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Section 33E Survives the Death Penalty: Why Extraordinary Review of First-Degree Murder in Massachusetts Serves No Compelling Purpose

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ABSTRACT

Chapter 278, section 33E of the Massachusetts General Laws guarantees every first-degree murder defendant direct review in the Supreme Judicial Court (SJC), skipping the intermediate Massachusetts Appeals Court. It also grants a more lenient standard of review. This article argues that this serves no justifiable purpose; rather, it routinely dumps meritless, automatic appeals onto the docket of the high court.

Section 33E is a relic of the death-penalty era, originally enacted in 1939 to provide special, plenary appeal in “capital cases,” but Massachusetts ceased to be a death-penalty state forty years ago. In 1962, however, the Massachusetts legislature added a crucial clause defining “a capital case” as “a case in which the defendant was tried on an indictment for murder in the first degree” By virtue of this legislative malapropism, section 33E survived the death penalty and has persisted as a statute orphaned by judicial and legislative history. Now first-degree murder defendants are guaranteed special review regardless of the punishment they face, and they take up a huge share of the SJC’s docket: over a third of its criminal appeals and almost twenty percent of all full opinions issued.

This article is the first to address comprehensively the unique treatment of murder appeals in Massachusetts. It blends original research into legislative and judicial history as well as contemporary statistics on reversal and parole

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rates for homicide convicts. Previously, law scholars have mentioned section 33E only in the context of the great death-penalty debates, giving the impression that section 33E grew out of the anti-death-penalty movement. This was never the case. Massachusetts actually enacted section 33E to make the death penalty more effective. Furthermore, the statute always addressed the *punishment* of death, not the *crime* of homicide. The 1962 definition clause changed this and guaranteed first-degree murderers, for no reason inherent in the crime, an expedited and more lenient appeal. This article argues that Massachusetts should eliminate the definition clause consistent with the statute's original intent. This will preserve the Supreme Judicial Court's primary purpose, as stated by Justice Henry Lummas, to "superintend the growth of the law."

I. INTRODUCTION

Chapter 278, section 33E of the Massachusetts General Laws guarantees every defendant convicted of murder in the first degree direct review in the Supreme Judicial Court (SJC), skipping the intermediate Appeals Court, and also granting a more lenient standard of review than ordinary appellate procedure. The statute is a relic of the death-penalty era, originally enacted in 1939 to provide a special, plenary appeal in "capital cases." As amended in 1939, section 33E read:

In a *capital case* the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence, and the court may order a new trial if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require.¹

Although the statute has been amended several times, its plain language still identifies it as a capital-procedure statute, despite the fact that Massachusetts has not been a death-penalty state for forty years.² In the meantime, section 33E has been converted into a murder-procedure statute. In 1962, when Massachusetts still had a death penalty, the legislature added a crucial clause defining "a capital case" as "a case in which the defendant was tried on an indictment for murder in the first degree . . ."³ By virtue of this legislative

1. Act of Jul. 12, 1939, ch. 342, 1939 Mass. Acts 402 (emphasis added) (amending 1932 Tercentenary Edition of law relating to criminal appeals).

2. MASS. GEN. LAWS ANN. ch. 278, § 33E (2012).

3. The 1962 amendment also defined second-degree murder as a capital case, but this was eliminated by amendment in 1979. See Act of May 16, 1962, ch. 453, 1962 Mass. Acts 260 (adding second-degree murder to definition of capital case); Act of July 2, 1979, ch. 346, 1979 Mass. Acts 229-30 (eliminating second-degree murder from definition).

malapropism, section 33E survived the death penalty. The SJC's extraordinary power of review is still reserved exclusively for "capital" cases, but the 1962 definition clause guarantees this protection for first-degree murder defendants regardless of the punishment they face.

First-degree murder appeals now take up a huge share of the court's docket, amounting to just over a third of its criminal appeals and eighteen percent of all full opinions issued.⁴ But these appeals are even more time consuming than the numbers imply. Unlike ordinary criminal appeals, the SJC may not restrict review to issues raised on appeal; it examines the whole record for any error giving rise to a "substantial likelihood of a miscarriage of justice"; and the court may order a new trial or reduce the verdict to a lesser degree of guilt for any reason that the interest of justice requires.⁵

