

PENNSYLVANIA: PAROLE AND LIFE IMPRISONMENT

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Februray, 2004

Preface:

The course of development of Pennsylvania's twentieth-century criminal-justice history may be likened to a pendulum, encumbered by political, economic and social conflicts, that had convulsed from its retributive apex to a peak of rehabilitation that emphasized reintegration of an incarcerated offender into society - chiefly through commutation and/or parole. Before the century ended, that pendulum would again plunge into an abyss of punishment and incapacitation.

By 1911 terms of imprisonment had graduated from a "definite" or "flat" number of years to what are commonly referred to as "indefinite" sentences;¹ i.e., sentences that specify a "minimum" term to designate parole eligibility and a "maximum" limit - the "real" sentence - upon expiration of which the offender must be released from control by the Commonwealth.²

Parole as a penological measure - but often misrepresented as a "get-out-of-jail-free-card" - was nonexistent in Pennsylvania prior to 1909. Until then, the sole means of obtaining release from incarceration prior to completion of the entire definite sentence was clemency by the governor; i.e., either commutation of sentence or a pardon.³ Parole does not forgive an offender. Parole, unlike commutation, is not an act of clemency but is the disciplinary treatment of those who seem capable of rehabilitation outside prison walls. A parolee remains under the legal custody - and control - of agents of the Commonwealth.

Significant legislative changes in the Commonwealth's sentencing schemes and related parole policies occurred approximately every thirty years during the

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1. Sometimes referred to as "indeterminate" sentences although this usage was discouraged by the Pennsylvania Supreme Court in Commonwealth v. Daniels, 243 A.2d 400 (1967).
2. Opinion of Attorney General 449; February 26, 1943; Commonwealth ex rel. Clawges v. Claudy, 98 A.2d 225 (Pa.Super. 1953).
3. Of Pennsylvania's five constitutions (1776, 1790, 1838, 1874 and 1968), only the latter two are relevant regarding how a governor's commutation and pardoning power relates to parole. Article IV, Section 9, of the 1874 and 1968 constitutions provides that in all criminal cases, except impeachment, the Governor shall have power to grant commutation of sentence and pardons.

twentieth century. Following the 1911 substitution of an indefinite sentencing scheme, a revisionary Penal Code and extreme-makeover parole system were put in place during 1939 and 1941, respectively. Although the 1972 Crimes Code and 1975 Sentencing Code consolidated Commonwealth penal statutes, the 1941 Parole Act, as periodically amended, remained in effect. The following provides an overview of the evolution of parole in Pennsylvania and how this "penological measure" has or has not been applied to terms of life imprisonment.

Birth and Puberty of Parole in Pennsylvania:

The 1909 General Assembly enacted the initial authorization⁴ for courts to impose indefinite "county prison" sentences comprised of a stated maximum term beyond which a prisoner could not be incarcerated and a minimum term at which time a convict became eligible for parole.⁵ However, for all practical purposes, the Commonwealth's parole history began in 1911:⁶

Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a State penitentiary, shall be sentenced to imprisonment therefore in any penitentiary or other institution of this State the court, instead of pronouncing upon such convict a definite or fixed term of imprisonment, shall pronounce upon such convict a sentence of imprisonment for an indefinite term: Stating in such sentence the minimum and maximum limits thereof and the minimum limit shall never exceed [one-half] of the maximum sentence prescribed by any court.⁷

If a court failed to impose the requisite minimum term, a minimum of one day automatically attached. Sentences of life imprisonment, legislated in 1925 as an alternative to the death penalty in cases of first-degree murder,⁸ were not expressly excepted from the mandatory "indefinite sentence with state minimum and maximum terms" language of Section 1057. A convict with an explicit or implicit minimum term of "one day" could apply for parole at any time.

A convict could not be released on parole until expiration of the minimum.

The Board of Inspectors of each State penitentiary shall meet once each month at its respective penitentiary. At each meeting of the said boards . . . every prisoner confined in such penitentiary on

4. Act of 1909, May 10, P.L. 495; Title 19, Purdon's Statutes (P.S.), Section 1086 (19 P.S. §1086).

5. The Act of 1909 mandated that the minimum term be one-fourth of the maximum imposed by the sentencing court.

6. Act of 1911, June 11, P.L. 1055; 19 P.S. §1057.

7. Act of 1923, June 29, P.L. 975, No. 397 (19 P.S. §1057), amended the 1911 act so as to permit minimum terms of no more than one-half of the maximum sentence imposed.

8. Act of 1925, May 14, P.L. 759

an indeterminate sentence, whose minimum term of sentence will expire within three months, shall be given an opportunity to appear before such board, and apply for his or her release on parole, as hereinafter provided.⁹

The Board of Inspectors had the power and duty to recommend appropriate action on the parole application.

If it shall appear to the Board of Inspectors of any penitentiary in which a convict is imprisoned . . . that there is a reasonable probability that such applicant will live and remain at liberty without violating the law, then said board shall recommend to the Governor that such convict be released on parole . . . until the maximum limit of the sentence imposed on such convict, . . . which report shall contain . . . a recommendation as to ~~commutation~~, together with the date for release from the penitentiary.¹⁰

In any case where a Board of Prison Inspectors does not recommend the release on parole of a convict at the minimum term for which the convict may have been sentenced, such Board shall report in writing to the Governor its reasons in detail for not having made such recommendation.¹¹

Release on parole could not occur without the approval of a four-member Board of Pardons and concurrence of the governor, the latter being ultimately responsible for parole releases for all sentences of imprisonment of two years or more - including life imprisonment.

The Governor shall not . . . execute any of the rights or powers herein granted unto him, until the Lieutenant Governor, Secretary of the Commonwealth, Attorney General, and Secretary of Internal Affairs, or any three of them, after full hearing, upon due public notice and in open session, according to such rules as they shall provide, shall have recommended the said ~~commutation~~ of sentences.¹²

These sections of the controlling Act of 1911 illustrate that the terms "parole" and "commutation", although distinct in formal definition, were virtually synonymous with regard to policy and practice during the first four decades of the twentieth century.

9. Act of 1911, June 19, P.L. 1055; 61 P.S. §303

10. 61 P.S. §304

11. 61 P.S. §306

12. Act of 1911, June 19, P.L. 1055; 61 P.S. §311. That "parole" and "commutation" were considered as the same process at this stage of Pennsylvania's history of parole is illustrated by substitution of "commutation" for "parole" in this statute, as well as by the Pennsylvania Supreme Court which held that;

The maximum sentence is the only portion of the sentence that has legal validity, and that the minimum sentence is merely an administrative notice . . . that . . . the question of grace and mercy ought to be considered . . . [Commonwealth v. Kalck, 87 A. 61, 64 (1913)]

1939 Penal Code:

The minimum-maximum indefinite sentencing scheme of the Act of 1911 was incorporated into the legislature's enactment of a "Penal Code",¹³ including a Section 4701 that prescribed terms of imprisonment for offenders convicted of first- or second-degree murder.¹⁴

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of [a felony], shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. . . . Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law or to undergo **imprisonment for life**.

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[T]he court shall sentence the defendant to **life imprisonment** upon the verdict theretofore rendered by the jury, and recorded as aforesaid. **The court shall impose the sentence so fixed as in other cases.**

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Whoever is convicted of a crime of murder of the second degree is guilty of a felony, and shall, for the first offense, be sentenced to undergo imprisonment by separate and solitary confinement not exceeding twenty (20) years . . . and for a second offense, shall undergo **imprisonment for the period of his natural life**.

Section 4701 expressly directed courts to impose terms of life imprisonment "as in other cases", a mandate consistent with then-applicable parole policies that treated life imprisonment as other sentences with regard to inherent parole eligibility. Nothing within section 4701 suggests that "not exceeding twenty (20) years" and "life imprisonment" were intended to be other than maximum terms of indefinite sentences.¹⁵ Section 4701's mandatory sentence of "natural life" for a second homicide offers an implicit distinction between ordinary "life" and "natural life" imprisonment, the latter likely intended to equate with an explicit term of "life imprisonment without parole" that first appeared in the Commonwealth's Crimes Code forty-three years later as a mandatory penalty for "arson murder".¹⁶

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13. Also known as "Crimes Code"; Act of 1939, June 24, P.L. 872.

14. 18 P.S. §4701

15. "The word 'sentence', when unmodified by the words 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence." Commonwealth v. Glover, 156 A.2d 114, 117 (Pa. 1959). Also see "When Should a Judge State a Minimum Sentence", Stephen G. Young; Pennsylvania Bar Association Quarterly, June 1973.

16. Act of 1982, April 29, P.L. 363, No. 101; 18 Pa. Consolidated Statutes Annotated, Section 3301(b) [18 Pa.C.S.A. §3301(b)].

1939 Governor's Commission:

The precipitating event that evolved into a "life-means-life" millstone that continues to crush those serving terms of life imprisonment today was a 1939 creation of Governor George Earle (1935-1939) who, responding to criticism of the Commonwealth's parole system, appointed a "Governor's Commission"¹⁷ to "investigate the application of criminal penalties in the Commonwealth and the operation of its probation and parole systems, and to make recommendations for the improvement and strengthening thereof."¹⁸

Addressing criminal penalties, the Commission noted that "as civilization advanced and the principles of penology were more thoroughly understood, it was gradually realized that the infliction of severe punishment did little to suppress crime although it may have satisfied a wronged individual's desire for vengeance."¹⁹ The Commission would also observe that any absolute uniformity in sentencing based upon a blind "rule of thumb" is as much to be deplored as is an inequality in the employment of sentencing power, that injustice produced by either causes the law to bear unequally on the whole body of offenders. To that end the Commission proposed an overhaul of Pennsylvania's parole system.

The Commission opined that "the value and effectiveness of parole as a weapon in suppression of crime is measured not so much by the number of cases in which parole has failed, as by the number in which it has been successful."²⁰ Given Pennsylvania's history of the successful parole of lifers, the Commission clearly did not support "life imprisonment without parole eligibility", but, to the contrary, stressed parole upon imprisonment reaching maximum effectiveness.

The Commission deprecates the suggestion . . . that an apparently confirmed criminal should be incarcerated for life for the protection of society. There may be particular instances in which this becomes necessary, but the right of the individual to an opportunity to work out his own destiny and well-being at liberty and in accordance with the law outweighs any supposed right of society to deprive him of this opportunity.²¹

Accordingly, the Commission recommended creation of a statewide five-member Board of Parole empowered with:

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17. Similar in many respects to the 2002 Senate Resolution 149 Task Force and Advisory Committee functioning during 2003-04.

18. Governor's Commission Report, page 1; appended to 1941 Parole Act as "Appendix D".

19. Idem (Id.), p. 4

20. Id., p. 7

21. Id., p. 8

exclusive power to parole, reparole, commit and recommit for violation of parole, and the discharge from parole all persons heretofore and hereafter sentenced by any court in the Commonwealth to imprisonment in any prison or penal institution thereof.²²

This section of the recommended parole legislation does not suggest excepting those serving life imprisonment from the proposed Board's "exclusive power to parole," the only recommended exceptions to that exclusive authority being (1) "persons sentenced or placed upon probation for a period of less than one year;" and (2) "any person sentenced by [any court of this Commonwealth] for a period of less than one year."²³

The Commission perceived its chief purpose to be creation of a parole system that effectively averted "the baneful consequences of political interference with the administration of parole",²⁴ concluding that:

the Superior Court is the one appellate tribunal of statewide jurisdiction for all criminal cases **except capital felonies**, and hence the appointment of the Board and supervision of the system should naturally and logically be assigned to it . . . especially in view of the constitutional prohibition against the committing of any function of this character to the justices of the Supreme Court. The second reason for the selection of a Court as the appointing power is that [the] Commission believes that . . . the Board would be better protected from political influences in the performance of its duties by placing selection of its members in the hands of the courts rather than by confiding their selection to those branches of government which are frankly political in character. The point is that to give such power to either the legislative or executive is, justly and unjustly, to invite suspicion of the injection of political considerations into the choices of such a board. . . .²⁵

Although the Commission proposed that oversight of the parole authority - including appointment of Board members - be vested in the judiciary rather than the executive, the Commission perceived conflict between its "Superior Court" solution and existing law that barred that intermediate court from participating in appellate review of "capital cases";²⁶ i.e., first-degree murder cases for which only "death" or "life imprisonment" could be imposed by the sentencing court. It was this quirk in Pennsylvania's appellate procedure that induced the Commission to recommend Section 21 of its proposed Parole Act to read:

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22. Section 17 of the 1939 Commission's proposed Parole Act.

