

LIFE WITHOUT PAROLE

A Reconsideration

2nd Edition

(2010 Edition with an Updating Addendum)

**Gordon Haas
Lloyd Fillion**

Criminal Justice Policy Coalition
Norfolk Lifers Group

LIFE

WITHOUT

PAROLE

A Reconsideration

2nd Edition

(2010 Edition with an Updating Addendum)

**Gordon Haas
Lloyd Fillion**

In conjunction with
Criminal Justice Policy Coalition
Norfolk Lifers Group

Collective Action for Humane Healing and Effective Criminal Justice Policy

Published by the Criminal Justice Policy Coalition, Boston, Massachusetts

All rights reserved. Printed by Red Sun Press. No part of this book may be reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and review. For information and multiple copies, contact www.cjpc.org

Boston Public Library call number, 2010 edition:
HV9105.M4 H33 2010x

Online Edition:
<http://www.cjpc.org/Life-Without-Parole-A-Reconsideration.pdf>

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.

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* 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 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 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 were 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. For the 2nd edition in 2016, Sonia Turek provided valuable assistance as editor, while Lauren Powers provided graphic layout. To all these individuals the authors are indebted. Of course, any errors are the responsibility of the authors alone.

* Found at http://www.cjpc.org/dp_cjpc_statement.htm

Executive Summary

The sentence of Life Without Parole (LWOP) is viewed by many as the equivalent of the death penalty, the only distinction being the length of time the sentence usually takes to be executed. Both death sentences can deprive those so sentenced of a sense of hope. This document, comprising both the original 2010 text and the 2016 addendum, challenges the need and wisdom for LWOP in Massachusetts on a number of grounds. This report argues for a maximum sentence of life with a possibility of parole after 25 years.

The report begins by reviewing the increasing use of LWOP sentences since the late 1970s. In 1977 there were 170 prisoners serving LWOP; by 2009 there were 938, an increase of 552 percent. Recently the LWOP-sentenced prisoner count has increased even further to 1,036. But for the 2012 U.S. Supreme Court *Miller v. Alabama* decision and subsequent MA Supreme Judicial Court *Diatchenko v. District Attorney for the Suffolk District* and *Commonwealth v. Brown* cases vacating juvenile LWOP sentences, the count would be higher by 69. In no instance does any increase in crime or in the murder rate correlate with these increases in the use of LWOP.

The increase in LWOP prisoners comes at considerable financial cost for little or no increase in public safety, as older prisoners have higher medical costs which the Department of Corrections must bear. The number of MA elderly prisoners has nearly doubled in the first decade of this century. Using figures for 2009, the total cost for each prisoner over 55 years of age may be calculated at \$80,000 and perhaps even \$125,000. Though some of these persons might be a burden on the state were they paroled, the costs would be substantively less; some of the expense would be borne by the private sector and some by the federal government through subsidized health providers.

Instituting a parole option for every prisoner does not mean that all lifers will be paroled. Rather it indicates that the state accepts the possibility that some persons do grow in understanding, and in combination with increased age, lose their propensity for violent and passionate responses to others and to circumstances. Additionally, studies suggest that length of sentence is of substantially less significance in deterring crime than the certainty and swiftness of sanctions.

Sentencing those under 18 to LWOP has been eliminated. However, the executive function of the human brain does not fully develop for many until 22 and even for several years beyond. An LWOP sentence is particularly ill suited for many between age 18 and 22.

Felony murder and joint venture often demonstrate a lack of proportionality of sentence to crime. This is especially true in cases where a shooter pleads to a lesser sentence while an accomplice receives an LWOP sentence. In contrast, the U.S. Supreme Court *Miller* decision called for "...punishment... graduated and proportioned to both the offender and the offense."

Habitual offenders are being sent to prison with life sentences with no parole options in increasing numbers for a third offense, for crimes which don't involve a murder, and for whom the prior two convictions are for felonies with sentences of a minimum of three years. Because of MA legislation passed in 2012, there are now an additional 18 non-homicide crimes for which a life sentence is mandated. Under this legislation, MA's version of "Three Strikes," a person convicted of

one of these 18 crimes as a third felony must be sentenced to the maximum allowed for that particular crime, which is life in prison.

While commutations are technically a relief valve for LWOP-sentenced prisoners, their virtual non-existence since 1997, despite hundreds of petitions and a few positive recommendations by the Advisory Board of Pardons, suggests that commutation relief is unlikely to be an option in the future.

Although LWOP is considered the equivalent of the death penalty, persons so convicted do not have the safeguard of a bifurcated trial which exists in states with the death penalty. Such would afford the jury an opportunity to consider both mitigating and aggravating circumstances. While LWOP should not be an option, a jury might conclude that a sentence of life with the possibility of parole at 25 years is indeed reasonable, while in other cases might deem a sentence of life with a lesser length before a possible parole appropriate. The actual length could then be determined by the judge.

Finally, statistically there are likely some 40 persons serving LWOP who are falsely convicted of the crime of murder.* Those certainly deserve a chance at parole.

* See the first footnote of page 41, regarding actual innocence, falsely convicted, exonerated, and other similar language.

Contents

Acknowledgements	ii
Executive Summary	iii
Preface	vi
Introduction	1
A Brief History of LWOP	6
Incarceration costs in Massachusetts	9
LWOP vs. the death penalty	11
Paroling a prisoner serving LWOP	12
Experience with parole for second degree lifers	14
Particular Issues Regarding LWOP	20
Juveniles serving LWOP	20
Felony murder/joint venture	25
2016 Addendum	35
Developments since 2010	35
a. Juveniles and LWOP	35
b. Habitual offenders	36
c. Increases in LWOP sentencing	37
Issues	37
a. Proportionality	37
b. Commutations	39
c. Bifurcation	39
d. Innocent persons serving LWOP	40
Appendix A: The Cinelli Case	44
Appendix B: Cases Cited	45
About the Authors	46
Sponsoring Organizations	47

Preface

In Massachusetts, the maximum penalty for murder is life in prison without the possibility of 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 1,000 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 affected survivors are forced to come to terms with the murder and its consequences, and to 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 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 LWOP. This paper argues for the introduction of parole hearings after 25 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.

* Charles Manson was the leader of a cult, which brutally murdered seven 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 12/27/15).

† Ted Bundy was a serial killer who is thought to have murdered at least 30 women over the course of five years between 1974 and 1978. en.wikipedia.org/wiki/Ted_Bundy; (Accessed 12/27/15).

‡ 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.

§ 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 the Death Penalty Information Center: <http://www.deathpenaltyinfo.org/victim-resources> (accessed 1.7.16).

UPDATES FOR THE SECOND EDITION

With the increased concern nationally about the overreliance on incarceration and even some questioning of mandatory sentencing, a re-publication of the 2010 work was thought relevant. In this second edition, the only changes to the original text are occasional words to increase clarity, as well as updating/substituting online addresses where possible/necessary.

This paper does not address other critical problems within the criminal justice system, in particular how parole might be administered to those currently serving an LWOP sentence. The authors and organizations they represent propose that current law regarding setbacks, i.e., a wait before another hearing where a lifer is denied, also be applied to all lifers who become eligible for a parole. Presently the Parole Board can order a setback of up to five years.

It should go without saying that the authors would argue that this sentencing change to LWOP should be applicable to any person already sentenced to LWOP. Furthermore, while the paper deals only with sentences resulting from murder, the authors would argue, consonant with the 2003 policy statement of the CJPC*, that all life sentences should be reviewed in a parole hearing after 25 years, again with setbacks of five years for subsequent hearings. The authors are convinced that any substantive change to LWOP will engender the seeds of further change.

The section on juveniles has been left in as it contains substantive commentary on neurological development of the young brain. The 2012 court decisions which eliminated LWOP for those under 18 are discussed in the Addendum, which brings up to date the original document, and which notes additional flaws in the application of LWOP.

* See page ii; also at http://www.cjpc.org/dp_cjpc_statement.htm (Accessed 1.7.16).

Introduction

Everyone serving a Life Without Parole sentence in Massachusetts after 25 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 25 years, as put forth in this paper, can be achieved without endangering public safety. The authors 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 percent of the world’s population and 25 percent 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 percent,³ were serving LWOP, an increase from 26.3 percent in 2003,⁴ and from 17.8 percent in 1992.⁵ In Massachusetts, as of January 1, 2008, 51 percent 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 percent, the third highest percentage of the 48 states reporting data.⁷ The national average was 2.8 percent.^{8‡}

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 percent. In 1977, there were only three prisoners serving LWOP (170) for every four 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 percent of the population of 5,782,000) to 2008 (.002 percent of the population of 6,449,755).¹³ In addition, the murder rate per population remained relatively consistent (.002 percent) from 1999 to 2008.¹⁴ Yet, the number of

* 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. Manson was refused parole 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.

