved of the burden of proving premeditation or malice related uniquely to the homicide.³

It was because of this “fictional transfer” of malice that the Michigan Supreme Court in 1980 threw out its felony murder common law, ruling that:

*Malice is an essential element of the crime of murder and, save for felony murder, must be proved to a jury beyond a reasonable doubt. There are three ways, or prongs, to prove malice – any of which is sufficient for a conviction, if found to have been present by a jury. First, a defendant can be found to have intended to kill. Second, a defendant can be found to have intended to do grievous bodily harm. Or, third, there can be found that a reasonable person, including the defendant, should have known there was a plain and strong likelihood that death would follow the contemplated act.⁴

The felony-murder doctrine violates the basic principle of criminal law that criminal liability for causing a result is not justified in the absence of some culpable mental state in respect to it. The doctrine punishes all homicides committed in the perpetration or attempted perpetration of proscribed felonies, whether intentional, unintentional, or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind. The felony-murder doctrine completely ignores the concept of guilt on the basis of individual misconduct, and thus erodes the relation between criminal liability and moral culpability. The most egregious violation of the basic rule of culpability occurs when felony murder is categorized as first-degree murder, because all other first-degree murders carrying equal punishment require a showing of premeditation, deliberation, and willfulness, while a felony murder only requires a showing of intent to do the underlying felony.⁵

The Kentucky Supreme Court, in a case involving the killing of a store employee during an armed robbery in 1985, also found that a felony murder charge must include intent to cause death: “the culpability of [the non-shooting defendant] for the killing of the deceased must now be measured by the degree of wantonness or the recklessness reflected by the extent of participation in the underlying robbery rather than by the implication of intent to murder from the intent to participate in the robbery.”⁶

Aggravating the “fictional transfer” of premeditated malice in felony murder cases can be the presence of an accomplice and the roles s/he may have played in the underlying felony. Within Massachusetts, the mere presence of an accomplice(s) may not create a joint venture. In a joint venture, any participant in the commission of a crime who a) is present at the scene of the crime, b) shares the intent of another to commit a crime, and c) is willing and available to help if necessary, can be held responsible for the actions of all other participants.⁷ Thus if one participates in a crime punishable by life in prison in which a victim dies at the hands of another participant in the commission or attempted commission of that underlying felony, even if that death was unintended, all participants are liable to be charged with first-degree murder. If convicted, LWOP is the sentence handed down to each defendant regardless of his or her role or culpability in the underlying felony. Due to the felony murder doctrine, accomplices can be sentenced to LWOP even though there may have been no intent to kill anyone during the planning or

commission of, or attempted commission of, the underlying felony. Each accomplice, sharing the intent to commit the underlying felony, may be charged with first-degree murder because he/she is considered a joint venturer and, as such, is held culpable for the acts of any other involved in the original crime. An accomplice neither need be armed, nor immediately involved in the killing, nor even be aware of a death having occurred to be convicted of first-degree murder.

Whether or not participants in a joint venture resulting in a felony murder are actually charged with first-degree murder and brought to trial, lies in the hands of a prosecuting attorney. The prosecutor has the option to offer plea bargains to participants. Guilty pleas save the Commonwealth the expense of trials and avoid the risk that a jury might render a verdict of not guilty. Common sense suggests that the participant most culpable is the actual “shooter”.* As a result, the shooter may be quick to take a plea bargain. Additionally, the non-shooting accomplices may have an understandable resistance to pleading guilty to murdering someone when they didn’t even carry a weapon, particularly if there had been an agreement among the participants that no one would be killed. This leads to the most bizarre aspect to felony murder/ joint venture cases. Because of a plea bargain, the actual shooter may then be eligible for parole after fifteen years, while the accomplice(s) – who did not actually kill anyone – serves LWOP, if convicted at trial. The actual shooter may be paroled while the accomplice(s) has no access to parole. This is not merely hypothetical.

In 1993 then Massachusetts Governor William Weld commuted the LWOP sentence of Rogelio Felix Rodriguez after he had spent nearly twenty-two years in prison. Felix Rodriguez had been convicted of first-degree murder in the death of William Johnson in 1971. Felix Rodriguez, however, was not the shooter. Hector Rodriguez, no relation to Felix, was. Hector was allowed to plead guilty to second-degree murder. He had been paroled seven years earlier, in 1986, after serving fifteen years.⁸

*See footnote, page 4.