23. Id.

24. 1939 Governor's Commission Report, p. 10

25. Id., p. 11

26. 19 P.S. §1186-§1187; repealed by Act of 1980, September 23, P.L. 686, No. 137; effective November 22, 1980

[t]he Board is hereby authorized to **release on parole** any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said Board **except convicts condemned to death or serving life imprisonment.**

Thus, although the recommended Section 17 appears to empower the Board to parole those serving terms of life imprisonment, the proposed Section 21 would deny the Board authority to **release on parole** those serving life imprisonment.

1941 Parole Act:

The General Assembly adopted, for the most part, the Commission's report as the 1941 Parole Act.²⁷ The act provided for a five-member Board of Parole with "exclusive power to parole and reparole, commit and recommit for violations of parole, and to discharge from parole **all persons heretofore and hereafter** sentenced by any court in the Commonwealth to imprisonment in an prison or penal institution" - except those sentenced to a maximum period of less than two years.

Although the Commission had reasoned that granting of parole is a judicial function not to be entrusted to Pennsylvania's legislative or executive branches, the General Assembly rejected the Commission's recommendation to vest oversight of the Board with the Superior Court, opting instead to retain authority for parole with the executive. The General Assembly concluded that the granting of parole and supervision of parolees are purely administrative functions that may be consigned to non-judicial agencies. The act also authorized the Board to extend the period of parole beyond the court-imposed maximum providing that the board-amended maximum not exceed that established by law for the offense.

The Parole Act was soon challenged as violating multiple provisions of the Commonwealth's constitution. The state's highest court held in Banks v. Cain²⁸ that the act did not undertake to fix punishment for any crime and therefore was not an assumption of judicial authority for the Board to administer the very conditions of punishment that the law prescribed and wrote in a judge's sentence; i.e., that the minimum term of a requisite indefinite sentence imposed by the court was intended as the date at which the offender could be paroled.

The state's highest court also opined that while parole is an amelioration of punishment, it does not set aside the court's sentence but is in legal effect imprisonment because while on parole the convict is bound to remain in the legal custody and under control of the warden until expiration of the maximum term.

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27. Act of 1941, August 6, P.L. 861; 61 P.S. §331.1 et seq.

28. Commonwealth ex rel. Banks v. Cain, 28 A.2d 847 (Pa. 1942)

The Banks court concluded that while the minimum term of an indefinite sentence determines parole eligibility, the legal sentence - **the real sentence** - is the maximum term since it sets the period of time that the state intends to exercise its control over the offender for his errant behavior. Because parole **mitigates** rather than **enhances** the maximum sentence, formulation, enactment or operation of the Parole Act was not unconstitutionally retroactive (ex post facto).

The court further found that although the terms "commutation" and "parole" had been used interchangeably during Pennsylvania's history of parole, **parole is not an act of clemency** but is merely a penological measure for the disciplinary treatment of inmates who seem capable of rehabilitation outside of prison walls. Consequently, the 1941 Parole Act does not usurp the governor's constitutional authority to commute sentences.

Finally, the court found that the portion of the act that permitted the Board to extend the maximum sentence imposed by a court violated the Separation of Powers Doctrine²⁹ and was therefore unconstitutional. The state's highest court thus defined the concept and process of parole in Pennsylvania!³⁰

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29. The principle of Separation of Powers bars any branch of government from exercising the function **exclusively** committed to another branch by Article II (legislature), Article IV (executive) and Article V (judiciary) of the Pennsylvania Constitution.

30. Sections 17 and 21 of the 1941 Parole Act, in their original form, read:

Powers of Board with respect to parole.

SESSION OF 1941.

Section 17. The board shall have exclusive power to parole and reparole, commit and recommit for violations of parole, and to discharge from parole all persons heretofore or hereafter sentenced by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, whether the same be a state or county penitentiary, prison or penal institution, as hereinafter provided. It is further provided that the board shall have exclusive power to supervise any person hereafter placed on probation by any judge of a court having criminal jurisdiction, when the court may by special order direct supervision by the board, in which case the probation case shall be known as a special case and the authority of the board with regard thereto shall be the same as herein provided with regard to parole cases within one of the classifications above set forth: Provided, however, That the powers and duties herein conferred shall not extend to persons sentenced for a maximum period of less than two years, and nothing herein contained shall prevent any court of this Commonwealth from paroling any person sentenced by it for a maximum period of less than two years: And provided further, That the period of two years herein referred to shall mean the entire continuous term of sentence to which a person is subject, whether the same be by one or more sentences, either to simple imprisonment or to an indeterminate imprisonment at hard labor, as now or hereafter authorized by law to be imposed for criminal offenses.

Scope of Board's power to release upon parole.

SESSION OF 1941.

Section 21. The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby. If at the time a person is paroled he has been imprisoned for a period in excess of the minimum term of imprisonment to which he shall have been sentenced, the period of parole may be extended by the board beyond the maximum term imposed, but in no case in excess of the maximum sentence provided by law for the offense for which he shall have been sentenced. The power to parole herein granted to the Board of Parole may not be exercised in the board's discretion at any time before, but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Pardon Board in a sentence which has been reduced by commutation. Said board shall have the power during the period for which a person shall have been sentenced to recommit one paroled for violation of the terms and conditions of his parole and from time to time to reparole and recommit in the same manner and with the same procedure as in the case of an original parole or recommitment, if, in the judgment of the said board, there is a reasonable probability that the convict will be benefited by again according him liberty and it does not appear that the interests of the Commonwealth will be injured thereby.

. . . Except Convicts Condemned to Death or Serving Life Imprisonment:

However, the Banks court, focusing upon general challenges to the Parole Act, did not analyze or resolve an apparent conundrum created by language of Section 17 of the act that granted exclusive authority to the Board of Parole to parole "all persons" sentenced by "any court" to imprisonment in "any penal institution", and the contradictory clause of Section 21 that excepted a convict "condemned to death or serving life imprisonment" from the Board's authority to "release on parole any convict confined in any penal institution." What did the General Assembly intend when on one hand it appears to have authorized the Board to parole a convict serving life imprisonment, but on the other to have barred the Board from releasing that "lifer" on parole?

The 1939 Penal Code defined only maximum terms of imprisonment - the real sentence according to the Banks court - for criminal offenses. The included section 4701 that fixed penalties for murder did not implicitly or explicitly require that sentences of life imprisonment imposed for first-degree murder be construed differently than maximum terms imposed for other offenses. Nothing in the statutory sentencing scheme expressly precludes a court from imposing an indefinite term, as appeared to be required by Section 1057 of the same Penal Code, comprised of a minimum term of any number of years that the court would perceive as being less than half of the maximum term of life imprisonment; e.g., one-half - or less - of one's life expectancy pursuant to contemporary actuary tables.³¹

Exacerbating this contrary language of Sections 17 and 21 is the latter's authorization for the Board to exercise its discretion to release a convict on parole after "the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Pardons Board in a sentence which has been reduced by commutation." Thus, the chicken-or-the-egg quandary: Does the Board

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31. Although neither the Commonwealth's penal/crimes codes nor sentencing codes have included provisions that explicitly preclude a court from attaching a minimum term of a specified number of years to a maximum term of life imprisonment, when enacting the 1941 Parole Act, the General Assembly included a Section 25 (61 P.S. §331.25) that expressly precludes a court from imposing a sentence of probation upon an offender convicted of first-degree murder.

Whenever any person shall be found guilty of any criminal offense by verdict of a jury, plea or otherwise, except murder in the first degree, in any court of this Commonwealth, the court shall have the power in its discretion . . . to place the person on probation . . .

Nothing in Section 25 appears to bar a court from imposing a term of probation upon a person found guilty of second-degree murder pursuant to 18 P.S. §4701 even though such a conviction for a second homicide mandates imprisonment for "natural life."

not release lifers on parole because sentencing courts failed to impose minimum terms - which do not appear to be barred by statute, or do courts fail to attach minimum terms to maximum sentences of life imprisonment because the Parole Board is barred from releasing such prisoners on parole?

This dichotomy is underscored by the Parole Board's release on parole of 607 life-imprisonment prisoners commuted by governors between 1932 and 1967,³² actions that appear to be contrary to Section 21's exception of those cases from the Board's authority to release on parole inasmuch as the "real" sentence that continued to be served by these convicts remained "life imprisonment." Each governor could have simultaneously commuted maximum terms of life imprisonment in such cases to a specific number of years³³ so as to defuse this dilemma, but such has not been the practice in Pennsylvania.

Moreover, courts routinely imposed "consecutive"³⁴ sentences, including terms of life imprisonment, for multiple offenses; e.g., first-degree murder and robbery. Which begs the question: Why would courts impose sentences consecutive to life imprisonment if those courts believed terms of life imprisonment to be parole-ineligible? Yet lifers were excluded from the Board's then-common policy of "constructive parole"³⁵ pursuant to which, rather than "aggregating" multiple sentences for purposes of parole as required by statute,³⁶ the Board paroled a convict after service of the minimum term of one sentence to immediately begin serving a second sentence.

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32. "The Need for Parole Options for Life-Sentenced Prisoners": The Pennsylvania Prison Society, July 6, 1993, citing a 1969 Pennsylvania study entitled "Report of Lifers Released on Parole".
33. For example, pursuant to Article IV, Section 9, of the Constitution of Pennsylvania, governors commuted at least 828 maximum terms of imprisonment between 1967 and 1981.
34. Consecutive sentences of imprisonment are those explicitly ordered by a court to be served successive to rather than simultaneous ("concurrent") with each other. First authorized by 19 P.S. §897 (1937, June 25, P.L. 2093, No. 420), but suspended in 1973 and replaced by 42 Pa.C.S.A. §9757 (1974, December 30, P.L. 1052, No. 345).
35. Constructive parole is not a term used in the Parole Act but is used by administrative authorities, and recognized by the courts, in cases where a prisoner is paroled from one offense where he may begin to serve a consecutive sentence. Commonwealth ex rel. Alexander v. Rundle, 214 A.2d 304 n.2 (Pa.Super. 1965) A prisoner on constructive parole is not released from prison although paroled on his original sentence. Hines v. Pa. Board of Probation and Parole, 420 A.2d 381, 383 (Pa. 1980) Constructive parole was usually applied to consecutive sentences imposed by different courts or at different terms of court; it was effectively eliminated by the Pennsylvania Supreme Court in Commonwealth v. Tilghman, 673 A.2d 898 (1996).
36. Aggregation of sentences of imprisonment (formerly required by 19 P.S. §897; currently by 42 Pa.C.S.A. §9757) is the process of adding the minimum terms and totaling the maximum terms of consecutive indefinite sentences in order to create a single, cumulative indefinite sentence; e.g., aggregation of two consecutive five-to-ten-year sentences results in an indefinite sentence of ten-to-twenty years to which parole eligibility does not apply until ten years have been served.

Constructive parole allowed a confined "parolee" to continue satisfying the maximum term of the first sentence while serving the minimum term of a second; i.e., a two-for-one credit of "imprisonment". This process could result in several overlapping sentences being served simultaneously without "release on parole." Yet, despite Section 17 of the Parole Act authorizing the Board to parole all convicts serving two or more years of imprisonment, the Board excluded lifers from "constructive parole" to consecutive sentences despite such "parole" being reconcilable with the "release on parole" language of Section 21.