This article argues that this no longer serves any compelling purpose. Massachusetts should eliminate the definition clause that mandates extraordinary review of non-capital cases. This would be consistent with the statute's original intent and purpose, and it is also warranted on grounds of judicial economy. Below I discuss the historical devolution of section 33E from the linchpin of Massachusetts's capital procedure into a murder-procedure statute. Parts I and II are historical in nature, with the first explaining how capital procedure survived the death penalty after the Commonwealth eliminated capital punishment in the 1970s. This altered the entire context of extraordinary review, which has thereafter focused on the crime of murder in the first degree rather than the punishment of death. Part II then delves into the legislative history of section 33E and shows that it had always addressed the qualitatively different fate faced by capital defendants, not murder per se. There was nothing historically distinctive about the *crime* of murder in the first degree that entitled defendants to an extra measure of review. Part III discusses why extraordinary review of murder in the first degree is actually a waste of resources, and why the Massachusetts Appeals Court could do this job more efficiently with no greater risk of error or injustice. Finally, Part IV examines statistics on the prison population in Massachusetts and demonstrates that, although only murder one is subject to life without parole, the possibility of parole makes no *qualitative* difference in life sentences as actually served. This is because in lenient years up to thirty percent of the releases of lifers have been murder-one convicts; however, during years of severe punishment, murder-two

4. All statistics on the Supreme Judicial Court's total docket were gathered from the case management program Forecourt Paragon with the assistance of David Lucal, Chief Information Officer of the SJC. My thanks to David as well as Susan Mellen, Clerk of Court of the SJC for their help in finding this data. There were 282 first-degree murder reviews from 2001-2010. The total criminal docket of the SJC during this period was 840 cases; the court issued 1578 full opinions and disposed of a total of 2130 cases.

5. MASS. GEN. LAWS ANN. ch. 278, § 33E (2012). The following cases discuss the standard of review: Commonwealth v. Ruddock, 701 N.E.2d 300, 303 & n.3 (Mass. 1998); Commonwealth v. Wright, 584 N.E.2d 621, 624 (Mass. 1992); Commonwealth v. Tavares, 430 N.E.2d 1198, 1204 (Mass. 1982).

convicts are very unlikely to win freedom through parole. There is, therefore, no justification for different standards of appellate review for murder-one defendants. Massachusetts should either extend extraordinary review to all defendants facing life sentences, or, preferably, eliminate section 33E review of non-capital cases in line with the original intent of the statute.

II. HOW CAPITAL PROCEDURE SURVIVED EXECUTION

Capital procedure may be defined as those extra safeguards at all stages of trial afforded to defendants who face the death penalty. The Commonwealth of Massachusetts, as well as most other states, has always required such procedures because of the permanence of execution.⁶ For instance, the landmark case, *Gideon v. Wainwright*,⁷ addressed a Florida capital-procedure statute that granted the right to appointed counsel in death-penalty cases but no others. *Gideon* forced Florida (and all states) to grant ordinary criminal defendants a right formerly reserved exclusively for capital cases, and it stands within a long-term trend in which normal criminal procedure has gradually incorporated the special protections of capital procedure.

This is particularly evident in Massachusetts where capital procedure extends back over three hundred years. The most famous example is the Supreme Court of Judicature, commonly considered the predecessor to the SJC, established during great political upheaval in 1692 and vested with exclusive jurisdiction over capital cases. This was partly a response to the special Court of Oyer and Terminer in Salem that began hanging individuals convicted of witchcraft.⁸ This miscarriage of justice cannot be overstated and was obvious even among colonists who sincerely believed that witchcraft was a real threat. During the entire 150-year period from the first charter in 1629 to the American Revolution, the Colony executed no more than forty individuals for murder, and only fifteen people had been executed prior to 1680, but in less than three months from June 10 to August 19, 1692 the Court of Oyer and Terminer sent twenty-two people to their death.⁹ The Supreme Court of Judicature (along with the colonial governor) quickly put an end to this orgy of executions, and the SJC retained exclusive original jurisdiction over capital cases for the next 184 years.¹⁰

6. ALAN ROGERS, MURDER AND THE DEATH PENALTY IN MASSACHUSETTS 2 (2008).

7. 372 U.S. 335 (1963) (creating a federal constitutional right to appointed counsel in criminal cases).

8. ROGERS, *supra* note 6, at 17.

9. *Id.* at 17, 37; Symposium, *The Death Penalty Debate: Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 481 (1999) [hereinafter *Death Penalty Debate*] (“only” fifteen executions up to 1660); Russell K. Osgood, *The Supreme Judicial Court: An Overview 1692-1992*, in THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992, at 12-13 (Russell K. Osgood ed., 1992) (counting twenty people sentenced to death in same three-month period).