§ First degree murder convictions require a finding of deliberately premeditated malice aforethought or extreme atrocity or cruelty, or murder committed in the commission or attempted commission of a crime punishable by imprisonment for life. All other murder convictions are second degree convictions. 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 15 years.

lifers serving LWOP increased 37 percent (683 to 938) in that period, while the rate of lifers serving second degree sentences, i.e., with a parole possibility after 15 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.*

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 25 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, 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, limitation 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

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.

* 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 percent of the names on the list have died within the past 25 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.

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 57 prisoners in Massachusetts serving LWOP who were under 17 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 nationally, 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 were 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. (For one such case, see pages 31-32.) 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 15 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 codefendants.

Affording possible relief to prisoners who, after 25 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

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

† “[S]hooter” is used throughout this paper in discussions of felony murder/joint venture to refer to the person who actually did the killing, whether by gun, knife, choking or other means.

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. Liptak, Adam, quoting B. Cain, “Serving Life, With No Chance of Redemption,” *The New York Times*, (October 5, 2007), at A-18.
2. <http://www.apa.org/monitor/2014/10/incarceration.aspx> (Accessed 1/8/16).
3. Nellis, Ashley and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*. The Sentencing Project, (July, 2009), at 3.
4. Mauer, Marc, Ryan S. King, and Malcolm Young, *The Meaning of “Life”: Long Prison Sentences in Context*. The Sentencing Project, (May, 2004), at 3.
5. *Id.*, Table 3, at 11.
6. McLaughlin, Pamela J., *January 1, 2008 Inmate Statistics*. Massachusetts Department of Correction, Research and Planning Division, (May, 2008), at 20, Table 23. (Hereinafter “2008 *Inmate Statistics*”).
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 percent) and PA (9.4 percent). IL did not provide usable data and UT did not report data; the federal government data was included.
8. *Ibid.*
9. Metzler, Charles, *A Description of the Residents of the Massachusetts Correctional Institutions on January 1, 1977*. Massachusetts Department of Correction, Research Unit, (August, 1977), at 41.
10. *January 1, 2009 Inmate Statistics*. Massachusetts Department of Correction, Research & Planning Division. (May, 2009), at 17, Table 15. (Hereinafter “2009 *Inmate Statistics*”).
11. *A Description of the Residents...* *supra*.
12. 2009 *Inmate Statistics*, *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. *Ibid.*
15. 2009 *Inmate Statistics*, *supra* at 17 (Table 16); statistics for 1999 from 2008 *Inmate Statistics*, *supra* 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 <http://www.interstatecompact.org/LinkClick.aspx?fileticket=acIRuZIrurk%3D&tabid=1289&portalid=0&mid=4388> (Accessed 1/8/16).
18. *Until They Die a Natural Death: Youth Sentenced 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*, 560 US 48 (2010). In *Graham*, the Supreme Court found a life without parole sentence for juveniles convicted of non-homicides to be unconstitutional.

A Brief History of LWOP

In the eyes of almost every developed nation, the United States has traveled a path regarding punishment from acclaimed enlightenment to its antithesis in the more than two centuries since the country's founding. As the 18th century turned into the 19th, 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 Vivien 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 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.

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 [sic] and 1960's [sic], 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

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

The news media's heavy emphasis on crime, and politicians being rewarded for playing the 'crime card', both contributed to a fundamental shift in policy away from rehabilitation.

LWOP sentences, however, began proliferating after 1984. The federal government, which had reduced parole eligibility for lifers* to 10 years in 1976, reversed course and eliminated parole in 1987.¹⁴ By 1990, 30 states had adopted LWOP statutes. By 2005, that number had increased to 49, as well as the District of Columbia. Presently, only Alaska (a non-death penalty state) has not adopted the sentence of LWOP.¹⁵ Nationwide, in 1993, 20 percent of prisoners serving a life sentence had no chance for parole. By 2004, that percentage had increased to 28 percent.¹⁶ In Massachusetts as of 2009, 52 percent of all lifers were serving LWOP.¹⁷ While those in Massachusetts serving second degree life sentences are eligible for parole after 15 years, virtually all first degree lifers die in prison. To be sure, there is a commutation process which permits LWOP

* In Massachusetts, "lifers" refer to those who are sentenced to either life with the possibility of parole after 15 years, or to life with no possibility of parole. Life sentences, with or without a parole possibility, can be for a single conviction or for multiple convictions, in which case, the life sentences may run concurrently or consecutively, depending on the discretion of the sentencing judge. In other states, "lifers" may be serving sentences that include a minimum number of years before eligibility for parole, such as 25 years to life.

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 20th 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 "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 "Bill" 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 "Bob" 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

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

* 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 30 years after their convictions, that exculpatory evidence withheld by law enforcement authorities proved that they all had been falsely convicted.

[†] 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.

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 percent of the rise in those states’ prison populations, while harsher sentencing policies accounted for the other 88 percent.²⁸ A meta-analysis of literature of the last quarter of the 20th century reviewing the correlation of severity of sentence to crime levels suggests that scholars consistently find that increased sentence severity doesn’t lessen crime.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 37 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 two weeks (18 days) on parole.³⁷ For every dollar spent on prisons in Massachusetts, four cents was spent on parole.

***In Massachusetts...more
of the taxpayers’ state tax
burden is spent on
incarceration than on
higher education.***

* Incarceration rate references the number of persons sentenced to incarceration on a yearly basis, as distinct from the prison population for any year.

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

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.

Instituting a parole possibility after 25 years for those serving LWOP would not empty Massachusetts' prisons of dangerous lifers. The number of lifers who might rejoin society after 25 or more years of incarceration would depend entirely on each individual lifer being able to meet criteria set by the Parole Board for release under continued community supervision.

There were 938 prisoners serving LWOP in Massachusetts as of January, 2009. From a fiscal perspective, 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 Centers for Medicare and Medicaid Services, increased more than 6 percent 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

* 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.

MCI-Norfolk’s recently renovated second floor in the Hospital Services Unit, for permanent housing and treating terminally or chronically ill prisoners.

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 50 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 DOC⁴⁸ (See Table 1).

Table 1

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 percent (283 to 472) from January 1, 2000 to January 1, 2009.⁴⁹ And, the number of prisoners aged 40 to 64 has increased 29.5 percent (from 3,131 to 4,055).⁵⁰ How many of those prisoners aged 40 to 64 and over age 65 are serving LWOP cannot be determined from Massachusetts DOC public reports. The number of prisoners serving LWOP alone has increased 34 percent 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 in excess of \$140,000 (\$47,500 times three) 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

* This cost references national averages. In the 2009 Pew Center study *One in 31...*, cited on p. 8 of this report (endnote 24), the annual cost for Massachusetts was calculated as \$47,500. See Endnote 35 of this section.

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 25 years.

The authors of this paper respect the concerns of death penalty opponents. Nevertheless, introducing parole eligibility after 25 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 reinstituting 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, fairness, 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. An 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 reinstitution of capital punishment. Yet, in a poll conducted by Georgia State University in 1986, 53 percent 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 25 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 percent 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 25 years and some form of restitution.⁵⁶

PAROLING A PRISONER SERVING LWOP

It also must be remembered that introducing parole eligibility after 25 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 25 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 percent - (one of the 188) - for repeat homicides.⁵⁷ In 1994, 79.4 percent 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 percent.⁵⁸ Note that rearrests 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, 37 commutations were granted in Massachusetts to lifers serving LWOP. Through 2008, none has 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 According to a June, 2004 study by the Massachusetts Department of Correction, 15 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

According to a June, 2004 study by the Massachusetts Department of Correction, 15 prisoners serving time for second degree murder were paroled in 1998 and not one, in the three years of the study was...convicted of any other new crime in Massachusetts.

* By statute, M.G.L. c.127, §130, a majority of the Parole Board members must make the determination to grant a parole.

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 Advisory Committee on Geriatric and Seriously Ill Inmates to the General Assembly of PA, of 99 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 percent. 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 percent. For those released when they were between 45 and 54 years of age, the recidivism rate was 23 percent. The recidivism rate dropped further to 19 percent for those 55 to 59 and to 16 percent for 60 to 64.⁶⁷ Thus, those who might be paroled after serving 25 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 reinstituted a death penalty statute on January 1, 1975, soon 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 25 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 Elizabeth Gaynes of the Osborne 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 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 15 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. Of those, 299 were approved for parole, an approval rate of 34 percent (See Table 2).