The foregoing ambiguities abstrusely converted court-imposed maximum terms of simple "life imprisonment" to "life-without-parole" sentences. Was this the intent of the 1941 legislature given that lifers historically had been paroled via a process procedurally identical to that of non-lifer convicts? Regardless of legislative intent, the determination of when a convict "serving life imprisonment" became eligible for "release on parole" by the Board of Parole remained with the Board of Pardons and governor pursuant to the "commutation" process applied to all parole applicants prior to the 1941 Parole Act.³⁷

Legislative Intent -- Only "Death" Sentences Ineligible for Parole? ? ?:

Within four years of creating the Board of Parole, the Pennsylvania General Assembly ostensibly intended to repudiate the inconsistent clause of Section 21 of the 1941 Parole Act that excepts persons "serving life imprisonment" from the Board's authority to "release on parole" and therefore from prescribed indefinite sentences. Significantly overhauling the Commonwealth's penal system, the 1945 General Assembly **unanimously** approved a trilogy of cojoined enactments for the "sentencing",³⁸ the "more effective treatment",³⁹ and "maintenance"⁴⁰ of "male

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37. Supra. at note 12

38. 1945, May 15, P.L. 569, No. 229; 19 P.S. §1161-§1162 ("Sentence of Male Prisoners and Defective Delinquents"): "An Act to provide for the sentencing of male prisoners convicted of certain crimes, the commitment of defective delinquents, and repealing certain laws."

39. Act No. 230 of May 15, 1945: "An Act relating to the more effective treatment of persons convicted of crime or committed as defective delinquents; creating in the Department of Welfare the Pennsylvania Diagnostic and Classification Center; providing for the diagnosis and classification of persons sentenced or committed by the courts to 'a State institution'. . ."

40. Act 231 of May 15, 1945: "An Act creating certain penal and correctional institutions and Boards of Trustees to manage them, abolishing certain penal and correctional institutions . . ."

persons"⁴¹ convicted of crime or "committed as defective delinquents." Section 1 of Act 229, the first and most relevant of these three statutes, declared:

For the more convenient punishment of criminals and the treatment of defective delinquents, this Commonwealth shall constitute one district, and **every** male person who shall be convicted in **any** court of this Commonwealth of **any** crime or crimes, and who would be sentenced by the court to an indefinite sentence in a penitentiary, or to a general sentence in an industrial school, shall hereafter be sentenced by the proper court to "a State institution", either on an indefinite sentence with a maximum and a minimum indicated, or on a general sentence, as the case may be.

To which convicts did the General Assembly intend for indefinite sentences to be applied? Most pertinent, to whom were indefinite sentences **not** to apply? Other than provisions for general sentences for defective delinquents, Act 229, for the most part, parrots prior penal statutes that required all sentences except "simple imprisonment"⁴² to be indefinite with stated maximum and minimum terms. However, unlike former sentencing statutes, Section 2 of Act 229 clearly excepted the capital-case sentence of "death" - but not its alternative of life imprisonment - from the indefinite sentencing requirement of Section 1: **"Nothing herein contained shall be construed to apply to death sentences."**

If the principles of statutory construction that require "strict construction" of penal statutes⁴³ and mandate that an "exception expressed in a statute shall be construed to exclude all others"⁴⁴ were to have been applied to Act 229, courts would have been compelled to impose indefinite sentences of life imprisonment with maximum terms of "life" and minimums of a specified numbers of years. Moreover, Section 3 of Act 229 expressly provides for the repeal of all acts and parts of acts insofar as they "are inconsistent herewith." Was not Section 21 of the Parole Act "inconsistent herewith?"

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41. In contrast to indefinite sentences required for male offenders (supra. at note 6), from 1913 until 1968 females were sentenced pursuant to the Muncy Act (1913, July 25, P.L. 1311, as amended 61 P.S. §551 et seq.) that provided mandatory and exclusive procedure and sentencing for women convicted of a crime punishable by imprisonment of more than one year. The act required imposition of indeterminate or general sentences comprised of only a maximum term specified by law for that crime - to be served at the State Institutional Home for Women at Muncy. The Muncy Act was held unconstitutional by the Pennsylvania Supreme Court in Commonwealth v. Daniels, 243 A.2d 400 (1967), and repealed by the Act of 1992, December 14, P.L. 887, No. 142.

42. For example, the Act of 1911 (19 P.S. §1057 of the 1939 Penal Code) cojoined parole and sentencing inasmuch as parole eligibility was dictated - except for sentences of "simple imprisonment" - by the explicit or implicit minimum term of the mandatory indefinite sentence.

43. Rules of [Statutory] Construction; 1992, December 6, P.L. 1339, No. 290; 1 Pa.C.S.A. §1924.

44. Id., Section 1928: Penal provisions shall be strictly construed in defendant's favor.

However, applicability of Act 229's parole-eligible, indefinite sentences to "life imprisonment" became moot inasmuch as Act 229 was self-destructive! Section 4 of the act included a mandate for its effective date to be fixed by the governor in a **proclamation** "declaring the establishment of a classification center" to diagnose and classify convicted persons to whom the act applied.⁴⁵ Although Governor Martin signed Acts 229, 230 and 231 into law May 15, 1945 so that Sections 1 and 2 of Act 229 were published as part of Pennsylvania's penal code,⁴⁶ he failed to issue the required proclamation to effectuate the trilogy. Thus, the singular "death" exception to parole eligibility enacted by a unanimous General Assembly never came into effect!⁴⁷

Parole-Eligible, Court-Imposed Sentences of Life Imprisonment:

The Barr-Walker Act of 1952⁴⁸ created a paradox similar to that of Act 229. On one hand, the Barr-Walker Act appeared to reiterate the General Assembly's intent for terms of life imprisonment to be parole eligible. On the other, it exposed a conundrum when viewed through the prism of Section 21 of the Parole Act. Section 1 of the act (19 P.S. §1166) provided:

For the better administration of justice and the more efficient punishment, treatment and rehabilitation of persons convicted of the crime of indecent assault, incest, assault with intent to commit sodomy, solicitation to commit sodomy, sodomy, assault with intent to ravish or rape, the court, in lieu of the sentence now provided by law, for each such crime, may sentence such person to a State institution for **an indeterminate term having a minimum of one day and a maximum of his natural life.**

45. Supra. at note 39. The substance of Act 230 (1945, May 15, P.L. 570; 61 P.S. §§901-910) of the trilogy also was not effectuated by proclamation; Act 230 was repealed by the Act of 1953, July 29, P.L. 1435, which reorganized Pennsylvania's penal system, including establishment of the Eastern and Western Diagnostic and Classification Centers.

46. Purdon's Statutes; 19 P.S. §1161 (Section 1 of Act 229) and §1162 (Section 2).

47. Act 229 was repealed by the Act of 1978, October 4, P.L. 909, No. 173 (1 Pa.C.S.A. §2301), because it applied only to "male" persons. Although Act 229 lay dormant, thirty years after its enactment, the General Assembly included language essentially identical to that of Act 229 - except for general sentences - in a sentencing statute that did become effective and which plainly provided for the "right to parole" for at least some terms of life imprisonment (Act of 1974, December 30, P.L. 1052, No. 345; 42 Pa.C.S.A. §9756).

48. Act of 1952, January 8, P.L.(1951) 1851; 19 P.S. §§1166-1174).

An Act providing for the sentencing of persons convicted of certain crimes to an indeterminate sentence having a minimum of one day and a maximum of life in certain cases; . . providing for the parole . . . of persons so sentenced.

The terms "indeterminate" and "indefinite" were commonly utilized synonymously by the Commonwealth's criminal-justice system prior to 1967.⁴⁹

Consistent with Section 17 of the Parole Act, Section 8 of the Barr-Walker Act (19 P.S. §1173) granted the Board of Parole "exclusive control over parole and reparole of persons sentenced under the provisions of this act . . . at such time and under such conditions as the interest of justice may dictate." The one-day minimum and related parole eligibility required by the Barr-Walker Act⁵⁰ also corresponds with the provision of Section 21 of the Parole Act that "the power to parole herein granted to the Board of Parole may not be exercised at any time before but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Pardons Board in a sentence which has been reduced by commutation." However, Section 21 and the Barr-Walker Act appear to be irreconcilable inasmuch as the former precludes the Board from releasing on parole those serving life imprisonment while the latter imposes a maximum term of life imprisonment - the "real" sentence - that authorizes release on parole at any time!

Did the legislature express an intent via the Barr-Walker Act, as it seems to have done with Act 229 of 1945, to repeal the provision of Section 21 that excepted maximum terms⁵¹ of life imprisonment from release on parole? The state's General Assembly appears to have framed this intent in the final sentence of Section 7⁵² of the Barr-Walker Act regarding when such a prisoner could apply for parole:

Nothing in this section shall be construed to prohibit a person sentenced under the provision of this Act from making application for parole in the manner now provided by law.

The "manner now provided by law" included Section 21 of the 1941 Parole Act! The Barr-Walker Act thereby authorized these lifers to apply for parole pursuant to Sections 17 and 21 of the Parole Act despite the latter's "life imprisonment" exception to "release on parole." Had the 1952 General Assembly assumed that its prior enactments, particularly the 1945 "death only" statute, had repealed the "serving life imprisonment" exception of the Parole Act?

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49. Supra. at note 1.

50. Section 7 of the Barr-Walker Act (19 P.S. §1172; "Parole of Sex Offenders") required the Parole Board to review persons sentenced under the act within three months of sentencing.

51. Supra. at note 15.

52. Supra. at note 50.

Despite enactment of penal statutes such as the Barr-Walker Act - declared unconstitutional by the Superior Court in 1967⁵³ and repealed in 1978⁵⁴ - that appeared to be irreconcilable with the "or serving life imprisonment" exclusion of Section 21 of the Parole Act⁵⁵, the Board of Parole continued to enforce that life-imprisonment exception to release on parole, not because it could logically or legally be reconciled with the 1945 or 1952 enactments but because the Board of Parole and Board of Pardons had "legislated" that life imprisonment imposed for murder pursuant to §4701 of the Penal Code was a minimum rather than maximum term - an interpretation contrary to controlling holdings of the state's highest court.⁵⁶ This "executive construction" of the Penal Code was exacerbated by the reluctance of lifers to judicially challenge denial of parole attributed to Section 21. Why would they? Sentences of life imprisonment were routinely and precedently commuted by governors after service of less than ten years toward those life sentences!⁵⁷

Parole in Pennsylvania - Sixty Years and Counting:

The initial thirty years of parole in the Commonwealth had culminated in a comprehensive and consolidating 1941 Parole Act. The next three decades saw the parole rate for first-time applicants reach nearly 90%! The "old" prison system that had functioned under the Department of Welfare was replaced in 1953 by the Bureau of Corrections (Bureau) as an integral part of the Department of Justice. The (in)famous Eastern State Penitentiary, reputed to be the world's first true penitentiary when opened in 1829, was closed in 1970, leaving the Bureau with state correctional institutions at Camp Hill, Dallas, Graterford, Huntingdon, Muncy, Pittsburgh and Rockview - as well as a regional correctional facility at

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53. Commonwealth v. Dooley, 232 A.2d 45 (Pa.Super. 1967)

54. Judiciary Act Repealer Act; 1978, April 28, P.L. 202, No. 53; 1 Pa.C.S.A. §20002(a); 19 P.S. §1057 (supra. at note 6) and 61 P.S. §311 (supra. at note 12) were also repealed by §20002(a).

55. Courts have traditionally followed the general rule of statutory construction that "whenever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of enactment shall prevail" (see 1 Pa.C.S.A. §1936).

56. Supra. at note 15.

57. Supra. at note 32. Although statistics were not maintained by the Board of Pardons prior to 1967, available data reported that more than 600 lifers were "commuted" between 1932 and 1967. According to the Board's post-1967 statistics, Governor Raymond Shafer (1967-1970), the last governor limited to a single four-year term by the state constitution, commuted 94 life sentences during his term: 1967 (25), 1968 (21), 1969 (17) and 1970 (31). Notably, the number of Bureau of Correction inmates during Governor Shafer's tenure increased from 5,674 to 6,289 while the number of lifers decreased from 449 to 402!

Greensburg that had come on line June 2, 1969. Revisions to Pennsylvania's 1874 constitution via a constitutional convention resulted in the Constitution of 1968 which, in part, created the Commonwealth Court, unified the judicial system under the Supreme Court, and authorized governors to succeed themselves.