10. Act of Apr. 23, 1872, ch. 232, 1872 Mass. Acts 170; JUDICIAL COUNCIL OF MASS., FOURTEENTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS 14 (1938) [hereinafter FOURTEENTH REPORT]; Osgood,

The rise of the SJC is perhaps the most notable example of the special protections afforded capital defendants, but there were many others long since incorporated into ordinary criminal procedure. For example, the right to indictment by a grand jury, to be represented by counsel, to have a trial by jury and appellate review; the right to challenge jurors, to present evidence, and to confront witnesses; all of these rights were once reserved exclusively for capital defendants.¹¹ In the revolutionary era, many were enshrined in the Sixth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights, but the plain language of Article XII still retains the distinction between capital and ordinary procedure where it forbids making “any law, that shall subject any person to a capital or infamous punishment . . . without trial by jury.”¹²

As the Salem Witch Trials make obvious, capital procedures did not come into being to address murder trials, and there was no special “murder procedure.” This is also obvious considering the wide variety of crimes formerly subjected to punishment by death. Along with the exotic anachronism of witchcraft, the Massachusetts Bay Colony imposed the death penalty on nine other offenses: murder, idolatry, blasphemy, bestiality, sodomy, adultery, “man-stealing,” bearing false witness in capital cases, and conspiracy.¹³ To these were eventually added: rape of a married or single woman, the cursing or smiting of a natural parent by a child over 16, burglary for the third offense, highway robbery for the third offense, arson, heresy, piracy and mutiny, and

supra note 9, at 12-13.

11. See ROGERS, *supra* note 6, at 17.

12. The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. Amend. VI. Article 12 of the Massachusetts Bill of Rights reads:

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

MASS. CONST. art. XII.

13. See *Death Penalty Debate*, *supra* note 9, at 481 & nn.12-13; Joel C. Moyer, Notes, *The Death Penalty in Massachusetts*, 8 SUFFOLK U. L. REV. 632, 633 & n.9 (1974).

military service with an enemy or against allies.¹⁴ At the time of the Salem Witch Trials, twelve crimes were punishable by death, increasing to fourteen between 1696 and 1736.¹⁵ At one time Jesuits and Quakers who returned to the Massachusetts Bay Colony after banishment also faced execution.¹⁶ In 1780, the legislature of the newly independent Commonwealth reduced the number of capital offenses to arson at night, rape, highway robbery, willful murder, burglary at night, and treason.¹⁷ But only after 1852 was this corpus reduced solely to murder,¹⁸ and only thereafter could anyone confuse capital procedure with murder procedure.¹⁹

Massachusetts has not had an enforceable death penalty since 1972 and, in practice, the state did not execute anyone after 1947. Attempts to reinstate the death penalty recurred through the 1990s but repeatedly failed, not least because of the activism of the SJC. In 1984, the court effectively declared unconstitutional an amendment to the state constitution that had authorized capital punishment. The amendment stated:

No provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.²⁰

This change in the constitution was the culmination of a broad-based popular reaction to *Commonwealth v. O'Neal*,²¹ which struck down the lone surviving death-penalty statute at that time (for rape-murder).

Following hard on the heels of these decisions, Governor Edward King was elected after campaigning on a pro-death-penalty platform in 1979. A new death-penalty statute, 1979 Mass. Acts 488, passed shortly after he entered office; but the SJC quickly struck this down in *District Attorney v. Watson*.²² *Watson* invoked evolving standards of decency and declared the death penalty unconstitutional per se as a cruel or unusual punishment under Article XXVI of

14. See *Death Penalty Debate*, *supra* note 9, at 481 & n.13; Moyer, *supra* note 13, at 633-34 & n.10.

15. See Moyer, *supra* note 13, at 634.

16. See *Death Penalty Debate*, *supra* note 9, at 481 n.13.

17. See Moyer, *supra* note 13, at 634.

18. See *id.*

19. See *Death Penalty Debate*, *supra* note 9, at 481. Seven years later, the crime of murder was parsed into two degrees in an Act of March 27, 1858, with only murder in the first degree subject to the death penalty. See *Commonwealth v. Di Stasio*, 11 N.E.2d 799, 800 (Mass. 1937) ("Ever since St. 1858, c. 154, murder, which previously had been invariably punishable by death, has been divided into two degrees, only one of which is punishable by death.")