Table 2

Year	# of Parole Hearings Held	# of Conditional Paroles Granted*	% of Conditional Paroles Granted ⁷¹
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
Total '02-'09	884	299	34

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 (See Table 3).[†]

It is important to consider that 116, or 72 percent, 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 of over \$5 million annually.⁷⁹

* 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.

Table 3

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 prison for technical reasons [*]	23	14.3%
Those returned to prison for new arrests [†]	16	10.0%
Those returned to prison for new convictions [‡]	6	3.7%
Total Number	161	100.0%

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, states: “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 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 Scheidegger’s view. As expressed by Marc Mauer et al.,

*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 25 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.

^{*} Technical violations consisted of breaking a rule, regulation or agreed upon provision of parole, without the commission of a new crime. These 23 violations were for: not following rules (7), use of alcohol (3), tested positive for or possession of drugs (11), domestic disturbance (2).

[†] 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).

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

1. Whitman, James Q., "What happened to Tocqueville's America?" *Punishment: The U.S. Record*. Social Research: An International Quarterly of the Social Sciences, Vol.74: no.2, (Summer, 2007), at 251.
2. *Id.*, at 252.
3. *Ibid.*, citing Tonry, Michael, ed., *Handbook of Crime and Punishment*. Oxford: Oxford University Press, (1998), at v.
4. Mauer, Marc, quoting Stern, *Comparative International Rates of Incarceration: An Examination of Causes and Trends*. The Sentencing Project, (June, 2003), at 11.
5. Flanagan, Timothy J., ed., *Long-Term Imprisonment- Policy, Science, and Correctional Practice*. Sage Publications, Thousand Oaks, CA, (1995), at 11.
6. Lazare, Daniel, "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).
8. *One in 100: Behind Bars in America 2008*. Public Safety Performance Project, Pew Center on the States, (February 28, 2008), at 5.
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 Trusts (June, 2007), at 1.
10. *One in 31: The Long Reach of American Corrections*. Pew Center on the States of The Pew Charitable Trusts, (March, 2009), at 1.
11. *Ibid.*
12. Tonry, Michael, "Looking Back to See the Future of Punishment in America," *Punishment: The U.S. Record*, supra at 354.
13. Mauer, Marc, Ryan King, and Malcolm Young, *The Meaning of "Life": Long Prison Sentences in Context*. The Sentencing Project, (May, 2004), at 4.
14. "A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment," *Harvard Law Review*, v. 119 (6) 1838, (April, 2006), at 1840.
15. *Id.*, at 1842.
16. Liptak, Adam, "To More Inmates, Life Term Means Dying Behind Bars," *The New York Times*, October 2, 2005, at A-28.
17. *January 1, 2009 Inmate Statistics*. Massachusetts Department of Correction, Research & Planning Division, (May, 2009), at 17.
18. Beale, Sara Sun, "Still Tough on Crime? Prospects for Restorative Justice in the United State." (2003) *Utah Law Review*, at 413, 424.
19. "Willie Horton," https://en.wikipedia.org/wiki/Willie_Horton. (Accessed 12/15/15).
20. "Remembering Rick Ray Rector," <http://www.talkleft.com/story/2008/1/24/105451/284>. (Accessed 2/3/16).
21. Currie, Elliott, *Crime and Punishment in America*. Henry Holt and Company, New York, (1998), at 4.
22. Simon, Jonathan, "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. Brooks, Lisa E., A. L. Solomon, S. Keegan, R. Kohl, and L. Lahue, *Prisoner Reentry in Massachusetts*, Urban Institute, Washington, D.C., (2005), at 3.
28. Blumstein, A., and A.J. Beck, "Population Growth in U.S. Prisons 1980-1996," *Crime and Justice; Prisons – A Review of Research*, Vol. 26, Chicago; Univ. of Chicago, (2000), at 43. The six states reviewed were California, Florida, Michigan, New York, Pennsylvania, and Texas.
29. Doob, Anthony N., and Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," *Crime and Justice*, v. 30, Chicago; Univ. of Chicago, (2003), at 143.
30. White, Jr., David W., "Fixing Our Criminal Sentencing System," *The Boston Globe*, April 26, 2008, at A-11.
31. *Ibid.*
32. "State Spending More on Prisons Than Higher Education," *Massachusetts Taxpayers Foundation Bulletin*, (November 24, 2003), at 1.
33. Richburg, Keith B., and Ashley Surdin. "Fiscal Pressures Lead Some States to Free Inmates Early," *The Washington Post*, May 5, 2008, at A-1.

34. Gramlich, John, "Strapped States Eye Prison Savings," *State of the States 2009*. The Pew Center on the States, at 28. http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/state-based_policy/sots2009pdf.pdf (Accessed 1/8/16).
35. *One in 31* ..., supra. State by state appendices, at 41, 42. Yearly rate computed by authors.
36. *Id.*, at 1. Yearly rate computed by authors.
37. *Ibid.*, State by state appendices, at 41, 42.
38. Engel, Len, *Promoting Public Safety Through Successful Community Transition*. A joint report published by Community Resources for Justice, Inc., and Crime and Justice Institute, (May 9, 2006), at 6.
39. *The Meaning of "Life"*: ..., supra at 25.
40. Mitka, Mike, "Growth in Health Care Spending Slows, But Still Outpaces Rate of Inflation," *Journal of American Medical Association*, Vol. 301, No.8, (February 25, 2009), at 815.
41. "A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment," Vol. 119, No.6. *Harvard Law Review*, (2006) at 1838, 1852.
42. Gottschalk, Marie, "Dollars, Senses, and Penal Reform: Social Movements and the Future of the Carceral State." *Punishment: The U.S. Record*, supra at 686.
43. Wright, Jr., Julian H., "Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?" 43 *Vanderbilt Law Review* 529,563 (1990).
44. *Id.*, at n.204.
45. www.hrw.org/en/news/2009/12/23/nursing-homes-razor-wire. (Accessed 12/13/15).
46. Wilper, Andrew, et al., "The Health and Health Care of US Prisoners: A Nationwide Survey," *American Journal of Public Health*, Vol. 99. No. 4, (April, 2009), at 3.
47. *Prison Inmates at Midyear 2007*, Bureau of Labor Statistics, (June, 2008), NCJ 221944, Table 9, at 7.
48. McLaughlin, Pamela J., *January 1, 2008 Inmate Statistics*. Massachusetts Department of Correction, Research and Planning Division, (May, 2008), Table 3, at 5.
49. Sampson, Lisa Lorant, *January 1, 2000 Inmate Statistics*, Massachusetts Department of Correction, Research and Planning Division, (May, 2000), Table 2, at 10; *January 1, 2009 Inmate Statistics*, Massachusetts Department of Correction, Research and Planning Division, (May, 2009), Table 23, at 23. (Hereinafter 2009 *Inmate Statistics*).
50. 2009 *Inmate Statistics*, supra at 23.
51. *Id.*, at 23.
52. "A Matter of Life and Death...", supra at 1839.
53. Gottschalk, supra at 681.
54. "A Matter of Life and Death...", supra at 1842-1843.
55. "Life-Without-Parole: ...," supra at 555.
56. Beale, supra at 423.
57. Sorenson, Jonathan R., and Rocky L. Pilgrim, "An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants," *The Journal of Criminal Law and Criminology*, Vol.90, no.4, (Summer, 2000), at 1251, 1255.
58. *The Meaning of "Life"* ..., supra at 3.
59. *Id.*, at 23.
60. Hill, Michael, "Out on Good Behavior," *Adirondack Daily Enterprise*, March 27, 2008, at http://realcostofprisons.org/blog/archives/2008/03/ny_none_of_hund.html (Accessed 9/20/08).
61. Black, Chris, "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 its 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.
63. Hoover, Hollie A. Matthews, *Recidivism of 1998 Released Department of Correction Inmates*, Massachusetts Department of Correction, Research and Planning Division, (June, 2004), at 24, Table 15, and at 48, Table 39.

64. Hill, *supra*, quoting J. Fagan.
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, at 81-82. <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2005-40-INMATES%20REPORT.pdf> (Accessed 1/8/16).
67. *Recidivism of 1998 Released Department of Correction Inmates*, *supra* at ii, iii and 22.
68. “A Matter of Life and Death...,” *supra* at 1852.
69. “Life-Without-Parole: ...,” *supra* at 563-564.
70. Hill, *supra*, quoting L. Gaynes.
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 Massachusetts Parole Board, at 9.
74. *2007 Annual Statistical Report* published by the Massachusetts Parole Board, at 12.
75. *2008 Annual Statistical Report* published by the Massachusetts Parole Board, at 15.
76. *A Study of Parole Board Decisions for Lifers – 2009*. Lifers Group, Inc., April, 2010, at 4. A copy may be obtained from: The Lifers Group, MCI-Norfolk, P.O. Box 43, Norfolk, MA 02056, Attn: Chairman.
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 appendices, at 41, 42. Yearly rates computed by authors.
79. \$5,208,400 calculated by multiplying \$44,900 by 116.
80. McDonough, Siobhan, “One of 11 in Prison Serving a Life Sentence,” *The Boston Globe*, May 12, 2004, at A2.
81. *The Meaning of “Life”*..., *supra* at 29.