Without explicitly amending parole statutes, Raymond Shafer, the last single-term governor (1967-1971), artfully maneuvered around the minimum-term/parole-eligibility mandate of the Parole Act by garnering legislative approval of a "pre-release" system for inmates except those condemned to death or serving life imprisonment. This legislation created Community Service Centers ("CSC") and authorized the Bureau to release inmates, upon expiration of one-half of an explicit minimum term, to temporary "furloughs" and/or transfer to a CSC.⁵⁸ The Bureau routinely transferred prisoners to CSCs years prior to expiration of court-imposed minimums. Such pre-release CSC residents most often retained status as Bureau "inmates" for one to six months before being liberated by CSC/Bureau staffs on consecutive seven-day furloughs during the remainder of their minimum terms. Upon expiration of those minimums, inmates would automatically be paroled by the Board of Parole. If a parolee served five years of uneventful parole (ten years for a commuted lifer), the Parole Board applied, pursuant to a "Special Maximum Commutation" process, to the Board of Pardons and governor to commute the parolee's ~~maximum~~ term to time served!⁵⁹

Perhaps most illustrative of a growing progressive mode was one of Governor Shaffer's final acts as chief executive that torpedoed the death penalty! The 1961 General Assembly had rejected abolishment of capital punishment, chiefly because House members believed the remaining alternative of life imprisonment to

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58. Act of 1968, July 16, P.L. 351, No. 173; as amended by Act 274 of December 2, 1970; 61 P.S. §§1051-1054. The Bureau of Corrections Administration Directive 803, "Policy and Procedures for Obtaining Pre-release Transfer", defined pre-release as including work release, educational/vocational training release, temporary home furloughs, and community services; i.e., Community Service Center Residency and Community Services Furlough Program, the latter including consecutive seven-to-ten day furloughs for the remainder of an inmate's minimum term which, in effect, became "parole" supervised by the Bureau. See "Project: A Description of Pre-release in Pennsylvania, 1974-75"; 20 Villanova Law Review: 967.

59. At least 820 such "Special Maximum Commutations" occurred between 1968 and 1978, the combined tenure of Governor Raymond Shafer and his successor, Governor Milton Shapp.

Commutation of Life Imprisonment	Commutation Minimum	Commutation Maximum	Special Maximum Commutation
316	292	9	828

"A Study of Recidivism Among Individuals Granted Clemency";
Phillip Remminger, Pa. Commission on Crime and Delinquency; May, 1982

be parole eligible and therefore insufficient retribution for heinous murders.⁶⁰ Yet, just prior to leaving office, Governor Shafer suspended the death penalty by ordering the "electric chair" dismantled and removed from the "Death Wing" (DW) of the Rockview prison!⁶¹

By 1971, when Governor Milton Shapp began his tenure as Pennsylvania's first two-term chief executive, the legislature was poised to embark upon a major overhaul of crimes and sentencing statutes. Although the Parole Act had undergone several amendments during this second thirty-year metamorphosis of parole,⁶² lifers had not been freed from Section 21's "or serving life imprisonment" millstone that continued to be construed as barring release on parole. Following the 1942 Cain decision,⁶³ the power of the Board to parole or, in the case of lifers, to not parole had not been questioned.

60. See debate at "Legislative Journal - House"; June 28, 1961; pp. 2675-89. Uncertainty among legislators regarding intent and meaning of "life imprisonment" is evident among concerns and opinions expressed by House members during debate about abolishment of capital punishment in Pennsylvania:

Rep. Long: If . . . this House . . . abolishes capital punishment in the State, if a man commits murder and gets life imprisonment, is he eligible for parole after a certain amount of years? (p. 2677)

Rep. Worley (sponsor of the bill): That right is now in existence and would not be changed under this bill, except that every person would have that privilege. (Id.)

Rep. Foerster: I have come to the conclusion that I cannot vote for the bill until there are proper safeguards . . . and also until somebody can prove to me that life imprisonment means life imprisonment. (p. 2682)

Rep. Gelfand: There is a statute in California which says that [defendants serving life imprisonment] could be paroled from prison . . . We have no such statute in Pennsylvania and life imprisonment could mean life . . . in the year 1954 life imprisonment in Pennsylvania meant that a prisoner had to serve 19.6 years in the penitentiary . . . in 1958, it meant that he had to serve 17.2. . . That is what life imprisonment means. (p. 2694)

Rep. Holman: Statistics show that lifers make the best parole risks. . . In the words of the Joint Legislative Committee, "a mandatory life sentence, without hope of parole, represents an unjustified distrust of the future."

61. "THE CHAIR" was dismantled and stored in the basement of Rockview's West Wing. Since the "DW" also served as the prison's administrative center, the death chamber and viewing areas were converted into offices for prison "counselors." Only a small, isolated section of "pre-execution holding cells", infamous site of "last meals", remained as a reminder of the death penalty.

62. Although each amendatory act addressed multiple facets of the Parole Act, examples of those changes are: Board's authority was extended to include the Industrial School at Camp Hill (Act of 1943, May 27, P.L. 767); salaries of Board members were increased (Act of 1951, August 24, P.L. 1401); method of computing maximum dates for parole violators (Act of 1957, July 3, P.L. 445); and requirement that Parole Board consider recommendations of sentencing judges and district attorneys regarding parole (Act of 1965, December 27, P.L. 1230).

63. Supra. at note 28

Perhaps the best opportunity for legislation creating a specific minimum for terms of life imprisonment occurred during 1971-72 when Shane Cramer, appointed Attorney General under Governor Shapp, initiated what he progressively designated as "Attorney General Rap Sessions." These sessions were conducted by Attorney General Cramer pursuant to a process whereby two prisoners, elected by inmates at each of the six state penitentiaries then in operation, were transported by prison staff to the Attorney General's Office in Harrisburg. Six such meetings were held subsequent to periodic elections.

The ten men and two women, mostly lifers, participating in each session met in a conference room with Attorney General Cramer and several Deputy Attorneys General. Inevitably, the initial subject of discussion was parole eligibility for life sentences. Contrary to popular myth, Attorney General Cramer did not offer a specific "minimum" but, instead, stated at each such meeting that if the group could agree on a "number" of years for a proposed minimum term then he would present the proposal to Governor Shapp. Attorney General Cramer stated that he believed the Governor would press for such legislation, particularly given the large number of commutations of life sentences that were then flowing from the Governor's office.

Six times these elected representatives attempted to agree on a minimum term and six times they failed! The women from Muncy were adamant that the minimum should be no more than seven years - chiefly because at that time only one woman had served more than eight years toward a life sentence! The men from the more minimum-security prisons at Dallas and Rockview were stuck in the 10-12 year range. Inmates from maximum-security facilities at Graterford, Huntingdon and Pittsburgh, where lifers routinely served 15-25 years prior to commutation of sentence, pressed for a much more realistic 15-year minimum. When no agreement was forthcoming, the sessions moved on to other prison(er) issues. Lifers had failed themselves!

Still, the penological pendulum had swung from its dark, nineteenth-century retributive apex where "death" had been a common penalty for even minor "crimes" and was approaching the rehabilitative peak of its ponderous arc.

Furman v. Georgia:

A credible indicator of just how far that pendulum had swung was provided by the Supreme Court of the United States when, on June 29, 1972, the court decided that processes utilized to impose the death penalty upon several state prisoners,

including two from Pennsylvania, were "capricious", thereby invalidating those sentences.⁶⁴ The court concluded in Furman v. Georgia that standards for imposing "death", especially upon defendants who had been convicted of assault or rape rather than murder, not only failed the due process mandate of the Fourteenth Amendment to the Constitution of the United States but also violated its Eighth Amendment bar against cruel and unusual punishment. The death penalty was itself dead in Pennsylvania - although the General Assembly planned a contrary eulogy!

The 1972 Crimes Code:

Seeking to consolidate under a single "code" a hodgepodge of offenses and penalties, the General Assembly repealed the 1939 Penal Code in its entirety, replacing it with the 1972 Crimes Code.⁶⁵ With a stated purpose of giving "fair warning of the nature of the conduct declared to constitute an offense, and of the sentences that may be imposed on conviction of an offense",⁶⁶ the Crimes Code defined criminal offenses or classes of offenses and set forth the maximum terms of imprisonment applicable to each.

For example, Section 2502 of Title 18 defined various degrees of murder⁶⁷ while Section 1102 specified penalties of "death" or "life imprisonment" for murder of the first degree and "twenty years" for second-degree murder.⁶⁸ Section 2503 defined felonies of the first, second and third degree. Section 1103 stated maximum terms of 20, 10 and 7 years, respectively, for those felonies.

64. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (June 29, 1972)

65. Act of 1972, December 6, P.L. 1482, No. 334; effective June 6, 1973. The 1972 Crimes Code, as amended, remains in effect.

66. 18 Pa.C.S.A. §104(4).

67. 18 Pa.C.S.A. §2502: Murder (compare with 18 P.S. §4701 at supra. at note 14).

(a) A criminal homicide constitutes murder of the first degree when it is committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing . . . [or] . . . if the actor is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.

(b) Any other kinds of murder shall be murder of the second degree . . . a felony of the first degree.

68. 18 Pa.C.S.A. §1102: Sentence for Murder (also compare with 18 P.S. §4701 at note 14).

(a) A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment.

(b) A person who has been convicted of murder of the second degree shall be sentenced to a term of imprisonment not to exceed 20 years.

Moreover, a relatively obscure "capital offense" provision of the 1939 Penal Code, "Assault by Life Prisoner",⁶⁹ was molded into the Crimes Code:

Every person who has been sentenced to death or life imprisonment in any penal institution located in this Commonwealth, and whose sentence has not been commuted, who commits an aggravated assault with a deadly weapon or instrument upon another, or by any means of force likely to produce serious bodily injury, is guilty of a felony and upon conviction thereof shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life . . .

This definition of "assault" as a capital offense⁷⁰ other than murder becomes especially significant when held up to the light of the Furman decision!

Although the Crimes Code did not affect minimum terms of imprisonment - except to the extent that minimums could be no more than half of maximum terms imposed,⁷¹ the legislature opted to not give "fair warning" that terms of life imprisonment were without parole or were excluded from the umbrella of indefinite sentences for which a specific minimum term was required. It is noteworthy that when the General Assembly had intended for a minimum term to not be imposed for certain sentences or class of sentences, it had explicitly declared its intent; e.g., the Muncy Act⁷² that provided that "the court imposing sentence shall not fix a minimum sentence, but shall fix such maximum sentence . . . as does not exceed the maximum term specified by law for the crime for which the prisoner is being sentenced."

Senate Bill 440 of 1971, a sister bill to the Crimes Code that would have concomitantly created a sentencing code almost exclusively applicable to minimum terms and therefore parole eligibility, died in the House. But, the subject matter of Bill 440 would soon be resurrected!

Temporary Death of "Death":

Pennsylvania courts were compelled to review, pursuant to Furman standards, death sentences imposed under the Penal Code and Crimes Code. On November 1, 1972, the Pennsylvania Supreme Court held that a death sentence could not be imposed under statutes such as 18 Pa.C.S.A. §1102 and §2704 that provided for a

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69. 18 Pa.C.S.A. §2704, formerly 18 P.S. §4710.2.

70. "Capital offense" is a definition of a penalty rather than of a crime such as first-degree murder. *Commonwealth v. Truesdale*, 296 A.2d 829, 832 (1972)

71. The mandate of 19 P.S. §1057 (*supra*. at note 7) that a maximum and minimum must be stated whenever a person is sentenced for a crime punishable by imprisonment in a state penitentiary remained in effect.

72. *Supra*. at note 41.

"split verdict"⁷³ procedure where the jury had unfettered discretion to impose a death penalty.⁷⁴ Consistent with Furman, the state's highest court opined that such a procedure would constitute cruel and unusual punishment. Consequently, condemned prisoners were released by executive fiat from death rows into the general populations of Bureau prisons. Death sentences resulting from split verdicts were invalidated by state courts and terms of simple life imprisonment were imposed in those cases. Now, the legislature had no choice but to amend the offending statutes!

Second-Degree "Felony" Murder:

On March 26, 1974, the General Assembly amended⁷⁵ the Crimes Code to comport with Furman. Section 2502 no longer authorized a conviction of murder of the first degree simply because the homicide was committed in the furtherance of a felony. Section 2502 was further restructured to designate "murder of the third degree" as equivalent to the former offense of second-degree murder. Most relevant was the creation within Section 2502 of the offense of "felony murder" as "murder of the second degree."⁷⁶

Section 1102 was concomitantly amended to designate sentences and sentencing procedures applicable to degrees of murder redefined at Section 2502.⁷⁷ First-degree murder continued to be punishable by either death or life imprisonment,

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73. A "split verdict" procedure is one in which the jury first issues a decision of guilt and then, after hearing additional evidence, renders a decision regarding the penalty to be imposed.

