

THE WORST OF THE WORST

Gordon Haas

A myth persists regarding Life Without Parole (LWOP) sentences for first degree murder. The myth is that those serving LWOP are the "worst of the worst" of all incarcerated individuals, particularly those serving life sentences with an option for a parole (LWP) for second degree murder. This myth has contributed significant impetus to the those resisting ending LWOP, both in the legislature and in the population at large. Characterizing LWOP prisoners as the "worst of the worst," wrongly implies that a clear and plain distinction exists between the two degrees of murder.

Those familiar with the trial system for criminal offenses know that a judge informs a jury that the primary difference between convicting a defendant of first degree murder or second degree murder is premeditation. That is, the defendant had planned before hand to commit the crime, no matter how short that planning period may have been.¹ In addition, until recently, a defendant also could have been convicted of first degree murder even if he or she had not killed the victim. The defendant may have only participated as an accessory to the crime during which the victim had been killed by someone else. Thus, the accessory, if convicted of first degree murder, would have been sentenced to LWOP. The classic example is the getaway driver sitting in a car outside a store when an accomplice enters the store and a clerk or shopper is killed. The reality, however, is much simpler and less legalistic. The reason many prisoners are serving LWP sentences is that they accepted plea bargains offered by district attorneys. Those serving LWOP chose to go to trial and lost.

District attorneys engage in plea bargaining for two reasons: one, to avoid the expense of a time consuming trial, and two, to avoid the possibility, however remote, that a defendant might be found not guilty. Concern for victim family members and/or the specific facts of the killing are in third and fourth place. Simply put, expediency trumps justice.

In addition, district attorneys sweeten pleas to second degree with the incentive that the defendant would be "out in 15 years," the minimum time a second degree lifer has to serve before seeing the Parole Board. I have studied parole decisions for lifers over the past twenty years. I have been struck by the fact that in nearly all of the decisions in which a defendant had pled guilty to a second degree sentence, one or more representatives of the respective district attorney's office testified at the parole hearing orally, in writing, or both against granting paroling the lifer.² Part or all of their oppositions to granting a parole were the facts of the crime. This begs the question: If the facts of the crime were so severe as to block a parole, then why was a plea deal offered in the first place? Answer: expediency.

When reading those parole decisions for second degree lifers, I also noted how "premeditated" the commission of many of those crimes appeared to be. Yet, that had not deterred the respective district attorneys from offering reduced charges of second degree murder with the resultant LWP sentence.

Why then do defendants refuse a deal with so much at stake? Most defendants go to trial because they profess their innocence. They trust that since they had not killed anyone, they would not be found guilty of first degree murder. This was particularly true for those charged as accessories, like drivers of getaway cars. They opted for trials reasoning that since someone else had killed the victim, they, as accessories, should not be found guilty for a murder they had not committed. They were proven wrong. Making matters worse, the actual killer was often given a plea deal to second degree. Thus, that defendant may then be paroled, while the accessory remains in prison serving LWOP.

One may appropriately ask: What about the grief and suffering of family members of murder victims? There is little that the criminal system can do to soften their pain or lessen the damage done to a community when a murder has occurred. But, is there any real or tangible difference in that pain or damage if a defendant is serving LWP or LWOP? How can a decision by a district attorney to plea bargain a killing down to second degree do justice to any victim's family member?

Let me be clear. I am not advocating against paroling any second degree lifer who has demonstrated to the satisfaction of the Parole Board that he or she is rehabilitated. Rather, I am contending that the difference between a person serving LWP or LWOP should not depend upon whether or not a district attorney is willing to make a deal. Should not those serving LWOP have the same opportunity to prove their worthiness before the Parole Board as do those serving LWP, even if a parole hearing does not come until the LWOP lifer has served at least 25 years?

Parole Board members have the difficult task of assessing a lifer's rehabilitation and concomitant ability to live as a law-abiding, productive citizen against the suffering of family members and the damage done to the community at large. The decision to or not to parole a lifer raises the question: Would society be better off by releasing on lifetime parole a person who is ready and able to serve his or her community or to keep that lifer behind bars as retribution?

The Massachusetts legislature has determined that the deciding questions for granting a parole are: Will the person's release be incompatible with the welfare of society? And, will the person not violate the law if released?³ Family members who wish to address the Parole Board at any lifer's hearing regarding the granting of a parole, may do so. The Parole Board actively solicits oral and/or written testimony from those affected by the actions of any lifer up for parole.