Particular Issues Regarding LWOP

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 Convention 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 percent (2,381), while the remaining seven were imprisoned in Israel.⁶

The use of LWOP sentences for juveniles has mushroomed in the United States. 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 32. From 1983 through 2003, the number of juveniles sentenced to LWOP totaled 1,636, a 50-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 percent of all juveniles serving LWOP had received that sentence for their first ever criminal conviction; 16 percent

* 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 20s. Consequentially, for purposes of criminal responsibility, a minimum age of 21 begins to approach what science is revealing.

were between the ages of 13 and 15 when their crimes had been committed; and 26 percent 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 60 out of 2,225 juveniles serving LWOP in 42 states for which data was available.⁹ According to a Human Rights Watch and Amnesty International study, the rate of juveniles aged 14 to 17 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 40 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 11th highest of the 40 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 per 100,000). The average rate for the four New England states reporting data on juveniles serving LWOP, not including Massachusetts, was 4.41 per 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 (109.6) 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 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 18.5 was fifth highest – Louisiana at 109.6, 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 one 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.

*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 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*}

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

Deborah Yurgelun-Todd, Director of Cognitive Neuroimaging and Neuropsychology Laboratory 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 Steinberg's assessment. In an interview for a PBS Frontline presentation, Yurgelun-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

* In a 2001 New York Times Op-Ed, Daniel Weinberger, M.D., Chief of the Clinical Brain Disorders Branch of the National Institutes 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

Sentencing juveniles to LWOP is tantamount to a living death sentence; such sentences may be the most unambiguous statement of the wastefulness of LWOP.

*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 Institutes of Mental Health study which began in 1991 and followed some 5,000 children, Jay Giedd, director of the study, found that the subjects' brain 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 percent of all homicide offenders in the United States were younger than 18. Ten years earlier, the rate was 11 percent.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. 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, as cited by Alison M. Smith of the Congressional Research Service, 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.’

Smith continued:

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

Laurence 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

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.

This year, the California State Senate approved a bill (SB399) which would allow a court to review LWOP sentences for juveniles after 10 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 25 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 25 years of incarceration, as is argued for in this report, offers a similar “careful consideration” by the MA Parole Board of each individual case.

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

* 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.

† 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. See *Enmund v. Florida* 458

is parole possibility after 15 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...”³⁷ It is incumbent upon prosecutors to present proof to a jury that

leads 12 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.

The felony-murder doctrine completely ignores the concept of guilt on the basis of individual misconduct, and this erodes the relation between criminal liability and moral culpability.

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,^{37*} 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 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.

US 782 (1982), as extended by *Tison v. Arizona* 481 US 137 (1987). Were MA to reintroduce the death penalty, it could not be a sanction for felony murder provided those two qualifying attributes.

* 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).

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.³⁹

*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.*⁴⁰

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:

*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.*⁴¹

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.”⁴²

Aggravating the “fictional transfer” of premeditated malice in felony murder cases can

***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.***

* Malice is an essential element of the crime of first degree 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.³⁸

be the presence of an accomplice and the roles he/she 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.⁴³ 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 15 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, Jr. after he had spent nearly 22 years in prison. Felix Rodriguez, Jr. had been convicted of first degree murder in the death of William Johnson in 1971. Felix Rodriguez, Jr., 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 15 years.⁴⁴

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.

Quoted in the press, Dennis Humphrey, former Associate Commissioner of Program and Treatment for the Massachusetts Department of Correction, regarding the differences between first and second degree lifers, stated:

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...⁴⁵

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.⁴⁶ In 1992 on a fall evening on a walkway near the Massachusetts Institute of Technology (MIT) in Cambridge, Donovan, three weeks after his 17th 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.⁴⁷

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.⁴⁸ 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 stolen the murdered victim’s wallet, which Donovan denied.⁴⁹

The knife wielder was tried as a juvenile and found guilty of murder.* He was released without supervision after serving 11 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 first degree murder under the felony murder doctrine. He was sentenced to LWOP and remains incarcerated.⁵⁰

Without a meaningful commutation process in Massachusetts and no change for parole, Donovan will die in prison, the ultimate punishment in Massachusetts for the act of throwing one punch.*

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.*⁵¹

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 the count of robbing the murdered victim.[†]

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.⁵² Despite this, the sentence 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,

* 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.

† The MA Supreme Judicial Court record errs in stating "Donovan was convicted of murder in the first degree of the victim and of armed robbery of the victim's companion." *Commonwealth v. Donovan*, at 352. There was no conviction for robbery of the victim, though so charged by the prosecution. *Id.*, at 356.

Donovan will die in prison, the ultimate punishment in Massachusetts for the act of throwing one punch.*

There is no doubt of 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 reprehensibleness of their criminal conduct.*⁵³

While the avenue of commutation has enabled a few to be released on parole, like Felix Rodriguez Jr., that opportunity has been practically nonexistent for the past 20 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 percent) were granted a hearing; neither received a commutation.⁵⁴ 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 25 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.

* Donovan was released on Parole in 2014. See pg. 36 in this report.

[†] Felix Rodriguez, Jr. 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> (Accessed 1/18/16).

[‡] Joseph Yandle, the get-away driver, had not entered the liquor store where his co-felon killed the clerk in 1972, 23 years prior to Yandle's commutation. <http://articles.latimes.com/1998/aug/27/news/mn-17104> (Accessed 1/18/16).

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

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, www1.umn.edu/humanrts/instree/k2crc.htm (Accessed 1/08/16).
2. United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (Accessed 1/08/16).
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., September 11, 2008, at 1.
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, <http://www.hrw.org/report/2005/10/11/rest-their-lives/life-without-parole-child-offenders-united-states> (Accessed 1/26/16).
5. *Sentencing Our Children to Die in Prison*, The Center for Law and Global Justice, (November, 2007), at *i*, <http://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 p. 36. Census data at <http://www.census.gov/popest/states/asrh/SC-EST2007-02.html> (Accessed 12/12/15).
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. <http://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* 560 US 48 (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.
19. *Id.*, at 1183-1195.
20. *Id.*, at 570.
21. Hubner, John, "Discarded Lives: Children Sentenced to Life Without Parole," *Amnesty Magazine*, Amnesty International, (Spring, 2006), at 20.
22. Weinberger, M.D., Daniel R., "A Brain Too Young For Good Judgment," *The New York Times*, March 10, 2001, at A13.
23. Written testimony of Laurence 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: <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/>. (Accessed 1/8/16).

25. “Adolescent Brain Development and Legal Culpability,” American Bar Association, Criminal Justice Section. Juvenile Justice Center, January, 2004. http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf (Accessed 12/16/15).
26. Henig, Robin Marantz, “What Is It About 20-Somethings?” quoting J. Geidd, The New York Times Sunday Magazine, August 18, 2010. <http://www.nytimes.com/2010/08/22/magazine/22Adulthood-t.html> (Accessed 1/8/16).
27. Amicus Curiae brief submitted by the American Bar Association in *Roper v. Simmons*, at <http://caselaw.findlaw.com/us-supreme-court/543/551.html> (Accessed 1/26/16).
28. “Adolescent Brain Development...,” *supra* at 109.
29. *The Rest of Their Lives...*, *supra* at 92, quoting M. Mauer.
30. Smith, Alison M., “Juvenile Justice: Life Without Parole Sentences,” Congressional Research Service, Doc. # R40818, September 14, 2009, at 12-13. http://www.nij.org/uploads/digitallibrary/resource_1392.pdf (Accessed 1/26/16).
31. *Sentencing our Children to Die...*, *supra* at *iii*.
32. Written testimony of Laurence Steinberg, Ph.D., *supra* at 3.
33. <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.508.htm> - 508.145 (Accessed 12/12/15).
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, at 1. (Accessed Spring, 2009).
36. Lagos, Marisa, “Bill Would Let Juvenile Criminals Seek Leniency,” San Francisco Chronicle, August 18, 2010, <http://www.sfgate.com/crime/article/Bill-would-let-juvenile-criminals-look-for-3255752.php> (Accessed 12/16/15).
37. 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.”
38. Rikard, Michael G., “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).
39. *Commonwealth v. Riley*, 73 Mass App. Ct. 721, 722. n.2 (2009).
40. Kling, L., “Constitutionalizing the Death Penalty for Accomplices to Felony Murder,” *American Criminal Law Review*, Vol.26: 463,464 n.10 (1988).
41. *People v. Aaron*, 409 Mich.672, 674 (1980).
42. *Kruse v. Commonwealth*, 704 S.W. 2d. 192; KY (1985).
43. *Commonwealth v. Clemente*, 452 Mass. 295, 331 (2008).
44. Ford, Beverly, “Murder Victim’s Family Helps Killer Earn Commutation,” The Boston Herald, February 25, 1993, at 16.
45. Black, Chris, “Horton Case Keeping the Jail Cells Shut,” quoting D. Humphrey, The Boston Globe, July 8, 199, at 68.
46. *Commonwealth v. Joseph Donovan*, 422 Mass. at 349 (1996).
47. *Id.*, at 350. Also: Blanding, Michael, “The Long Shadow of Willie Horton,” The Boston Globe Magazine, October 18, 2009.
48. “The Long Shadow of Willie Horton,” *supra*.
49. “The Long Shadow of Willie Horton,” *supra*.
50. “The Long Shadow of Willie Horton,” *supra*.
51. *Commonwealth v. Donovan*, at 352.
52. *Ibid.*
53. von Hirsch, Andrew, “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.
54. Information provided to the Lifers Group, Inc. by the Massachusetts Parole Board, pursuant to a public records request.