20. See MASS. CONST. pt. I, art. CXVI (amending article XXVI).

21. 327 N.E.2d 662 (Mass. 1975) (opinion supplemented by 339 N.E.2d 676 (Mass. 1975) (per curiam)).

22. 411 N.E.2d 1274 (Mass. 1980).

the Declaration of Rights. The legislature responded by holding a constitutional convention on June 21, 1982. The resulting pro-death-penalty amendment received a resounding fifty-four percent majority when put on the ballot for ratification (with only thirty-five percent against and eleven percent non-vote). Little more than a month later, Governor King signed a new death-penalty statute into law.

The SJC brazenly brushed aside this new law and, for all intents and purposes, the amendment. In *Commonwealth v. Colon-Cruz*,²³ the court stated that nothing “in the new [constitutional] language . . . prevents us from invalidating a particular death-penalty statute . . . on a ground other than that the imposition of the punishment of death is forbidden [per se].” The court found that the new variant violated Article XII of the Declaration of Rights for two reasons. First, under the law, defendants who waived their jury right could not be sentenced to death; therefore, the court held, a defendant might feel undue pressure to opt for a bench trial, thus depriving him of his constitutional right to trial by jury.²⁴ Second, defendants could still avoid execution by entering into plea bargains for lesser sentences, and this, the court reasoned, impermissibly infringed the right against self-incrimination.²⁵

Although the SJC refrained thereafter from declaring the death penalty unconstitutional per se, the court clearly signaled that it would find some ground, whether clever or not, to strike down any particular death-penalty statute that the legislature or governor might send its way.²⁶ Justice Quirico, writing in dissent, warned against the majority “thus elaborating a view of contemporary morality . . . with no apparent regard for the constitutionally distinct roles of the judiciary and the Legislature.”²⁷ Nevertheless, anti-death-penalty activists have hailed *Colon-Cruz* as a courageous example of the “New Constitutionalism” or the “New Federalism,” in which state high courts interpret their constitutions to extend more expansive rights than the United States Supreme Court has allowed under the federal Bill of Rights.²⁸ It is hard

23. 470 N.E.2d 116, 121 (Mass. 1984).

24. *Id.* at 124.

25. *Id.*

26. See *Commonwealth v. A Juvenile*, 300 N.E.2d 439, 441 (Mass. 1973). In *A Juvenile*, the court ruled that judicial discretion in juvenile proceedings that transferred a murder-one defendant to be tried as an adult was unconstitutional. *Id.* Wherever some aspect of the death penalty was “left . . . within the discretion of the judge [it] is invalid . . .” *Id.* Because a trial without discretion accorded to the trial judge is impossible, *A Juvenile* seemed to signal that no capital punishment could be imposed constitutionally. See Moyer, *supra* note 13, at 649-51, 670 (discussing *A Juvenile*: “It now appears in Massachusetts that if a defendant can find discretion exercised against him at any stage of the trial, then, based upon . . . *A Juvenile*, the resultant imposition of a death penalty would be tainted . . . and must be held invalid.”).

27. Dist. Attorney v. Watson, 411 N.E.2d 1274, 1298-1299 (Mass. 1980).

28. Alan Rogers, *The Death Penalty and Reversible Error in Massachusetts*, 6 PIERCE L. REV. 515, 515 (2008) (arguing “state constitutionalism” stimulated judicial reform of criminal procedure in capital cases in Massachusetts); Donald Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 225-28 (1984) (“phoenix-like” resurrection of state courts has responded to Federal Supreme Court’s

to fathom what these terms mean in the context of the Massachusetts death-penalty laws, where the SJC, in fact, ran roughshod over the act of a constitutional convention ratified by an unambiguous citizen vote. If this is “new” constitutionalism, the role of constitutions in it remains unclear.

Be that as it may, the constitutional wrangling belied the fact that the death penalty had been moribund in the commonwealth for decades.²⁹ The only practical effect of section 33E review for a quarter of a century had been to afford murder-one convicts an extra measure of appellate scrutiny. Up through the 1970s, however, there was still the real possibility that a court might put a defendant to death. Once the judiciary abolished capital punishment, however, this rationale ceased.