Surely, input from victim family members must be given full respect and consideration. But, assuming family members oppose a parole, as most family members do when they give testimony, should their wishes be the deciding factor in a parole decision? Fairness to all would seem to call for a more balanced approach.

There is the question: What about commutations to reduce sentences of LWOP? From 1998 to 2022, no commutations of LWOP sentences were granted.⁴ Despite hundreds of applications, no one was found deserving. Then, in the closing days of his last term, former Governor Charlie Baker commuted three LWOP lifers. Three commutations out of hundreds of applications hardly offers a viable opportunity. I seek not to disparage those commutations or the lifers who deservedly received the reductions in their sentences. A cynic, however, might argue that those commutations were designed not as a sign of mercy, but rather to blunt the growing drive to end LWOP sentences in Massachusetts. LWOP sentences have proven to be *de facto* death sentences. For example, from 2018 through 2022, on average, 19 lifers have died in Massachusetts prisons.⁵

Either plea bargaining should end or all those serving life sentences should be allowed an opportunity for a parole hearing. Doing so would not open prison doors to all lifers. Rather, only those who were able to demonstrate to the Parole Board that they met the criteria mandated by the legislature would be paroled with lifetime supervision by the state. That paroled lifers have rarely committed new crimes demonstrates the efficacy of a parole opportunity for all. For instance, since 2016, after the Supreme Judicial Court banned LWOP sentences for juveniles, i.e., those under the age of 18 at the time of the crime, 39 ex-juveniles formerly serving LWOP sentences have been paroled. Not one has been returned to prison for a new crime.⁶

In addition, since 2009, 74 LWOP prisoners were released after it had been determined that they had been wrongfully convicted.⁷ It is likely that scores more LWOP lifers have been similarly wrongfully convicted, but their legal options have run out. Allowing a parole opportunity for all would address that inequity.

If the criminal justice system is to be just, growth in prisoners needs to be recognized and rewarded, regardless of the length of sentence. Rehabilitation needs to replace retribution against those erroneously perceived as the "worst of the worst."

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END NOTES

¹ A jury is not informed what the penalties are for first (LWOP) or second (LWP) degree murder.

² Data regarding representatives from district attorney's offices testifying at parole hearings was tracked by the Lifer's Group Inc. beginning in 2019 and continuing through 2020. For those years, the total number of parole hearings was 191. In 173 or 91%, representatives from various district attorney's offices testified against granting a parole. (*Parole Decisions For Lifers For The Year 2020*. Lifer's Group Inc. at 20. See: realcostofprisons.org/writing.)

In 2021, the Parole Board ceased identifying whether or not a representative from a district attorney's office had testified in some form at a parole hearing. (*Parole Decisions For Lifers For The Year 2021*. Lifer's Group Inc. at 20. See: realcostofprisons.org/writing.)

³ Mass. Gen. Law c. 127, §130.

⁴ *Prison clemency program needs a fresh start*. The Boston Globe Editorial Staff. May 14, 2023.

⁵ The Lifer's Group Inc. for the past 25 years has maintained a list of lifers known to have died while incarcerated. As of January 1, 2023, the list totaled 399 names. Compiling this list was motivated by erroneous assertions by conservative pundits, such as Howie Carr, that no one dies in prison. Until 2018, the Department of Correction (DOC) had refused to divulge each year the names and/or numbers of lifers who died while incarcerated. The names were reported anecdotally by various members of the Lifer's Group Inc. Prior to 2018, the list was not inclusive.

In 2018, the DOC reversed its position. From 2018 through 2022, the DOC has reported to the Lifer's Group Inc., pursuant to public records requests, the name of each lifer who died in prison each year. For that period, the total number of lifers who died while incarcerated was 95 or an average of 19 lifers each year.

Since second degree lifers have parole options, the Lifer's group Inc. estimates that at least 75% of the 304 lifers who were reported as having died in prison prior to 2018 were serving LWOP sentences. Due to COVID, the percentage of lifers serving second degree sentences who died from 2019 through 2022 would be higher than the percentage of second degree lifers who died in prison pre-2018.

⁶ *Parole Decisions For Lifers For The Year 2022*. Lifer's Group Inc. at 16. See: realcostofprisons.org/writing.)

⁷ Dirk Greineder. *Wrongful First Degree Murder Convictions In Massachusetts: Too Many and Justice Delayed Too Long*. Lifer's Group Inc. July 2023. See: realcostofprisons.org/writing.)