74. Commonwealth v. Bradley, 295 A.2d 242 (September 7, 1972; rehearing denied November 1, 1972).

75. Act of 1974, March 26, P.L. 213, No. 46.

76. 18 Pa.C.S.A. §2502; Murder (see former §2502, *supra*. at note 67):

- (a) A criminal homicide constitutes murder of the first degree when committed by an intentional killing.
- (b) A criminal homicide constitutes murder of the second degree when the death of the victim occurred while defendant was engaged as principal or accomplice in the perpetration of a felony.
- (c) All other kinds of murder shall be murder of the third degree . . . a felony of the first degree.

77. 18 Pa.C.S.A. §1102: Sentence for Murder (see former §1102, *supra*. at note 68):

- (a) A person convicted of murder of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with Section 1311 of this title (relating to sentencing procedure for murder of the first degree).
- (b) A person convicted of murder of the second degree shall be sentenced to a term of life imprisonment.

but now pursuant to procedures specified at Section 1311⁷⁸ of the Crimes Code that would satisfy constitutional constraints of Furman. The newly enacted non-capital offense of "felony" murder of the second degree was to be penalized with a mandatory sentence of life imprisonment. The penalty aspect of Section 2704, Assault by Life Prisoner, was amended to read: ". . . is guilty of a crime, the penalty for which shall be the same as for murder of the second degree."⁷⁹ Those convicted of third-degree murder would be subject to the same twenty-year maximum term that had applied to the former offense of second-degree murder.

The most striking aspect of this intensive review and redefinition of the degrees of murder - particularly of sentences applicable to each - is that the legislature opted to not explicitly preclude a parole-eligible minimum from being appended to a maximum term of life imprisonment. Whether life sentences were "without parole" would soon appear to have been resolved!

The Sentencing Code:

On December 30, 1974, Governor Shapp signed into law a "modern" Sentencing Code⁸⁰ that, akin to the 1972 Crimes Code, was intended to consolidate a mishmash of decades-old sentencing procedures and amendatory provisions. This Sentencing Code was assigned to Chapter 13 of the Crimes Code,⁸¹ joining Section 1311 - that chapter's only prior entry - which had resulted from the legislature's March, 1974 redefinition and sentencing realignment for degrees of murder.⁸²

Although the new code comprehensively defined forms of punishment (e.g., probation, partial confinement, total confinement, fines, restitution), including parameters for application of each type of penalty, that could be imposed by a sentencing court, explicit clarification of Parole Act mandates at Section 9756⁸³

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78. Chapter 13 of Title 18, Purdon's Consolidated Statutes, had been reserved for the sentencing code intended to have complemented the 1972 Crimes Code. In compliance with Furman, 18 Pa.C.S.A. §1311 was to provide a jury with precise legal standards; e.g. nine "aggravating circumstances" and three "mitigating circumstances" to govern the "death" versus "life" penalty phase of a split verdict. Illustrative of how rapidly the penological pendulum was to swing from its Seventies reformation peak toward its former retributive apex within this final tri-decade of the 20th Century is the legislature's increase of the number of "aggravating circumstances" authorizing a death sentence from 8 to 18 by 2003!

79. Supra. at note 69.

80. Act of 1974, December 30, P.L. 1052, No. 345.

81. 18 Pa.C.S.A. §1301 et seq., transferred to 42 Pa.C.S.A. §9701 et seq. by the Act of 1980, October 5, P.L. 93, No. 142.

82. Supra. at note 78

83. 42 Pa.C.S.A. §9756 (18 Pa.C.S.A. §1356); references to the Sentencing Code will hereafter be cited according to their post-1980 designation (supra. at note 81).

appeared to be the code's signature feature. Section 9756, the only section of the Sentencing Code to include the word "parole", established requirements for imposition of a "Sentence of Total Confinement", as distinguished from other authorized forms of punishment.⁸⁴ Subsections (a)(b)⁸⁵ of Section 9756 included much of the language of 1911 statutes that had initially created indefinite sentences with explicit maximum and parole-eligible minimum terms.⁸⁶

However, it was Section 9756(c) that provided long-overdue clarification of parole eligibility for all sentences of total confinement but those explicitly excepted in that subsection.

- (c) Prohibition of parole. **Except in the case of murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when: [a summary offense is charged, for nonpayment of fines or costs, or sentence of less than 30 days].**

The apparent mandates of subsection (c) include (1) the "right to parole", and (2) the applicability of that right to at least some terms of life imprisonment!

First, the "right to parole" guarantee of Section 9756(c) is merely a reiteration of the mandatory language of Section 1 of the 1941 Parole Act.

Section 1: The value of parole as a disciplinary and corrective influence and process is hereby recognized and **it is declared to be the public policy of this Commonwealth** that persons subject or sentenced to imprisonment for crime **shall**, on release therefrom, **be subjected to a period of parole** during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by a competent and efficient **parole administration** . . . (61 P.S. §331.1)

Pursuant to this long-standing "Commonwealth policy" that all prisoners had a right to parole - i.e., **shall** be subject to a period of parole - upon release from imprisonment, Section 9756(c) simply confirmed that right to parole!

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84. 42 Pa.C.S.A. §9721.

85. 42 Pa.C.S.A. §9756. "Sentences of Total Confinement":

- (a) General rule. In imposing a sentence of total confinement the court shall at the time of sentencing specify any maximum period up to the limit authorized by law and whether the sentence shall commence in a correctional or other appropriate institution.
- (b) Minimum sentence. The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed.

86. Chiefly 19 P.S. §1057 (supra. at note 6); Krantz v. Pa. Board of Probation and Parole, 483 A.2d 1044 (Pa.Cmwlth. 1984): significance of a minimum term is that it establishes parole eligibility.

Second, Section 9756(c) expressly mandated that a sentencing court may not impose a sentence of total confinement without that right to parole except when sentencing for first-degree murder. Especially relevant, when addressing the General Assembly's intent, is the legislature's enactment of Section 9756 just nine months after comprehensive debate that not only resulted in creation of the offense of second-degree "felony" murder and its mandatory sentence of "life imprisonment", but also in amendment of the penalty for assault by life prisoner to the "same as the penalty for murder of the second degree".

It would be ludicrous to presume that Pennsylvania legislators rank so far to the "left" on the "Intelligence Bell Curve" that within nine months they had been collectively capable of "forgetting" the recent upheaval of Furman that had led to creation of the non-capital offense of second-degree murder and mandatory sentence of life imprisonment. Inasmuch as an offender's "right to parole" is cojoined under Pennsylvania statutes with imposition of a minimum term⁸⁷ required by Section 9756(b), the most logical interpretation of subsection (c) is that the General Assembly had finally and explicitly required courts to append specific parole-eligible minimum terms to sentences of life imprisonment - at least those imposed for second-degree murder. This is especially true given the presumption that a legislature says in a statute what it means and means in a statute what it says.⁸⁸

Moreover, Section 2(h) of the act creating the Sentencing Code provides that "all acts or parts of acts are repealed in so far as they are inconsistent herewith." The language of Section 9756(c) may be somewhat cloudy as to the right to parole for terms of life imprisonment imposed for first-degree murder. However, the language of this "more-recent-than-1941" Section 9756 plainly attached an eligibility for parole to second-degree life imprisonment. Section 9756(c) is therefore "legally inconsistent"⁸⁹ with the parole prohibition of Section 21 of the Parole Act⁹⁰, thereby repealing its "or serving life imprisonment" clause.

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87. Commonwealth v. Sutley, 378 A.2d 780, 786. (Pa. 1977): "legal sentence is the maximum, the reason being that while the minimum sentence determines parole eligibility, the maximum sets forth the period of time that the state intends to exercise its control over the offender for his errant behavior").

88. Connecticut National Bank v. Germain, 503 U.S. 245, 252, 112 S.Ct. 1146, 1149 (1992).

89. Laws are legally inconsistent if the mandate or purpose of each law cannot be obtained when both laws operate on the same individual simultaneously.

90. 1 Pa.C.S.A. §1936. If two statutes are irreconcilable ("legally inconsistent"), the latest in date of final enactment should prevail.

Was it this parole-eligible "construction" of Section 9756, or the hundreds of lifers who had been paroled⁹¹ during the dozen years preceding 1979, that induced trial and appellate judges, defense counsel and prosecutors⁹² to often advise murder defendants, especially when seeking guilty pleas, that persons serving terms of life imprisonment could be paroled after an arbitrary number of years? What else could explain the Superior Court's opinion that "specification of mandatory life imprisonment for assault by inmates already serving life is clearly intended to serve as a deterrent?"⁹³ What "deterrent" if "no parole?" Regardless, lifers failed to timely utilize what appeared to be a favorable judiciary to challenge the Commonwealth's denial of the "right to parole" imposed by Section 9756!

Notably, one lifer did try! In Commonwealth v. Sourbeer,⁹⁴ an inmate serving life imprisonment following conviction of a 1976 homicide sought appellate review of the sentencing court's failure to impose a parole-eligible minimum term of a specific number of years. However, Sourbeer based his claim for an indefinite

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91. "A Study of Recidivism Among Individuals Granted Executive Clemency in PA: 1968-1981"; Report by Phillip Remminger, Pa. Commission of Crime and Delinquency; May 25, 1982.

Year	Clemency Category			
	Commute Life	Commute Minimum	Commute Maximum	Pardon
1968	30	8	187	50
1969	14	7	126	46
1970	26	4	77	26
1971	45	35	93	52
1972	48	25	50	36
1973	44	28	44	44
1974	31	17	47	64

Year	Clemency Category			
	Commute Life	Commute Minimum	Commute Maximum	Pardon
1975	22	40	39	73
1976	13	37	50	74
1977	22	47	56	60
1978	17	42	52	57
1979	3	0	9	5
1980	0	1	2	10
1981	0	0	1	1

92. Commonwealth v. Scarborough, 460 A.2d 310, 311 (Pa.Super. 1983): possibility of parole from a life sentence was for the consideration of the Parole Board (defendant with life "would be eligible for parole before codefendant with a 30-to-60 year sentence; Commonwealth v. Simpson, 510 A.2d 760, 763 (Pa.Super. 1986): minimum sentence of 30 years twice as long as the average life sentence; Commonwealth v. Ruffo, 528 A.2d 43, 48 (Pa.Super. 1986): citing Ruffo dicta that 30-year minimum is twice the average life sentence; Commonwealth v. Divincenzo, 523 A.2d 758, 763 (Pa.Super. 1987): minimum sentence of 81 years six times as long as the average life sentence; Commonwealth v. Pfender, 540 A.2d 543 (Pa.Super. 1988): "you know that a life sentence in this state is not a life sentence . . . but that she would become eligible for parole within 15 to 20 years"; Meyers v. Gillis, 142 F.3d 664, 665 (3rd Cir. 1998): guilty plea to second-degree murder induced by counsel's 1981 advice that parole eligibility attached to life imprisonment.

93. Commonwealth v. Bryant, 361 A.2d 350 (Pa.Super. 1976)

94. Commonwealth v. Sourbeer, 422 A.2d 116 (Pa. 1980).

sentence upon language of the "old" Section 1057⁹⁵ rather than the more explicit Section 9756 of the newly enacted Sentencing Code. The Supreme Court rejected his argument solely on the basis that Section 1057's requirement of an indefinite sentence in all cases of imprisonment was irreconcilable with the 1974 Crimes Code's Section 1102 that authorized a mandatory sentence of life imprisonment; i.e., Rules of Statutory Construction⁹⁶ provide that "whenever provisions of two statutes enacted by the same⁹⁷ or two different⁹⁸ General Assemblies are irreconcilable then the statute latest in date of enactment shall prevail.