2016 Addendum

A life sentence with the possibility of parole could motivate offenders to commit themselves to meaningful rehabilitation...it would also recognize the healing that can take place in all people, even those who have committed murder.

In 2010 the Criminal Justice Policy Coalition (CJPC) and the Norfolk Lifers Group (NLG) published *Life Without Parole: A Reconsideration*. In the past five years several relevant court decisions have come down, so it is appropriate to revisit the sentence of LWOP in MA and nationwide as well.

As in the original document, the addendum urges the repeal of all legislation that imposes life sentences offering no possibility of parole. Current law should be changed to ensure the automatic review after 25 years of all life sentences that currently exclude parole.

A life sentence *with* the possibility of parole could motivate offenders to commit themselves to meaningful rehabilitation. It would thereby reduce prison violence while cutting the costs of housing aging and progressively more infirm prisoners who no longer pose a risk to public safety. More important, it would also recognize the healing that can take place in all people, even those who have committed murder.

On the surface, an LWOP sentence seems simple and unambiguous. In practice, however, it is neither. To be sentenced to LWOP means that a person is to die in prison, regardless of what strides that person may make in rehabilitating him/herself. LWOP sentences, in essence, declare that a prisoner has been found to be forever irredeemable.

Given the seriousness of such a sentence - indeed in MA, LWOP is the maximum sentence allowed - one might believe that LWOP, particularly where there is no death penalty, is reserved for those who commit the most heinous crimes. In other words, only someone who with premeditation and/or extreme atrocity or cruelty has deliberately murdered another human being would receive LWOP. Such a belief is wrong. In Georgia, for instance, as of October, 2013, 41 percent of those serving LWOP had not been convicted of murder.¹ Prisoners serving LWOP include habitual offenders convicted under Three-Strike Laws. Additionally, while not in MA, LWOP sentences have been meted out in other states and by the federal government to those having possessed or sold large amounts of drugs, particularly crack cocaine. There is no gainsaying that such persons should be held accountable for their actions. But to be sentenced to die in prison, irrespective of age, the severity of the actual crime, and one's level of culpability, is neither fair nor just.

In a few states, MA being one, there are prisoners serving LWOP who never personally took another person's life. These prisoners were convicted under the combination of felony murder and joint venture laws.* These statutes allow prosecutors to seek LWOP sentences for all accomplices in a criminal enterprise, regardless of the roles any of the accomplices actually played. Prosecutors in felony murder cases do not have the burden of proving anyone's intent to kill, when a victim's life was taken by one of the perpetrators. For instance, if someone serves as a getaway driver during an armed robbery of a store in which another person actually goes into the store and, with or without intent, shoots and kills an employee or customer, the getaway driver is held equally accountable for the actions of the "shooter", even though he/she was not inside the store. The question raised by this scenario is proportionality. Should not a punishment be proportional to an offender's action? Should a non-participant in the taking of a human life be punished the same as the actual killer? In a fair society, the answer to the first question is a resounding Yes!!; to the second, an equally resounding No!!

...to be sentenced to die in prison, irrespective of age, the severity of the actual crime, and one's level of culpability, is neither fair nor just.

A supporter of LWOP might argue that a person sentenced to LWOP has an opportunity, as long as he/she remains alive, to appeal the conviction or to secure a commutation of sentence. The first option is limited at best as few LWOP convictions are overturned on appeal. In comparison to death penalty appeals, LWOP appeals generate less energy and the lawyers assigned to such cases are generally not as dedicated, nor have access to resources equal to those available for death penalty appeals.² The second option is, in MA at least, functionally nonexistent as this report will make clear. In short, LWOP is the equivalent of the death penalty; it just takes longer. The end result is the same whether the state kills someone or the prisoner remains in prison until the day he/she expires. While incarcerated, the LWOP prisoner has no future, no rehabilitation, and no hope – a desperate, dehumanizing condition.

DEVELOPMENTS SINCE 2010

a) Juveniles and LWOP

In 2012, the U.S. Supreme Court decided in *Miller v. Alabama*³ that juveniles, i.e., those who were under age 18[†] at the time of their crime(s), could not be sentenced to mandatory LWOP sentences. The Court did not outlaw LWOP for juveniles altogether, but rather prohibited mandatory sentences which did not allow for mitigating factors to be presented to a judge or a jury which might then find that a reduced sentence would be appropriate.

* "Felony Murder" occurs when a person intent on committing one felony –e.g. robbing a store – commits another by killing a person. Intent to kill, or "malice aforethought", need not be proved. "Joint Venture" involves the same scenarios, and is applicable when two or more persons share the intent to commit the original felony and therefore are legally held responsible for the actions of all perpetrators, even an unintentional killing, whether they participated in that act or not.

[†] See footnote, p.22 regarding chronological age.

In 2013, the MA Supreme Judicial Court found, in the *Diatchenko*⁴ case, that the *Miller* decision was retroactive in MA, i.e., applied to all juveniles at the time of their crimes serving LWOP. In the *Brown* case⁵, decided by the Supreme Judicial Court as a companion case to *Diatchenko*, LWOP could not even be a discretionary sentence imposed upon a person who was a juvenile at the time of his/her crime(s).*

Sixty-five prisoners in MA were affected by the *Miller* and *Diatchenko* decisions as they were juveniles at the time of their crimes.⁶ Those prisoners now are eligible for parole after they have served at least 15 years. In 2014, seven of those juveniles went before the Parole Board and six were granted paroles, conditioned upon their serving up to a year in minimum security and then a specified length of time in a Long Term Residential Program to prepare them for reentering society.⁷ Joseph Donovan, whose case was discussed previously (p. 29-31) was one of those six granted a parole. In the first half of 2015, 11 more juveniles serving LWOP went before the Parole Board. Only three were granted a parole under similar conditions, as outlined above. The remaining eight were denied paroles and will see the Parole Board again within five years of the dates of their respective initial parole hearings.⁸

Under current law, juveniles convicted of first degree murder can be sentenced to life with the possibility of parole after serving between 20 and 30 years, the term to be set by the judge. In the case of extreme cruelty, the law sets 30 years as the minimum in cases of extreme atrocity and cruelty; where deliberately premeditated malice aforethought is present, the minimum term is 25 years with the maximum set at 30 years.[†]

b) Habitual Offenders

In response to the killing of a Woburn, MA police officer in December, 2010 by a paroled lifer who had been sentenced to a second degree life sentence as a habitual offender,[‡] in 2012 the legislature passed House Bill 4286, a bill “relative to sentencing and law enforcement tools”. Under this legislation, a person convicted of a third felony, MA’s version of “Three Strikes”, must be sentenced to the maximum allowed for that particular felony. And parole eligibility is specifically denied. In effect, the person so sentenced would be serving LWOP if the maximum penalty for the third felony is life in prison. Previously, the only sentence with no opportunity for parole was first degree murder. Because of this legislation, the number of crimes for which a person could ultimately be sentenced to LWOP rises from two to 20, if adjudicated to be a habitual offender.