III. LEGISLATIVE HISTORY OF SECTION 33E: DEFINING MURDER IN THE FIRST DEGREE AS A “CAPITAL CASE”

The elimination of capital punishment cut section 33E adrift from its political and legislative history. That history had begun over thirty years earlier at a time when ordinary criminal procedure had never offered weaker protections to capital defendants. The Judicial Council of Massachusetts, formed in 1924 to “make a continuous study of the organization, procedure and practice of the courts,”³⁰ focused special criticism on the erosion of capital procedure. “The history of the law relating to capital trials in this commonwealth has been the story of gradual relaxing of safeguards once deemed essential,” it reported three years before the enactment of section

counterrevolution in criminal procedure by interpreting state declarations of rights to provide greater protections than the Bill of Rights or 14th Amendment). See generally James Acker & Elizabeth Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299 (1989) (overview of death-penalty litigation before federal and state courts as part of “remarkable” trend in state constitutionalism due to perceived weakened Bill of Rights enforcement by United States Supreme Court).

29. See *Stewart v. Massachusetts*, 408 U.S. 845, 845 (1972) (vacating death-penalty sentence as cruel and unusual punishment under *Furman v. Georgia*); see also *Furman v. Georgia*, 405 U.S. 238, 309 (1972) (setting standard relied upon in *Stewart*). The Court in *Stewart* invalidated discretionary portions of Massachusetts’s death-penalty statute, “leaving in place only the mandatory application of capital punishment in rape-murder cases.” *Death Penalty Debate*, supra note 9, at 483. The General Court passed legislation extending Massachusetts’s existing mandatory death penalty for rape-murder cases to include nine other categories of crime, but Governor Francis Sargent vetoed the bill. See *id.* In 1973, the General Court enacted a law that required extensive questioning of jurors to determine if there was prejudice that would taint the outcome of a case. See ROGERS, supra note 6, at 170. This change was to counteract “community attitudes.” *Id.* at 473 n.3. In 1975 the SJC struck down the death penalty in felony rape-murder cases. *Commonwealth v. O’Neal*, 339 N.E.2d 676, 676 (Mass. 1975). Generally, see the history of SJC jurisprudence on the death penalty in Alan Rogers’s work. See ROGERS, supra note 6, at 377-393.

30. 1924 Mass. Acts ch. 244 (codified as amended MASS. GEN. LAWS ANN. ch. 221, § 34A (2012)); JUDICIAL COUNCIL OF MASS., TWELFTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS 10 (1936) [hereinafter TWELFTH REPORT] (explaining council mandate: “There shall be a judicial council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts.”).

33E.³¹

After the Salem Witch Trials, all death-penalty cases had been heard by a full bench of the SJC. For over one hundred years, the full court gave capital defendants maximum protection from arbitrary discretionary rulings on evidentiary motions and, above all, on motions for a new trial.³² But in 1820, a capital defendant could be arraigned before a single judge, though the death penalty was still “considered a serious matter.”³³ By 1872, the legislature authorized murder trials by only “two or more justices,” and a hearing by the full court of the SJC was no longer required.³⁴ In 1891, jurisdiction for capital crimes was transferred to the Superior Court for the first time, although defendants were still guaranteed a three-judge panel. Only three years later, however, this was reduced to a two-judge panel,³⁵ and in 1910, the legislature took the final step: thereafter a single judge of the Superior Court heard capital cases.

This eliminated almost all vestiges of capital procedure, something unheard of in the history of the Commonwealth. Even the outrageous Salem Witch Trials had required a panel of judges. After 1910, the caprice of a single individual might decide a capital defendant’s fate:³⁶ “The decisions of one judge on motions for a new trial based on the weight of the evidence thereby became final.”³⁷ The Judicial Council lamented that the “threat to justice” had never been greater because “there is no review of the discretion of the single judge. Thus a matter of life or death, once treated with the utmost care, even beyond the requirements of the law, has now been committed to a single judge of the Superior Court, with no review whatever on its most vital aspects.”³⁸ A lone, capricious trial judge might order the execution of a defendant. “[W]e think the responsibility too great to be thrown upon one man.”³⁹ On average, only two capital cases were heard each year in the 1930s, but the Sacco and Vanzetti trials demonstrated that lax capital procedure could create a political maelstrom throughout the nation.⁴⁰ Both abolitionists and proponents of the death penalty could agree on the need to satisfy “the public . . . right to demand

31. FOURTEENTH REPORT, *supra* note 10, at 14.

32. *See id.*

33. *See id.*

34. *See* Act of Apr. 23, 1872, ch. 232, 1872 Mass. Acts 170; FOURTEENTH REPORT, *supra* note 10, at 14.