Again, lifers were lulled into failing to employ the precedential rationale of Sourbeer that Section 9756, the statute latest in date of enactment, must then take precedent over Section 1102; i.e., Section 9756's mandate of the right to parole, for at least some terms of life imprisonment, must prevail and therefore implicitly repeal⁹⁹ "or serving life imprisonment" from Section 21 of the 1941 Parole Act. Clearly, inmates were not inclined to fix a system they did not perceive as broken! Such a languid view may be excused for prisoners serving parole-eligible indefinite sentences inasmuch as there was no evidence - at least until the mid-Eighties - that, except for some parole violators, any non-lifer had served an entire maximum term of total confinement. However, lifers had again missed a golden opportunity!

Those content with the status quo not only would soon have that confidence betrayed, but would ultimately pay a heavy price for disregarding plain statutory language that may have literally set them free if challenged at a time when the penological pendulum was still near its rehabilitative apex and state courts were inclined to follow the rule of statutory construction that penal statutes were to be strictly construed; i.e., in favor of the defendant.¹⁰⁰ Meanwhile, the parole authority continued to treat sentences of life imprisonment as "without parole."

The Envenomed Eighties:

Although the Parole Act was amended only twice during the Eighties, the decade introduced an escalating estrangement between the reality of parole and

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95. Supra. at note 6; although 19 P.S. §1057 was repealed in 1978 (supra. at note 54), it technically remained in effect until 1978 despite subsumption by the Sentencing Code.

96. Rules of Statutory Construction were enacted December 6, 1971, P.L. 1339, No. 290.

97. 1 Pa.C.S.A. §1935

98. 1 Pa.C.S.A. §1936

99. 1 Pa.C.S.A. §1971

100. 1 Pa.C.S.A. §1928(b)(1)

the Commonwealth's "public parole policy"; i.e., rehabilitation, adjustment and restoration of prisoners to a post-incarceration society.¹⁰¹ Governor Richard Thornburgh (1979-1986), a former U.S. Attorney General, carried with him a hard-line criminal-justice philosophy perhaps best illustrated by the near-extinction of the clemency process as previously applied to lifers and non-lifers alike.¹⁰² Although Governor Thornburgh's retributive views regarding punishment have been commonly "credited" with the demise of clemency in Pennsylvania, an amendment to the Commonwealth's constitution that in 1980 converted the office of Attorney General from an appointed to elected position¹⁰³ may have had an even greater impact on the retirement of commutation as an avenue to parole.

Article IV, Section 9, of the 1968 Constitution of Pennsylvania included the mandate that the Attorney General, along with the Lieutenant Governor, serve on the five-member Board of Pardons, a majority of whom were required by Article IV, Section 9, to approve an application for clemency prior to consideration by a governor. Attorneys general no longer were appointed "team players" of governors requiring loyalty. Instead, attorneys general were now elected officials whose decisions and allegiances reflected their own political aspirations that could conflict with those of a governor during subsequent "contests" - political or otherwise. A governor could no longer rely on the traditional alliance between governors and their appointed chief law enforcement officers. The commutation process, especially for lifers, appeared to have become the victim of internal politics inasmuch as beginning in 1980 the number of lifers being paroled plunged from an average of 30 per year during the prior decade to ZERO. Consequently, the number of lifers doubled from 750 in 1978 to 1,500 in 1986!

By 1982 a legislatively created Pennsylvania Commission on Sentencing had imposed upon the judiciary "Sentencing Guidelines" intended to narrow discretion of courts to fashion minimum terms/parole eligibility to correspond to individual circumstances of offenders.¹⁰⁴ The Bureau of Correction became the Department of

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101. Supra. at page 23.

102. Supra. at note 91; see "Life Means Life, Maybe? An analysis of Pennsylvania's Policy Toward Lifers"; Mark Rowan and Brian Kane, Duquesne Law Review, Vol. 30, No. 3; 1992.

103. "As a result of a constitutional amendment, the Attorney General became an elected official in 1980, and the office became an independent department. The designation Department of Justice was discontinued. Within the executive branch an Office of General Counsel was formed to continue the old function of an attorney appointed and subordinate to the Governor. A further result of the amendment was the eventual creation in 1984 of a separate Department of Corrections." Introduction to 1994 "Pennsylvania Manual."

104. 204 Pa.Code §303.1 et seq.

Corrections in 1984, a remodeling that transferred corrections to the executive's Office of General Counsel. Beginning in 1982,¹⁰⁵ statutes requiring mandatory sentences proliferated! By 1987 annual **denials** of parole applications would mushroom from the 10%-15% of the Seventies to 36% by the mid-Eighties and to 60% by the mid-Nineties!¹⁰⁶

Crime control had become a "war!" The "War on Crime" and "War on Drugs", coined as political buzzwords, enabled agencies involved in "fighting crime" - including corrections and parole - to glut from a trough of seemingly endless government funding. Pennsylvania's annual corrections budget, supplemented by an artesian well of federal funds, would skyrocket from \$30 million in 1980 to \$346 million in 1990 to more than \$1 billion by the end of the century. These "wars" fed the insatiable appetite of a burgeoning corrections-industrial-complex for more inmates - particular minorities - who had become the commodity of choice for salvaging a state economy formerly founded upon, for example, exportation of steel and lumber.

Not only was parole being denied to a distended percentage of prisoners,¹⁰⁷ but parolees who were to be "aided and facilitated" by the Board of Probation and Parole were being recycled to the Department of Corrections at a rampant rate. The Commonwealth's parole authority appeared to have adopted, contrary to the rehabilitative emphasis of Section 1 of the Parole Act, a "We Trail 'em, Surveil 'em, Nail 'em and Jail 'em" philosophy of supervision that increased the number of these recycled inmate commodities to several thousand.¹⁰⁸

Pennsylvania DOC demographics illustrate just how profitable the "wars" had proven to be, not only for economically depressed, predominantly rural areas bidding for prisons but also for entrepreneurs feeding on corrections budgets. By the end of the Eighties, the Department's population had tripled from 7,500 (1979) to more than 22,000 (1990).¹⁰⁹ Profits of the prison-industrial-complex soared inasmuch as by the early Nineties it had engendered more than a dozen new DOC prisons to house the wars' casualties.

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105. For example, see 42 Pa.C.S.A. §9714 and §9715.

106. Department of Corrections Annual Statistical Reports; see 1996 report at page 45.

107. *Supra.* at note 106.

108. The Department of Corrections reported in its 1996 Annual Statistical Report that 6,316 of the DOC's 34,537 inmates were parole violators.

109. *Id.*

Life Imprisonment Without Parole (LWOP):

Except for "life imprisonment", a "mandatory sentence" was rarely found in Commonwealth penal statutes¹¹⁰ until 1982 when mandatory **minimum** sentences became the General Assembly's retribution of choice for offenses involving drugs and/or violence.¹¹¹ Likewise, prior to 1982, phrases such as "life without parole" or "life imprisonment without parole" - or references to life imprisonment as a "minimum term" - were not part of Pennsylvania's criminal-justice vernacular.

That abruptly changed with the 1982 enactment of **three** sentencing statutes that authorized terms of life imprisonment, two of which explicitly appended a "without parole" qualifier! Act 54, signed into law March 8, 1982, provided at **Section 3** of the act that:

any person convicted of murder of the third degree in this Commonwealth who has been previously convicted at any time of murder or voluntary manslaughter in this Commonwealth
shall be sentenced to life imprisonment.¹¹²

Particularly relevant is the General Assembly's inclusion, within that Section 3 of Act 54, of discretion for courts to impose "life imprisonment **without parole**":

Upon conviction for a third or subsequent crime of violence, the court may, if it determines that 25 years of total confinement is insufficient to protect public safety, sentence the offender to life imprisonment **without parole.**¹¹³

Thus, the initial explicit legislative authorization of a sentence of "life imprisonment without parole." Some may argue that the General Assembly simply did not know or understand that within the same section of the same act it had provided for a sentence of "life imprisonment" as well as a sentence of "life imprisonment without parole", a distinction that strongly implies an intended difference in treatment. However, such a claim of ignorance does not dignify the status of legislators - collectively or individually - on the intelligence Bell

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110. The Act of September 26, 1961, P.L. 1664 (35 P.S. §780.1-31) authorized a mandatory maximum term of five years for certain drug offenses; although this act was repealed in 1972, superseding enactments retained the five-year mandatory maximum sentence.

111. For example, effective June 7, 1982: 42 Pa.C.S.A. §9712 (minimum of five years for specified offenses committed "with a visibly possessed firearm"; §9713 (five-year minimum for specified violent offenses occurring "near public transportation"; and §9714 (minimum of five years for specified violent offenses). Effective January/February, 1983: §9717 (five-year sentence for offenses against those over 60 years of age); §9718 (two or five years minimum for specified offenses against persons under 16 years of age).

112. 42 Pa.C.S.A. §9715; Act of March 8, 1982, P.L. 169, No. 54, §3 (authorized "life imprisonment" for third-degree murder).

113. 42 Pa.C.S.A. §9714; Act of March 8, 1982, P.L. 169, No. 54, §3 (authorized "life imprisonment without parole" for third or subsequent offenses).

Curve, especially since rules of statutory construction require not only that, in construing language of a statute, a court must assume that the General Assembly intended every word of the statute would have effect, but also that legislatures are presumed to have intended to avoid mere surplusage in words so as to give effect to every word.¹¹⁴

Less than two months later, in response to an arson that resulted in multiple deaths, the General Assembly explicitly authorized a mandatory sentence of life imprisonment "without right to parole" for first-degree and second-degree murder related to arson¹¹⁵ - but added that "no language herein shall infringe upon the inherent powers of the Governor to commute said sentences." No prior statute providing for simple "life imprisonment" had included a provision that the sole means to parole was commutation! Again, one must presume that the legislature intended to avoid mere surplusage! Especially indicative of intended distinction between "life imprisonment" and "life imprisonment without parole" are views of legislators' expressed during debate related to this act; i.e., that previous terms of life imprisonment had been parole eligible.¹¹⁶

Fundamentally, LWOP is an attempt by a society to banish an offender for the remainder of his or her natural life, a philosophy of incapacitation taken to its (il)logical extreme.¹¹⁷ Throughout the United States, LWOP has usually been a sanction for specified forms of first-degree murder and is often an alternative to capital punishment or to a "normal" life sentence. Inasmuch as only one of 607 Commonwealth lifers who were released during the 37 years preceding 1969 was again convicted of first-degree murder, "Pennsylvania's adherence to a life-without-parole sentencing structure both defies national norm and has no basis in concern for community safety or the prevention of further violent crime."¹¹⁸

As illustrated by Pennsylvania during 1982, LWOP sentences are often an abrupt response to precipitating events through the action of a particular person

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114. 1 Pa.C.S.A. §1922(2); Commonwealth v. Driscoll, 401 A.2d 312, 315 (Pa. 1979).

115. 18 Pa.C.S.A. §3301(b); Act of 1982, April 29, P.L. 363, No. 101.

116. "Legislative Journal - House"; April 28, 1982, pages 1040-1046:

Mr. Ritter (sponsor of bill): "So we are making sure that if you are going to impose . . . life imprisonment for an arson murder, that you are going to say that that person shall not be eligible for parole . . . If you do not adopt my amendment, the punishment for arson-murder would be the death penalty or life imprisonment . . . So, I am changing it only to the degree that if you are going to impose a life sentence for arson-murder, then there ought to be a life sentence. . . I want that punishment to be without possibility of parole."

117. Derral Cheatwood, "The Life Without Parole Sanction", Crime & Delinquency, Vol. 34, No. 1; January 1988; pages 43-59. As of January 1987, 29 states had LWOP statutes.

118. Supra. at note 32.

or small group who have undertaken the role of moral entrepreneurs. Many believe that the need for such full terms of life imprisonment for murder convictions is justified only by a personal moral code or a political value judgment.¹¹⁹

If the 1945 General Assembly's mandate that only death sentences were to be excluded from imposition of indefinite sentences comprised of specific minimum and maximum terms,¹²⁰ or the similar language of the 1974 legislature that only those convicted of first-degree murder may be sentenced without the "right to parole", are significant, enforcement of sentences of simple "life imprisonment" as being "without parole" can no longer be labeled a legislative value-judgment. Regardless, Pennsylvania now had two sentencing statutes authorizing LWOP!