Those 20 crimes range from murder and manslaughter, the only ones in which someone’s life is taken, to 18 others including: four types of assault, home invasion, confining a victim in fear, eight categories of rape, two categories of kidnapping, poisoning, and armed burglary. For those 18 crimes plus manslaughter, life is by law the maximum sentence allowed. Prior to this new legislation, a habitual offender serving such a life sentence was eligible for parole after serving 15 years. Now, however, the life sentence for a habitual offender is the equivalent of a LWOP sentence since parole eligibility is specifically prohibited in the statute.⁹

* The MA legislature subsequently enacted legislation allowing judges, after a conviction of a juvenile of first degree murder with a finding of either premeditation or extreme atrocity or cruelty, to sentence juveniles to between 20 and 30 years before becoming eligible for parole. This new law applies prospectively.

† M.G.L. chapter 279, §24, para. 2.

‡ The lifer, Dominic Cinelli, had been sentenced as a habitual offender for a series of armed robberies. He had not taken anyone’s life prior to December, 2010. It is worth noting that Cinelli was paroled by a parole board which, through no fault of theirs, did not have Cinelli’s complete record for consideration. See Appendix A.

While all of the 19 crimes are serious and demand an appropriate level of separation from the community, being automatically sentenced to life with no parole is clearly excessive, particularly when that sentence is the maximum sentence within the MA criminal code. It must be noted that the prior two felonies for which a habitual offender had been convicted need not have been ones which carry a maximum penalty of life in prison; the only stipulation is that the two prior felonies each result in a sentence of at least three years.¹⁰ It is only the third felony, regardless of the severity of the prior two felonies, which triggers the sentence of life with no possibility of parole.

c) Increases in LWOP Sentencing

An impetus for reconsidering LWOP sentences in 2010 was the proliferation of LWOP in the United States and, in particular, in MA. That trend has not abated. In 2008, there were 140,610 prisoners in the U.S. serving life sentences, i.e., parole eligible as well as LWOP prisoners. Of that total, 29 percent or 41,095 were serving LWOP.¹¹ In MA, the total of all lifers in 2008 was 1,785, 51 percent (917) of whom were serving LWOP.¹²

By 2012, the number of prisoners serving life in the U.S. had jumped to 159,520, an 11.8 percent increase. The number serving LWOP increased by 22.2 percent - 41,095 to 49,081.¹³ In the time period from 2008 to 2015, the number of life sentenced prisoners* in MA increased from 1,785 to 2,022 (237) or 13.3 percent. LWOP prisoners in MA increased from 917 to 1,036 (119) a change of 13.0 percent.¹⁴ The percentage of prisoners serving LWOP from 2008 to 2015 remained at 51 percent (1,036 of 2,022). The 2015 number (1,036) of prisoners in MA serving LWOP reflects a reduction for the 65 juveniles whose designation changed from first degree murder (LWOP) to second degree murder pursuant to the *Diatchenko* decision. Without that decision and the *Miller* decision, the number of LWOP prisoners in MA would have been significantly higher, approximately a 20 percent increase over 2008.

ISSUES

None of the following issues should be read as suggestions for making LWOP just or viable, but rather as a catalogue of existing problems that the government – legislative or judicial – has not yet addressed. Rehabilitation and reentry to society must be achievable goals for all, regardless of how difficult that journey may be. As well, most scholars recognize that there are wrongly convicted people in prisons. Failure to account for those individuals who may in actuality not even be in need of rehabilitation constitutes a lasting injustice by society.

a) Proportionality

Whether a society's criminal justice system is just can be determined in part by assessing if punishment is proportionate to a person's culpability in a criminal enterprise. The U.S. Supreme Court, in the *Miller* decision, stated that a "precept of justice [is] that punishment for a crime should be graduated and proportioned to both the offender and the offense and we view that concept [proportionality]...according to the evolving standards of decency that mark the progress of a maturing society."¹⁵ Imposing a mandatory punishment, like LWOP, regardless of any mitigating factors is neither graduated nor proportional. Incidents and participants vary. In cases of a single perpetrator, it might be simpler to fairly assess culpability and intent. Still, the proportionality issue

* The number of life sentenced prisoners included both those serving LWOP and those serving life with the possibility of parole after 15 years, i.e. second degree life.

raises the question of whether the sentence does indeed fit the crime. Prohibiting any chance for parole as part of the habitual offender statute in MA for crimes which do not involve the taking of life is disproportionate to the actual crime committed. LWOP is the maximum penalty in MA. To effectively impose a life sentence without parole for crimes, no matter how vile or aggravating to the judicial system an individual offender may be, violates the standard of proportionality, which underpins a just judicial system.

Proportionality is even more at issue in joint venture cases in which a victim has lost his/her life during the commission of a separate felony. There are two aspects to such cases. First is the actual perpetrator who takes another's life, without any original intent to do so, while committing a felony punishable by life in prison (felony murder). At issue here is intent, or more specifically, the lack of intent to kill. Prosecutors in such cases in MA are relieved of the burden of proving an intent to kill* which is a critical element in every other murder case. Rather, MA prosecutors need only prove

To effectively impose a life sentence without parole for crimes, no matter how vile... an individual offender may be, violates the standard of proportionality, which underpins a just judicial system.

the intent to commit the underlying felony, e.g., armed robbery, and that intent is substituted for the intent to kill even when the killing was the result of an accidental discharge of a weapon. The perpetrator is then tried for first degree murder under the felony murder doctrine. If convicted, he/she receives a mandatory LWOP sentence, despite any possible extenuating circumstances. Such a killing, while tragic, does not rise to the level of a premeditated murder committed with extreme atrocity and/or cruelty, the crime for which the LWOP sentence was intended. Yet, the sentence remains the same.

The second aspect is if there is an accomplice who may aid in the commission of the underlying felony, e.g., a getaway driver, but does not participate in the actual killing, and who may not even know about it until after the fact. While both share the intent to commit the underlying

felony, e.g., armed robbery of a store, the accomplice had no intent to kill and, in many cases, was not even present in the store. Still, under the joint venture doctrine, all participants are held responsible for the actions of each other since they shared the intent to commit the underlying felony. Thus, the accomplice is also charged under the felony murder doctrine and, if convicted at trial, will be sentenced to mandatory LWOP. This sentence is clearly neither graduated nor proportionate to the culpability of an accomplice when someone else actually kills during the commission of a felony. Yet, there are men and women serving LWOP in MA who have never personally killed anyone, but were found guilty of being joint venturers in a felony murder. Additionally, the actual shooter on occasion cooperates with the police, testifying against the accomplices, and then pleads out and thereby gets a lesser sentence.†

* Footnote, p. 27, regarding "malice".

† See p. 29-31, text and footnotes, for several such cases.

b) Commutation

As noted on pages 11 and 12 of this report and accompanying endnotes, 37 persons serving LWOP sentences had their sentences commuted between 1972 and 1987; another four LWOP sentences were commuted after 1987. Though neither the Department of Correction nor the Parole Board publishes records of parolees returned to prison for crimes, the Norfolk Lifers Group determined that none of those 41 parolees was returned for committing another murder.*

The Governor of MA, after consultation with the Advisory Board of Pardons[†] and the Governor's Council, may commute, i.e., lessen the length, of any sentence, including LWOP. Given that most prisoners have a chance at parole, petitions for commutations have been primarily submitted by prisoners serving LWOP.¹⁶ Proponents of LWOP sentences may well argue that the commutation process is a way out of prison, thus LWOP is not, in effect, a death sentence. In theory, those proponents are correct; in practice they are wrong. The commutation process for those serving LWOP, as the past 18 years attest, is simply an exercise in futility.

The last commutation for a prisoner serving LWOP was granted in 1997. From 2006 through August, 2014, 310 petitions for commutations were filed with the Advisory Board of Pardons.[‡] Only one petition was recommended by the Board to then Governor Deval Patrick for a commutation. He denied that recommendation. None of the 310 petitions was approved.¹⁷ In the last quarter of 2014, in anticipation that Patrick might commute life sentences as he was leaving office, dozens of commutation petitions were filed.¹⁸ Patrick failed to commute any lifers, although he did commute one prisoner serving a 7½ year sentence for drug possession. The subsequent governor, Charlie Baker, issued commutation guidelines on December 10, 2015.¹⁹ All previous commutation guidelines were rescinded. Lifers with petitions still pending before the Advisory Board of Pardons were given a choice of withdrawing and resubmitting under the new guidelines, allowing the already submitted petition to stand, or withdrawing the petition entirely. The result, as of this writing, has been that commutations have not been a way out for anyone serving LWOP nor have they been for more than 15 years.[§] LWOP, as stated before, remains the functional equivalent of the death penalty.

c) Bifurcation

In states with the death penalty, trials are separated into guilt and penalty phases, i.e., bifurcated. First comes the guilt phase – is the alleged perpetrator guilty or innocent? If found guilty, then the penalty phase follows. In the *Miller* case, what the Supreme Court found unconstitutional was the mandatory imposition of LWOP sentences on those who were juveniles at the time of their crime(s) without either the jury or the sentencing judge being able to consider mitigating circumstances, e.g., a juvenile's age, concomitant brain development, susceptibility to rehabilitation, family circumstances, and/or peer pressure. The same rationale, i.e., the ability to consider mitigating factors for a person's conduct by a sentencing judge or jury, should be applied to all mandatory LWOP sentences regardless of the age of the perpetrator at the time the crime(s) was committed.