Prisoners serving LWOP as accomplices to a felony murder have received sentences disproportionate to the roles they actually played since they never actually took anyone's life. While they may also have been offered a deal to plead guilty to second-degree murder, it is easy to understand why many who did not commit murder would reject a deal which would force him or her to confess to something he or she did not do, and then to serve a life sentence. This disparity, which can amount to decades, appears intended not to punish the actual criminal behavior but the unwillingness to plead guilty.

According to Dennis Humphrey, former associate commissioner of program and treatment for the Massachusetts Department of Correction regarding the differences between first and second-degree lifers:

I'd be hard pressed to say which should be first and which second. The crimes are virtually identical, but all those second-degrees will be eligible for parole in 15 years.

In Massachusetts, a first-degree is often used because the defendant will not cooperate with the district attorney's office... .⁹

Of course, all those convicted of first-degree murder as joint venturers were not necessarily unwitting participants regarding the actions of their joint venturers. There certainly have been cases in which ringleaders have ordered underlings to murder someone. That level of specific involvement, i.e. the planning of a murder "with deliberate premeditation," includes the shared intent to kill. Ringleaders need to be treated as equally culpable as actual shooters. This involvement, however, differs significantly from an accomplice present at the actual scene of a crime in which someone else has killed a victim, an occurrence which was not intended when the criminal activity began or about which intended homicide all accomplices may not have been informed. Alternately, one participant may not inform the others of his/her decision to carry and/or use a lethal weapon and in the heat of the moment use the weapon, or provide it to another participant who then kills a victim. Those individual decisions should not necessarily implicate others unaware of a fellow participant's carrying, or intending to use, a weapon.

Consider the case of Joseph Donovan.¹⁰ In 1992 on a fall evening on a walkway near the Massachusetts Institute of Technology (MIT) in Cambridge, Massachusetts, Donovan, three weeks after his seventeenth birthday, and two friends encountered two Norwegian MIT students. Prior to this encounter Donovan's companions, one of whom was a juvenile, age 15, had planned to break into lockers at MIT to steal money. Meeting Donovan, the three then planned to rob a liquor store after the juvenile, according to the findings of the trial court, had shown Donovan that he (the juvenile) was armed with a knife. The plan to rob the liquor store, however, was abandoned as the store was deemed by the trio to be too crowded with customers. The group then headed down Memorial Drive where they came upon the Norwegian students.¹¹

In passing the trio, one of the students, the subsequent victim, bumped into Donovan who then demanded an apology. The students said something to each other in Norwegian, which Donovan did not understand and took to be an insulting remark. Donovan became angry and punched the victim in the head, knocking him down onto the ground. The force of the blow injured Donovan's hand and he turned away to tend to this pain.¹² At that point, the juvenile stabbed the victim in the heart, killing him. The third accomplice, Alfredo Velez, then demanded and took the other student's wallet. Donovan had seen the theft of the wallet, but not the stabbing. Velez, testifying as a witness against Donovan, stated that Donovan had robbed the murdered victim's wallet, which Donovan denied.¹³

The knife wielder was tried as a juvenile and found guilty of murder.* He was released without supervision after serving eleven years in prison, having completed his sentence. The other member of the trio, Velez, was given a deal to plead guilty to manslaughter, in exchange for testifying against Donovan and the juvenile. Velez served eight years before he was released. Donovan, found guilty of the underlying felony of armed robbery in the theft of the surviving victim's wallet, was also convicted at trial of

* In 1996 as a result of another murder in which a male juvenile stabbed a female neighbor scores of times, the Commonwealth passed legislation mandating that all persons accused of murder over the age of 14 be tried in adult court.

first-degree murder under the felony murder doctrine. He was sentenced to LWOP and remains incarcerated.¹⁴

The Supreme Judicial Court of Massachusetts, in denying Joseph Donovan's appeal of his conviction, stated that:

*The evidence that the defendant agreed to commit robbery, that he knew the juvenile had a knife, and that he punched the victim and took his wallet amply supports the finding of felony-murder.*¹⁵

It needs to be pointed out that the conclusion by the Supreme Judicial Court regarding the theft of the victim's wallet is not in accord with the facts found by the trial jury, which acquitted Donovan of this count.

This case illustrates the injustice of a first-degree murder conviction for felony murder and joint venture. What Donovan was culpable for was an assault and battery, which he was willing to plead guilty to, as that was what he felt he was responsible for.¹⁶ Despite this, the sentence Joe Donovan is serving is grossly disproportionate to those served by the other two participants who actually committed the physical felonious acts of murder and of robbery. Both have been released: one because he was tried as a juvenile, despite the fact that he was the person who actually stabbed the victim; the other because the prosecution needed him to testify against Donovan to secure a conviction, though only Velez did in fact steal a wallet.