Castle v. Pennsylvania Board of Probation and Parole:

For thirteen years following enactment of the 1974 Sentencing Code, no lifer judicially challenged the Commonwealth's failure to apply the "right to parole" mandate of Section 9756(c) to at least some sentences of life imprisonment. In April, 1988, Franklin Castle, serving a sentence of life imprisonment pursuant to a 1975 conviction of second-degree murder,¹²¹ presented the Commonwealth Court with what it termed "a case of first impression."¹²²

Castle claimed that Section 9756(c) created "a statutory right of parole eligibility for life prisoners convicted of an offense other than first-degree murder and certain summary offenses." He further alleged that the absence of a modifier such as "minimum", "not less than" or "at least", common to statutes imposing explicit mandatory minimum terms, required "shall be sentenced to life imprisonment" to be construed as imposing maximum rather than a minimum terms.¹²³

The Castle court concluded that the legislature intended "life imprisonment" to be a mandatory minimum sentence regardless of absence of a "modifier." The court failed to state whether it had considered the mandate of the Pennsylvania Supreme Court in Commonwealth v. Glover,¹²⁴ i.e., when "sentence" is unmodified

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119. Supra. at note 117.

120. Supra. at note 38, and accompanying text.

121. Castle v. Pennsylvania Board of Probation and Parole, 554 A.2d 625 (Pa.Cmwlt. 1989).

122. Id. at page 626.

123. Id. at pages 626-627.

124. Supra. at note 15. Contrary to the Castle opinion, the Pennsylvania Commission on Crime and Delinquency subsequently stated that "with the exception of the penalties for first and second degree murder . . . the mandatory sentence specified by statute is a mandatory minimum sentence". "Data for Determining Eligibility for Violent Offender Incarceration and Truth-in-Sentencing Grants", Appendix B, page 166; 1994.

by the words "maximum" or "minimum", it necessarily refers only to the maximum sentence. Addressing Castle's "right to parole" claim, the court opined that Section 9756 "does not have as its **stated** purpose the creation of eligibility for parole" but merely states what a court may or may not do when imposing sentences in certain cases. Such rationale not only does not indicate consideration of the rule of statutory construction that penal statutes are to be strictly construed but also fails to state if the court considered that the **sole purpose of Section 9756(b) is to establish parole eligibility** via a parole-eligible minimum!¹²⁵

The court further found that Section 9756 is not "clearly irreconcilable" with - and therefore does not impliedly repeal - the provision of Section 21 of the Parole Act that excepts those "serving life imprisonment" from the PBPP's authority to release on parole. Here again, the Castle court did not state if it had considered whether the Pennsylvania Supreme Court's rationale in Commonwealth v. Sourbeer would require the indefinite-sentence mandate of Section 9756 of 1974 to prevail over any prior LWOP interpretation of Section 1102 or Section 21 of the 1941 Parole Act.¹²⁶

The Duquesne Law Review strongly criticized the Castle Court's conclusions! "The Castle decision is clearly result oriented and fails to adequately analyze whether Section 9756(c) of the Sentencing Code and Section 331.21 of the Parole Act conflict. The court's reliance on the presumption against implied repeal serves as a weak crutch on which to rest the proposition that the sections do not conflict and merely sidesteps [those] apparently conflicting mandates."¹²⁷ The "Review" alleged that the Castle opinion, "with its utter lack of analysis", highlights the difficult interpretation problems for Pennsylvania courts because of "the patchwork manner in which the legislature has arrived at the apparent policy against parole for lifers."¹²⁸

The state's highest court refused to review the Commonwealth Court's holding in Castle.¹²⁹ Although dozens of similar challenges based upon Section 9756

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125. Supra. at notes 87 and 100; also see Gandy v. PBPP, 478 A.2d 139 (Pa.Cmwlth. 1984): minimum sentence merely sets date prior to which prisoner may not be paroled.

126. The court did not indicate whether it had considered the Supreme Court's contrary conclusion in Sourbeer (supra. at note 94 and accompanying text) that Section 1057 of 1911, which required indefinite sentences, was irreconcilable with Section 1102 of 1974, that required a sentence of "life imprisonment" for second-degree murder, and therefore was impliedly repealed by the prevailing last-enacted statute.

127. Mark Rowan and Brian S. Kane, "Life Means Life, Maybe? An Analysis of Pennsylvania's Policy Toward Lifers"; Duquesne Law Review, Vol. 30, No. 3, Spring 1992, page 672.

128. Id. at page 678.

129. 567 A.2d 653 (Pa. 1989).

were filed by lifers during the next decade, all were denied based upon the Castle rationale. The Supreme Court has yet to grant review of any of those cases! Although the issue of parole eligibility for lifers may not have been thoroughly argued, it has been definitively decided!

Parole Versus the Prison-Industrial Complex:

Corrections was quickly becoming a blue-ribbon, profit-generating industry. Not only was the nation experiencing a proliferation of businesses - and their lobbyists - specializing in prison construction, expansion and security, but rural communities that once adamantly shunned construction of prisons NEAR their communities now vigorously competed for such economic salvation. By the beginning of Robert Casey's two terms (1987-1994) as Governor, the number of Commonwealth prisons had ballooned from only three in 1910 to twelve.¹³⁰ Most indicative of momentum of the lucrative prison-industrial-complex was the burst of prison growth to 22 by 1993.¹³¹ The DOC's annual budget had congruently increased from \$30 million in 1980 to \$117.5 million by the end of 1994!

Meanwhile, the Commonwealth's prison population had reached 16,000-plus, including more than 1,600 lifers. During 1987 the PBPP disposed of 4,686 parole applications, approving only 65%.¹³² By the end of Governor Casey's tenure, the DOC population had again doubled to 28,297 of which 2,806 were lifers. Although the parole rate had risen to as much as 77% during 1991, the PBPP paroled only

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130. The Pennsylvania Department of Corrections 1996 Annual Statistical Report illustrated that three prisons existing in 1910 at Philadelphia ("Eastern" - closed in 1970), Pittsburgh ("Western") and Huntingdon had been supplemented by 1987 with SCI-Rockview (1915), SCI-Muncy (1920 - for women), SCI-Graterford (1929), SCI-Camp Hill (1941), SCI-Dallas (1960), SCI-Greensburg (1969), SCI-Mercer (1978), SCI-Waynesburg (1984), SCI-Cresson (1987) and SCI-Frackville (1987).

131. Additional DOC prisons through 1993 were SCI-Retreat (1988), SCI-Smithfield (1988), SCI-Waymart (1989), SCI-Cambridge Springs (1992 - for women), Queshanna Boot Camp (1992), SCI-Albion (1993), SCI-Coal Township (1993), SCI-Greene (1993), SCI-Mahanoy (1993) and SCI-Somerset (1993).

132. Pa. Department of Corrections 1996 Annual Statistical Report; see supra. at note 59.

YEAR	COMMUTED	PAROLES GRANTED	PAROLES REFUSED	TOTAL ACTIONS	PERCENT GRANTED
1986	1	2,539	1,410	3,949	64.3
1987	0	3,021	1,665	4,686	64.5
1988	3	3,363	1,557	4,920	68.4
1989	1	3,355	1,745	6,100	65.8
1990	1	4,505	1,818	6,323	71.2
1991	6	5,401	1,614	7,015	77.0
1992	4	5,722	1,858	7,580	75.5
1993	8	5,982	2,211	8,193	73.0
1994	2	5,752	2,898	8,650	66.5
1995	0	4,382	3,843	8,195	53.5
1996	0	5,155	8,114	13,269	38.8

66.5% of 8,650 applicants reviewed during 1994.¹³³ Parole violators returned to DOC prisons by the PBPP's amended "we trail 'em, surveil 'em, nail 'em and jail 'em" philosophy had grown from fewer than 2,000 in 1986 to 4,302 in 1995.¹³⁴ The cojoined DOC and PBPP were experiencing an unprecedented obesity cultivated by a contagion of corrections entrepreneurs!

Notably, the General Assembly enacted few amendments to the Parole Act during the Eighties and early Nineties. Of those, only a 1990 statute authorizing oral or written input by crime victims during review of parole applications¹³⁵ would significantly affect denials of parole and related increased in prison inmates.

By 1987 commutation of terms of life imprisonment had realistically become extinct despite lone sightings in 1982, 1983 and 1984. Although Governor Casey temporarily resuscitated the commutation process by selectively approving the applications of 26 lifers - of more than 400 submitted,¹³⁶ clemency that had been successfully applied to lifers for several decades (a procedure that had affected related decisions of jurors, sentencing courts, prosecutors, defense counsel and defendants) was destined for the trash heap of antiquity. A mushrooming number of lifers would create a substantial, permanent base for the prison-industrial-complex's insatiable appetite for more secure and therefore more costly prisons.

The "M & M" Debacle:

As previously noted, LWOP statutes are usually "an abrupt response to a precipitating event."¹³⁷ Two "events" during the last year of Governor Casey's tenure finally nudged our penological pendulum into an anti-commutation and anti-parole abyss of retribution and punishment from which it may never return. The concept of being penalized for the conduct of others is universally assailed; yet

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133. Id.

134. Id.

135. Act of 1990, July 11, P.L. 476, No. 114. Other amendments during this time-frame established an "Advisory Committee" (1986) and required "drug testing" within 45 days preceding release on parole.

136.

	BOARD OF PARDONS STATISTICS <u>Commutation of Life Sentences</u>									
	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996
Applications	--	--	--	52	95	77	87	49	65	15
Hearings Granted	47	40	29	20	36	33	22	25	6	8
Recommended	22	23	19	11	20	21	16	10	3	1
Commutation Granted	3	0	9	4	5	2	1	1	0	0

137. Supra. at note 117 and accompanying text.

the actions of these two parolees incited Pennsylvania politicians to quickly cast a broad net of retaliation across release mechanisms for convicts.

The coup de grâce for an already mortally wounded clemency process stemmed from Governor Casey's 1994 commutation of Reginald McFadden's sentence of life imprisonment.¹³⁸ Subsequent to release, McFadden was charged with - and eventually convicted of - multiple post-parole murders in New York State. Despite McFadden having been only the second commuted lifer of nearly 900 paroled since 1930 to have again committed first-degree murder, opposition to parole of lifers resonated throughout the Commonwealth - and beyond.

Commutation of McFadden's life sentence became the central issue in the 1994 gubernatorial election. Candidate Tom Ridge, a hard-line district attorney, bludgeoned his opponent Mark Singel, Lieutenant Governor and Chairman of the Board of Pardons who had recommended the release of McFadden, with responsibility for the consequences of McFadden's release. Because of the McFadden issue, Tom Ridge defeated the previously favored Mark Singel in the November, 1994 election. There would be no commutation of a life sentence during Governor Ridge's two terms (1995-2001)! Not only did LIFE MEANS LIFE become a political catch-phrase but "life means death in prison" loomed as reality for those serving sentences of life imprisonment.

The second precipitating event was the PBPP's 1994 parole of Robert "Mudman" Simon, a long-time member of the "Warlocks", who on May 6, 1995 shot and killed a New Jersey police officer. The avalanche of anti-parole rhetoric that followed brought the Commonwealth's parole system to its knees! Pennsylvania's Inspector General and Senate Judiciary Committee launched investigations of the parole system that resulted in recommendations that the philosophy of the DOC and PBPP should change from "client-centered corrections" which emphasized offenders' rehabilitation to one emphasizing public safety, incapacitation of criminals, and deterrence of crime.¹³⁹

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138. Governor Casey approved Reginald McFadden's clemency application on March 17, 1994 following the recommendation of four of the five members of the Board of Pardons. Only Attorney General Ernest Preate, who has since become a lobbyist for prisoners in general and lifers in particular, opposed McFadden's request for parole from his first-degree murder conviction. Critics of the release of McFadden claimed that the commutation had not been based on "rehabilitation" considerations but rather was a reward for McFadden's cooperation with various law enforcement agencies. McFadden's previous application had been unanimously denied on December 17, 1987.