* See p.19, endnote 61.

† The Advisory Board of Pardons also doubles as the Parole Board.

‡ The Advisory Board of Pardons does not distinguish in its statistics what sentence a petitioner for a commutation is serving. Thus, the 310 petitions as well as those filed after August, 2014, were not all submitted by prisoners serving LWOP.

§ From 1998 through 2014, according to the annual reports of the Parole board, the Advisory Board of Pardons held five hearings for five of the hundreds of petitions filed. Two were for Arnold King – one in 2007 which ended in a positive recommendation, and one in 2010 which ended in a negative vote of 8-0. The third was for Thomas Koonce, which petition was also denied. The other two were in 2014, about which petitioners nothing is known, though it is likely that one of them was the drug offender who received Patrick's sole commutation.

In MA, juries do determine the level of guilt - whether the accused, if found guilty, committed first or second degree murder, felony murder, or indeed manslaughter. However, juries are not told the penalty for these differing crimes. Nor do defense counsels have an opportunity to present mitigating conditions, nor the prosecutors the chance to present aggravating conditions, both of which might impact juries' deliberations and thereby the degree of punishment.

All cases are not the same. Nor are all perpetrators. Whenever a person may be sentenced to the maximum penalty allowed, LWOP in MA, that person should have the opportunity to present mitigating factors and for the sentencing judge or jury to be able to obviate the LWOP sentence if sufficient grounds to do so are found. As with death penalty cases, for which LWOP is the functional equivalent in MA, perpetrators facing LWOP sentences should be given bifurcated trials – first to determine guilt or innocence - and then, if found guilty, to have a sentencing judge or jury determine the appropriate punishment, considering all relevant mitigating and aggravating factors. Fairness in a just society would seem to require such a procedure.

The argument for the adoption of bifurcated trials does not imply the acceptance of LWOP as a reasonable or necessary sentence. The essence of the call for bifurcated trials is that judges or juries should decide the appropriate level of punishment. Prosecutors have unlimited discretion in determining what charge(s) to bring, charges carrying various penalties, against a defendant. Prosecutors have much at stake, both personally and professionally, in securing convictions and concomitant harsh sentences. It is just for that reason that prosecutors should not determine the sentence to be served. Bifurcation would allow either judges or juries to consider all relevant sentencing factors in determining a just and fair level of punishment, not prosecutors. In any case, LWOP should not be an option for either judges or juries.

It is interesting to point out that juries of one's peers, a mainstay of the judicial system, are entrusted with determining whether a defendant is guilty of the crimes for which he/she has been tried. Should not the jury also be entrusted with determining the appropriate punishment? That decision, however, is taken out of the hands of juries by prosecutors when they levy the charges which are to be tried. If one or more of those charges carries a mandatory LWOP sentence, then, upon a guilty finding, it is the prosecutor, not the judge or jury, who ultimately determines what sentence will be served. According to Josh Bowers, Associate Professor of Law at the University of Virginia School of Law, a significant flaw in this procedure is that faith is placed in prosecutors to "...exercise their unfettered charging authority in normatively appropriate ways, notwithstanding their significant (And often contrary) instrumental reasons to forgo measured discretion." For Bowers, a more equitable solution would be to put faith in "...a body of laypersons charged with doing that which members of the public do well: exercising practical wisdom based on everyday experience to reach commonsense determinations about the advisability of a particular type of punishment in a particular case for a particular defendant."²⁰

d) Innocent Persons Serving LWOP

As noted above, prosecutors have broad discretion in determining what charges they choose to bring against any person. The impact is greatest when one or more of those charges carries the maximum sentence, i.e. in MA life with no chance of parole. In states which have the death penalty, prosecutors "have been known to charge a defendant with capital murder in the hopes that he or she

will plead guilty and accept a reduced, LWOP sentence.”²¹ The U.S. Supreme Court has sanctioned this practice.²²

In the same vein, it is not beyond the realm of possibility that people, fearful of dying in prison, will plead guilty to crimes they have not committed just to avoid a LWOP sentence. Ninety-seven percent of criminal charges in all federal jurisdictions end in guilty pleas.²³ According to federal judge John Gleeson, “...prosecutors are using the threat of decades of life in prison to extract guilty pleas even if the defendants’ alleged crimes fall far short of meriting such long sentences.” Gleeson characterized such practices as “...the sentencing equivalent of a two-by-four to the forehead.”²⁴

No one can accurately compute the percentage of those who are incarcerated and are actually innocent. According to University of Michigan law professor Samuel Gross, a conservative estimate of prisoners on death row who are falsely convicted is 4.1 percent.^{25*} The percentage may even be higher when applied to those not sentenced to death. Using the 4.1 percentage rate, of the 1,036 prisoners serving LWOP in MA, at least 41 would be falsely convicted. Even more instructive are the numbers of prisoners who have been exonerated. According to the Innocence Project, from 1989 to 2013, 311 men and women have been exonerated based on DNA evidence which indicated that the wrong person had been convicted.²⁶ In addition, the rate of reversals of capital cases has been calculated at around 68 percent; the rate for non-death penalty cases, however, is between 10 and 20 percent.²⁷ One reason for this disparity is the lack of time and resources given to non-capital appeals, including LWOP, as compared to death penalty appeals which can go on continuously for years until success or the person is executed.

***According to University
of Michigan law
professor Samuel
Gross, a conservative
estimate of prisoners on
death row who are
falsely convicted is 4.1
percent.***

It is important to note that LWOP appeals are not similarly endless. Even though LWOP is the functional equivalent to the death penalty, the resources for appeals for LWOP sentences are far below those for death penalty cases. One reason that LWOP appeals do not go on seemingly forever is that some state and federal court rules limit the number and timing of such appeals. According to Ashley Nellis of the Sentencing Project, in the past 30 years, except for death penalty cases, “...the opportunities for post-conviction appeals have been drastically reduced.” It appears the perception exists “...that less is at stake compared to a death sentence.”²⁸ In MA, given the total absence of commutations for LWOP sentenced prisoners over nearly two decades, when the window for legal appeals closes, there is no way out but to die.

* Gross et al. use “false conviction” in the title of their paper. Elsewhere that paper refers to “exonerated,” “actually innocent,” “innocent criminal defendants,” and “false convictions” interchangeably. This paper uses the conservative language of “falsely convicted” to stand in for all similar language.

While there have been a few recent exonerations in MA of prisoners serving LWOP, it is the proverbial tip of the iceberg. Of the 1,036 prisoners serving LWOP in MA as of July 1, 2015, it cannot be gainsaid that a certain number are innocent. Whatever that number may be, it is clearly unjust and unfair to have any person die in prison for a crime he/she has not committed. Given that commutations are virtually nonexistent and that legal challenges are limited, the option of a parole hearing is clearly reasonable.*

* Interestingly, in MA, maintaining one's innocence is not an impediment to being granted a parole.