Donovan has served nearly as much time as the other two combined. And, there is little light at the end of the tunnel, despite the support of the trial judge, at least one juror, and even the family of the victim. Without a meaningful commutation process in Massachusetts and no chance for parole, Joe Donovan will die in prison, the ultimate punishment in Massachusetts for the act of throwing one punch.

There is no doubt for the need or right of society to penalize criminal behavior. But, the sanction needs to be proportionate to the actual actions of each offender.

Andrew von Hirsch, a professor in the School of Criminal Justice at Rutgers University, states that:

*Fairness thus requires that penalties be allocated consistently with their blaming implications. The severity of the punishment (and thereby its degree of implied censure) should comport with the blameworthiness (that is, the seriousness) of the defendant's criminal conduct. Disproportionate or disparate punishments are unjust, not because they fail to requite suffering with suffering, but because they impose a degree of penal censure on offenders that is not warranted by the comparative reprehensibility of their criminal conduct.*¹⁷

While the avenue of commutation has enabled a few to be released on parole, like Felix Rodriguez, that opportunity has been practically nonexistent for the past twenty years. Two commutations were granted in 1993,^{*} one in 1995,^{**} and one in 1997.^{***} All were non-shooters. No one has received a commutation since 1997. In addition, from 2004 through 2008, 184 petitions for a commutation were filed. Only two (1.1%) were granted a hearing; neither received a commutation.¹⁸ With that record, the commutation process has bordered on the meaningless.

For those serving LWOP after being convicted under the felony-murder doctrine, particularly coupled with the joint venture rule, the argument for parole eligibility after twenty-five years is based on proportionality, lack of specific intent, and relative culpability. Presently the felony-murder doctrine, along with joint venture, fails on all three.

*Felix Rodriguez was one. The other was Benjamin DeChristoforo who had been convicted 22 years earlier and had been described by the prosecution as an accomplice, not the shooter. http://bulk_resource.org/courts.gov/c/F2/473/473.F2d.1236.72-1338.html (viewed on 3/14/09)

**Joseph Yandle, the get-away driver, had not entered the liquor store where his co-felon killed the clerk in 1972, twenty- three years prior to his commutation. <http://articles.latimes.com/1998/aug/27/news/mn-17104> (viewed on 3/14/09)

***Joseph Salvati was ultimately found innocent. He was convicted based on exculpatory evidence withheld by the FBI.

1. M.G.L. c265, §1. “Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first-degree. Murder which does not appear to be in the first-degree is murder in the second-degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.”
2. *Commonwealth v. Riley*, 73 Mass App. Ct. 721, 722. n.2 (2009)
3. “Constitutionalizing the Death Penalty for Accomplices to Felony Murder,” *American Criminal Law Review*, Vol.26: 463,464 n.10 (1988).
4. Michael G. Rikard, “The Uncertain Status of the Felony-Murder Rule in Massachusetts After *Commonwealth v. Matchett*, 386 Mass.492, 436 N.E. 2d 400 (1982),” *Western New England Law Review*, Vol. 6:1081,1092 (1984).
5. *People v. Aaron*, 409 Mich.672, 674 (1980).
6. *Kruse v. Commonwealth*, 704 S.W. 2d. 192; KY, 1985.
7. *Commonwealth v. Clemente*, 452 Mass. 295, 331 (2008).
8. Beverly Ford. “Murder Victim’s Family Helps Killer Earn Commutation,” *The Boston Herald*. February 25, 1993.pg.16.
9. Chris Black. “Horton case keeping the jail cells shut,” *The Boston Globe*, July 8, 1990 at 68.
10. *Commonwealth v Joseph Donovan*, 422 Mass. 349 (1996)
11. Id. At 350. *The Long Shadow of Willie Horton: Joe Donovan’s case for commutation*. The Boston Globe Magazine. October 18, 2009.
12. *The Long Shadow of Willie Horton*, supra.
13. *Commonwealth v. Donovan*, supra at 351. *The Long Shadow of Willie Horton*, supra.
14. *Commonwealth v. Donovan*, supra at 350. *The Long Shadow of Willie Horton*, supra.
15. *Commonwealth v. Donovan*, at 352.
16. Id.
17. Andrew von Hirsch. “The ‘Desert’ Model for Sentencing: Its Influences, Prospects, and Alternatives,” *Punishment: The U.S. Record – Special Research: An International Quarterly in the Social Sciences* 2007, at 414.
18. Information provided to the Lifers’ Group, Inc. by the Massachusetts Parole Board, pursuant to a public records request.