139. Judiciary Committee Chairman's Report: "Investigation into the Parole of Robert Simon"; February, 1996. Also see Stewart v. Pennsylvania Board of Probation and Parole, 714 A.2d 502 (Cmwlth.Ct. 1998)

Within a year, only half of inmates who applied for parole were approved. Within two years, two-thirds of applicants would be denied parole by the PBPP!¹⁴⁰ Almost half of the DOC population would soon be comprised of those eligible for release on parole.¹⁴¹

The prison-industrial-complex, already obese as a result of a "War on Crime" and a "War on Drugs", would now become further bloated by a coalition of police, prosecutors and lobbyists for correction entrepreneurs responding to the "Mudman-McFadden" debacles by launching a two-pronged war on prisoners, a movement that sought to curtail release of convicts by both judicial review and parole.

Political sentiment against release of convicts that followed the "Mudman" and McFadden episodes had not only induced the PBPP to amend its policies so as to require three affirmative votes for parole of violent offenders, but had also engendered a rash of statutory amendments to the Parole Act. Governor Ridge called a 1995 "Special Session" of the General Assembly that resulted in deletion from the act a provision of its Section 21 that authorized the Board of Pardons to parole commuted lifers if the PBPP had refused to do so within ten days of a parole date set by the governor.¹⁴²

The special session also provided for the continuous (e.g., "electronic") monitoring of parolees, day reporting centers and intensive supervision units.¹⁴³

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140. DOC "1996 Annual Statistical Report", July 1997; DOC "Recidivism in Pennsylvania State Correctional Institutions 1995-2000"; Robert Flaherty, Security Data Analyst; October 2002.

141. James Tice, Chief of the DOC's Treatment Division, issued a March 4, 1997 statement that the number of DOC inmates confined beyond their minimum sentences was 14,168 as of January, 1997! More than 8,100 of those had been denied parole during 1996! The DOC reported that of its 34,537 inmates as of December 31, 1996, 6,316 (18.3%) were parole violators. An average of 50% of parolees released between 1995 through 1998, inclusive, were returned to prison within three years as parole violators (supra. at note 140).

142. The Act of 1995, June 1, P.L. 1020, No. 16, deleted the following portion of Section 21 of the Parole Act (61 P.S. §331.21):

That if the Board of Parole refused to parole the prisoner at the expiration of any minimum term fixed by the Pardon Board, it shall within ten days of the date when the minimum expired, transmit to the Pardon Board a written statement of the reasons for refusal to parole the prisoner at the expiration of the minimum term fixed by the Pardon Board. Thereafter, the Pardon Board may either accept the action of the Board of Parole, or order the immediate release of the prisoner on parole, under the supervision of the Board of Parole.

The Board of Parole became the Board of Probation and Parole pursuant to the Act of 1965, December 27, P.L. 1230, effective July 1, 1967.

143. Act of 1995, November 17, P.L. 1145, No. 37.

Subsequent amendments increased the PBPP from five to nine members and extended the mandatory period between parole applications from six months to one year.¹⁴⁴ "Victim impact education" became mandatory for parolees.¹⁴⁵

A 1996 amendment to the Parole Act is especially illustrative of the 180-degree reversal in philosophy and actions of the PBPP from "rehabilitation" to "nail 'em and jail 'em."¹⁴⁶ Until 1996, the purpose and intent of the board had been stated in Section 1 of the act as:

. . . it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subject to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration . . .

The Mudman-and-McFadden-induced 1996 amendment to Section 1 provided that:

. . . the Board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Thus, the PBPP's post-Mudman emphasis on "trail 'em and surveil 'em" that would return thousands, if not tens of thousands, of parolees to prison for "technical" violations!

The PBPP's constricted parole of only 4,382 prisoners during 1995,¹⁴⁷ and return of 4,302 parole violators during that period¹⁴⁸ appears to have created a "perpetual prison machine!" This "give-and-take" operation by the DOC/PBPP team functioned comparable to a "pump-back dam" such as, for example, the Northfield Mountain hydroelectric dam on the Connecticut River where a portion of the water released through the dam's turbines is then pumped back up and into the dam to again be released when the demand for electricity is highest and therefore most profitable. That parole could be controlled to maintain and/or expand prison populations created a perpetual profit machine for a prison industrial complex! By 1997 the DOC managed "nearly 12,000 employees, 23 prisons, 15 community corrections centers, one motivational boot camp, and more than 34,000 inmates."¹⁴⁹ Prisoners had become a highly profitable commodity!

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144. Act of 1996, December 18, P.L. 1098, No. 164.

145. Act of 1998, December 21, P.L. 1077, No. 43.

146. Supra. at note 144.

147. Supra. at note 140.

148. Id.

149. Introduction to the DOC's "1996 Annual Statistical Report", July 1997.

Such anti-release sentiment was not limited to Pennsylvania. On April 24, 1996, President Clinton signed the federal "Antiterrorism and Effective Death Penalty Act" (AEDPA) and "Prison Litigation Reform Act" that dramatically limited inmates' access to judicial review of the constitutionality of their confinement as well as their treatment, respectively.¹⁵⁰ For example, the AEDPA reduced to one year the time frame for prisoners to appeal their convictions to the federal judiciary. Pennsylvania quickly followed suit with legislation that imposed the same "time bar" on access to state courts. These "jurisdictional time bars" to judicial relief etched "life means death" in stone for lifers!

For example, subsequent to the Castle opinion,¹⁵¹ dozens of lifers throughout the DOC had submitted appeals to state and federal courts seeking eligibility for parole via a more rationale judicial interpretation of the Sentencing Code's Section 9756.¹⁵² They continued to unsuccessfully claim that subsection (c) plainly provided that a sentencing court "may" impose a term of total confinement without the "right to parole" only in the case of first-degree murder and summary offenses. Moreover, the Code's Section 9711(k) explicitly required that those sentenced to "death" must be held in "solitary" total confinement in contrast to convicts sentenced to "life imprisonment" pursuant to Section 9711. This implied that the General Assembly's choice of "may" rather than "shall", when addressing the exception for first-degree murder, intended a distinction between confinement for "death" and "life" with regard to that "right to parole."

A "modern" legislature, apparently having recognized the implications of Sections 9711(k) and 9756, repealed subsection (k) in 1998¹⁵³ and amended Section 9756 in 2000 so as to apply subsection (c) only to "summary offenses."¹⁵⁴ Thereafter, the AEDPA's one-year time-bar for collateral appeals precluded challenges by lifers to prior parole-ineligible interpretations of their sentences!

This "penal colony" mentality reduced prisoners to "property" that could be shipped anywhere - particularly to for-profit private prisons at "south sea" locations such as Texas - without concern by profiteers that the judiciary would

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150. The "Antiterrorism and Effective Death Penalty Act" [1996, April 24, 110 Stat. 1214 (28 U.S.C.A. §2254)] reduced the time frame from "unlimited" to one year during which a prisoner could seek post-conviction review of his confinement via a federal habeas corpus action. The "Prison Litigation Reform Act", also enacted April 24, 1996, dramatically limited prisoner access to federal courts regarding civil rights; e.g., conditions of confinement.

151. Supra. at note 121 and accompanying text.

152. Supra. at note 85 and accompanying text.

153. Act of 1998, December 21, P.L. 1077, No. 143.

154. Act of 2000, June 22, P.L. 345, No. 41; effective in 60 days.

provide an escape mechanism prior to expiration of maximum terms of confinement. The resurrection of this merchant-slave inclination had the federal government's political and financial support!

Truth-In-Sentencing:

An egregious example of federal complicity in the corrections industry's pursuit of profit is found in the "Violent Offender Incarceration and Truth-In-Sentencing Grants Act" (VOI/TIS)¹⁵⁵ that became law two days after the AEDPA. The VOI/TIS authorized a five-year program (1996-2000) of annual grants, totaling billions of dollars,¹⁵⁶ to qualifying states. To qualify, states were required to build and expand correctional facilities to house violent offenders, build and expand jails, design sentences to provide sufficiently severe punishment, require violent offenders to serve a substantial portion (85%) of sentences imposed, and ensure that "time served" be that deemed necessary to protect the public.¹⁵⁷ The Commonwealth was soon in line for tens of millions of dollars from this windfall!

Catchall "safety of the public" and "fair administration of justice" reasons for denial of parole have become routine coverups for victim opposition, a policy that denies parole applicants an opportunity to challenge the factual veracity of victim input.¹⁵⁸ As a result of these restrictive parole policies, the number of applications received by the PBPP doubled from 8,953 (2,063 of which were denied) during 1990-91 to 17,512 during 1999-2000 - of which 9,021 were rejected. By 2000 the DOC had added two prisons (SCI-Laurel Highlands and SCI-Chester) and had contracted for construction of two others in rural Fayette and Forest counties -

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155. Act of 1996, April 26, 110 Stat. 1321-26; 42 U.S.C.A. §§13701 et seq.

156. The U.S. Congress authorized Truth-In-Sentencing Grants to qualifying states pursuant to the following schedule:

1996	(\$0,997,500,000)
1997	(\$1,330,000,000)
1998	(\$2,527,000,000)
1999	(\$2,660,000,000)
2000	(\$2,753,000,000).

Opponents of the program argued that if Congress failed to extend Truth-In-Sentencing grants beyond 2000, participating states would experience budget deficits related to bloated prison systems. As Pennsylvania's current budget crunch illustrates, those predictions were accurate.

157. Supra. at note 155. The extremes to which the PBPP applied these criteria is well documented in the trilogy of federal court opinions critical of the PBPP's nine years of denials of parole to a commuted lifer. *Mickens-Thomas v. Vaughn*, 3d Cir. No. 03-3714 (January 14, 2004); *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003, and *Mickens-Thomas v. Vaughn*, 217 F.Supp.2 570 (M.D.Pa. 2002).

158. "Crime Victims Act", 1998, November 24, P.L. 882, No. 111; 18 P.S. §11.101 et seq.; also see 61 P.S. §331.22(a). Whether the PBPP's refusal to disclose the nature and content of controlling victim input denies due process of law guaranteed by both the federal and state constitutions remains to be tested.

bringing the DOC's total to 28! Moreover, since 1990 the DOC population had nearly doubled to 36,816; its budget had tripled during this last decade of the century to \$1.17 billion!

Meanwhile, commutation's interment became complete with a November, 1997 amendment to Article IV, Section 9, of the Pennsylvania constitution that not only replaced the "attorney" member of the Board of Pardons with a "victim",¹⁵⁹ but then required a unanimous rather than simple majority vote of the five-member Board for an application for commutation of a life sentence to be recommended to the governor. This death knell for commutation of lifers echoed into the next century, with the failure of three members of the Board of Pardons¹⁶⁰ to have cast a single vote for commutation of a lifer through 2002! Despite a Pennsylvania Prison Society challenge in the federal courts to retroactive application of this amendment,¹⁶¹ reincarnation of commutation appears as a long shot at best.

Post-Mortem:

And so the twenty-first century begins with Pennsylvania having cast dice comprised of commutation and parole, only to have them come up "snake eyes!" Commutation is extinct and parolees are an endangered species! Prisoners have become commodities, profits from whom drive a glutinous prison-industrial-complex that dictates penal and parole processes and procedures. Analogous to "The China Syndrome", an example of an irresistible force run rampant, prisons have become the steel and concrete Chernobyls of social nuclear waste. Ignorance in social science of those who have created and are implementing mandatory-sentence, no-commutation, and anti-parole policies and practices are one with the blindness of Chernobyl technicians to know the limits of their knowledge. Both have acted as though we can go on mortgaging our future forever! As the numbers of elderly and ill prisoners continue to mushroom, along with inherent geometrically progressing costs of confinement and treatment, the future for Pennsylvania becomes NOW! *

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159. Prior to this 1997 amendment, the Board of Pardons was comprised of the Lieutenant Governor as the chairperson, Attorney General, a psychologist, a penologist and an attorney. The amendment replaced the penologist with a "corrections expert" and the attorney with a "crime victim."

160. Lieutenant Governor Mark Schweiker, Attorney General Michael Fisher and "penologist" Richard Gigliotti.

161. Pennsylvania Prison Society v. Schweiker, C.A. No. 1:97-CV-1731 (U.S. District Court, M.D.Pa.). This appeal has, to date, withstood summary judgment.

* The author is currently incarcerated at the DOC's State Correctional Institution at Huntingdon pursuant to a sentence of life imprisonment imposed during 1966.