1. Nellis, Ashley, Ph.D., *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to The Death Penalty*. *University of Miami Law Review*, Vol. 57, #2, Winter 2013, at 444-445.
2. *Id.*, at 448-450. See also: Barkow, Rachel, "Life Without Parole and the Hope For Real Sentencing Reform," *Life Without Parole: America's New Death Penalty?* Charles Ogletree, Jr. and Austin Sarat, eds. New York University Press, New York, (2012), at 206. "Defendants in capital cases also receive more substantive checks on their sentences that do not exist for LWOP or any other noncapital sentence."
3. *Miller v. Alabama*, 567 US ____ (2012).
4. *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013).
5. *Commonwealth v. Brown*, 466 Mass. 676 (2013).
6. Cramer, Maria, "Two Life Inmates Plead for Parole," *The Boston Globe*, October 27, 2014 at A1.
7. Haas, Gordon, *Parole Decision for Lifers – 2014*. Norfolk Lifers Group, (March, 2014), at 17. <http://www.realcostofprisons.org/writing/haas-parole-decisions-for-lifers-2014.pdf> (Accessed 8/13/15).
8. Compiled by Norfolk Lifers Group from Records of Decisions provided by MA Parole Board responding to a public records request filed by Gordon Haas.
9. <http://www.mass.gov/legis/journal/desktop/Current%20Agenda%202011/H4286.pdf> SECTION 46 (b). (Accessed 8/22/2015).
10. *Ibid.*
11. Nellis, Ashley, Ph.D. and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*. The Sentencing Project, Washington, D.C., (July, 2009), at 3. http://sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf (Accessed 12/16/2015).
12. *Ibid.*
13. Nellis, Ashley, Ph.D., *Life Goes On: The Historic Rise in Life Sentences in America*. The Sentencing Project, Washington, D.C., (2013) at 1. http://www.sentencingproject.org/doc/publications/inc_LifeGoesOn2013.pdf (Accessed 8/13/15).
14. MA DOC Institutional Fact Cards – July 1, 2015.
15. *Miller*, supra at 417, quoting *Weems v. U.S.*, 217 U.S.349, 367 (1960) and *Estelle v. Gamble* 429 U.S. 97, 102 (1976).
16. Cramer, Maria, "Late in Governor's Tenure, Hope for First Commutation," *The Boston Globe*, October 27, 2014, at A1.
17. Statistics provided by the Executive Clemency Coordinator to the MA Advisory Board of Pardons.
18. Cramer, Maria, "As 2 Felons Earn Pardons, Time for Others Runs Short," *The Boston Globe*, January 3, 2015, at B1.
19. <http://www.mass.gov/eopss/docs/pb/executiveclemencyguidelinesissuedbygovernorcharlesd-bakeron12-10-2015.pdf>
20. Bowers, Josh, "Mandatory Life and the Death of Equitable Discretion," *Life Without Parole: America's new Death Penalty?* Charles Ogletree, Jr. and Austin Sarat, eds. New York University Press, New York, (2012), at 25.
21. Nellis, *Tinkering with Life*, at 445.
22. *Brady v. U.S.* 397 U.S. 755 (1970).
23. Barrett, Devlin, "Sentencing Abuse Alleged by Judge," *The Wall Street Journal*, October 19, 2013 at A6.
24. *Ibid.*, quoting D. Humphrey.
25. Gross, Samuel et al, "Rate of false conviction of criminal defendants who are sentenced to death," *The Proceedings of the National Academy of Sciences*, (2014), <http://www.pnas.org/content/111/20/7230.abstract> (Accessed 8/23/15).
26. Jervis, Rick, "Texas Leads National Trend in Challenging Forensic Evidence," *USA Today*, December 17, 2013, at 3A.
27. Nellis, *Tinkering with Life*, at 449.
28. *Id.*, at 450-451.

Appendix A: The Cinelli Case

In December, 2010, a paroled lifer, Dominic Cinelli, the son of a former Boston police officer, shot and killed a Woburn, MA police officer during a botched armed robbery.* Cinelli was also shot and killed at the scene. Cinelli had been paroled in 2008 from a second degree life sentence he had been serving for a number of armed robberies. Cinelli's life sentence was not for murder, but for being a habitual offender. The killing of the Woburn police officer sparked outrage in the community. Pressure was brought upon then Governor Deval Patrick to introduce sweeping changes in the Parole Board. According to a report, dated January 12, 2011, to Mary Elizabeth Heffernan, then Secretary of the Executive office of Public Safety & Security, from Undersecretaries John Grossman and Sandra McCroom of that department, those authors found that:

- 1) The summary of facts provided Parole Board members from the Parole Board's Transitional Services Unit did "...not adequately highlight the violence and seriousness of the[sic]Cinelli's crimes." (p.3);
- 2) Notification of Cinelli's 2008 hearing was not made to the Middlesex District Attorney's Office, "...nor to the relevant Middlesex County municipalities," as required by Parole Board regulations. (p.4);
- 3) Inadequate notification was made to the Suffolk County District Attorney and the Boston Police Department (p.4);
- 4) "Neither the Suffolk County nor Middlesex County District Attorneys' Offices attended the 2008 hearing or submitted an opposition; both had opposed Cinelli's release in 2005." (p.4);
- 5) The Parole Board members, however, who had voted for Cinelli's parole in 2008 stated: "...[T]hey felt that they had read all of the materials – including police reports, grand jury minutes and prison disciplinary history – necessary to make an informed decision at the hearing." (p.6);
- 6) The authors of the report confirmed "...that all available police reports and similar material was [sic] before the Board." (p.6); and
- 7) The authors of the report also found that the oversight of Cinelli by his assigned parole officer and that parole officer's supervisor was deficient and did not meet Parole Board standards. (p.7-8).[†]

Based on the report, the five Parole Board members who had voted to parole Cinelli in 2008 and remained on the board were forced to resign. Cinelli's parole officer and her supervisor were fired in 2011. In 2013, however, both were reinstated with full back pay and seniority. An arbitrator found that they had been fired without just cause.[‡]

* Redmond, Lisa and Mills, Robert. "Cop and His Killer Both Sons of Officers," The Lowell Sun. December 29, 2010.

[†] Grossman, John A. and Sandra McCroom. *Cinelli*. A report to Mary Elizabeth Heffernan, Secretary, Executive Office of Public Safety & Security. January 12, 2011. <http://s3.documentcloud.org/documents/26173/cinelli.pdf> (Accessed 2/1/16).

[‡] Cassidy, Chris. "Cop Killer's Parole Officer Reinstated After '11 Firing," The Boston Herald. July 25, 2013.

Appendix B: Cases Cited

Provided below are the cases mentioned in text, by order of page reference.

Enmund v. Florida 458 US 782 (1982). (p. 25, second footnote).

<https://www.law.cornell.edu/supremecourt/text/458/782>

Tison v. Arizona 481 US 137 (1987). (p. 25, second footnote).

https://scholar.google.com/scholar_case?case=14220274687480210625&hl=en&as_sdt=6&as_vis=1&oi=scholar

Graham v. Florida 569 US 48 (2010). (p. 5, endnote 20).

<https://www.law.cornell.edu/supct/html/08-7412.ZO.html>

Roper v. Simmons 543 US 551 (2005). (p. 3).

<http://caselaw.findlaw.com/us-supreme-court/543/551.html>

Diatchenko v. District Attorney for the Suffolk District 466 Mass. 655 (2013) (p. iii).

<http://masscases.com/cases/sjc/466/466mass655.html>

Commonwealth v. Riley 73 Mass. App. Ct. 721 (2009) (p. 33, endnote 39).

<http://masscases.com/cases/app/73/73massappct721.html>

People v. Aaron 409 Mich. 672 (1980) (p. 33, endnote 41).

http://www.leagle.com/decision/19801081409Mich672_11057/PEOPLE%20v.%20AARON

Kruse v. Commonwealth 704 S.W. 2d 192 (1985) (p. 33, endnote 42).

http://ky.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19851219_0040014.KY.htm/qx

Commonwealth v. Clemente 425 Mass. 295 (2008) (p. 33, endnote 43).

<http://masscases.com/cases/sjc/452/452mass295.html>

Commonwealth v. Donovan 422 Mass. 341 (1996) (p. 30, second footnote).

<http://masscases.com/cases/sjc/422/422mass349.html>

Miller v. Alabama 567 US ____ (2012). (p. iii).

<http://www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf> (slip opinion)

Commonwealth v. Brown 466 Mass. 676 (p.iii).

<http://masscases.com/cases/sjc/466/466mass676.html>

Brady v. U.S. 397 US 755 (1970). (p. 43, endnote 22).

<http://caselaw.findlaw.com/us-supreme-court/397/742.html>

The Authors

Gordon Haas has served as chair of the Norfolk Lifers Group at MCI-Norfolk for a number of years. He is the author of annual reports on parole decisions for lifers, as well as various reports on the MA Department of Correction. These reports can be accessed at www.realcostofprisons.org/writing/. (Scroll down to Gordon Haas.) Questions or responses to any of the reports may be addressed to Gordon Haas, MCI-Norfolk, P.O. Box 43, Norfolk, MA 02056-0043.

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 (John Geoghan, former Roman Catholic priest, was convicted of sexual abuse of children in 2002, and was murdered in a MA prison in 2003) as well as of several other CJ reports issued by the Commonwealth.

Sponsoring Organizations

The [Criminal Justice Policy Coalition](#), established in 1996, is a member-based, nonprofit 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 has 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 Gov. William Weld administration under its getting-tough-on-crime and returning prisoners, as Weld often said, to the joys-of-breaking-rocks philosophy.

Criminal Justice Policy Coalition

549 Columbus Ave | Boston, MA 02118