35. *See* Act of June 6, 1891, ch. 379, §§ 1-2, 1891 Mass. Acts 966 (amended 1894) (jurisdiction over capital cases transferred to three-judge panels of the Superior Court); Act of Apr. 5, 1894, ch. 204, 1894 Mass. Acts 186 (three-judge panel reduced to two); FOURTEENTH REPORT, *supra* note 10, at 14.

36. *See* Act of May 23, 1910, ch. 555 § 1, 1910 Mass. Acts 534; FOURTEENTH REPORT, *supra* note 10, at 14.

37. FOURTEENTH REPORT, *supra* note 10, at 14.

38. *Id.* at 15.

39. *See* JUDICIAL COUNCIL OF MASS., THIRD REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS 40 (1927) [hereinafter THIRD REPORT].

40. JUDICIAL COUNCIL OF MASS., THIRTEENTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS (Nov. 1936), Mass. Judicial Council Annual Reports, 29, no. 144.

that judicial consideration should be exhausted before a man is condemned to death.”⁴¹

At the founding of the Judicial Council, the governor requested proposals for reforms to the state’s capital procedure.⁴² This was of particular concern at the state house because Massachusetts trial courts had no power to stay executions pending appeal, and a man’s case might be reversed only after he had gone to the gallows. To prevent this, the governor had to stay each individual defendant’s execution.⁴³ Depending on the notoriety of a case, this stay might cost valuable political capital on a mere legal technicality; on the other hand, political scandal could erupt as well if the justice system misfired and executed a suspect only to reverse later.⁴⁴ Section 33E review grew out of this general concern with the unique predicament that capital punishment imposed upon both the judicial system and the executive, but these policies had nothing to do with the uniqueness of murder as a crime.

To date, law scholars have only addressed the extraordinary power of review under section 33E as a side issue in the anti-death-penalty movement, which has made it easy to mistake section 33E as a measure intended to check capital punishment.⁴⁵ This was never the case. The Judicial Council, which pushed for over a decade to pass section 33E, primarily intended to make capital trials more efficient and fair. Historian Alan Rogers writes that the scandalous trial of Nicolo Sacco and Bartolomeo Vanzetti spurred the reform,⁴⁶ and there can be no doubt that the Sacco and Vanzetti trial galvanized the drafting of section 33E. Moreover, this trial was only one of the spectacular capital trials in the 1920s. In another, two defendants were condemned to death for murders that only one man could have possibly committed.⁴⁷ In 1927, shortly after Sacco and Vanzetti’s execution, the Judicial Council published the entire docket of the trial⁴⁸ to “illustrate[] in a striking way some serious defects in our methods of administering justice.”⁴⁹ But the focus was neither predominantly on the trial’s injustice nor on abolishing the death penalty; rather the Judicial Council

41. FOURTEENTH REPORT, *supra* note 10, at 15.

42. THIRD REPORT, *supra* note 39, at 1, 32.

43. *Id.* at 33.

44. The Judicial Council proposed to add section 49A to Mass. Gen. Laws ch. 279, providing that “[t]he execution of a sentence of death may be stayed from time to time for definite and stated periods by the supreme judicial court, or a justice thereof, pending the final determination of any judicial question arising in or out of the case in which the sentence is imposed.” See THIRD REPORT, *supra* note 39, at 32 (emphasis added).

45. See generally ROGERS, *supra* note 6; Rogers, *supra* note 28.

46. See Rogers, *supra* note 28, at 169-97 (account of Sacco and Vanzetti trial in context of anti-death-penalty activism); Benjamin Tymann, Note, *Populism and the Rule of Law: Rule 25(b)(2) of the Massachusetts Rules of Criminal Procedure and the Historical Relationship Between Juries and Judges in the Commonwealth’s Trial Courts*, 34 SUFFOLK U. L. REV. 125, 135 n.57 (2000) (section 33E popularly linked to Sacco and Vanzetti trial).

47. ROGERS, *supra* note 6, at 340-344.

48. See THIRD REPORT, *supra* note 39, at app. C.

49. See *id.* at 37.

reserved its particular criticism for the extraordinary, six-year delay between the verdict and execution.⁵⁰

Section 33E was not the only reform it promoted, and the Judicial Council also focused on the cumbersome, uncertain nature of appeals in this pre-digital era. Preserving a complete trial record was much more difficult than it is today, and ordinary appeals required a bill of exceptions, in which the parties stipulated to a narrative presentation of relevant evidence.⁵¹ Predictably, opponents tried to get facts favorable to their theory of the case into the record while objecting to all facts favorable to the other side. “In practice the result [was] . . . not infrequently [that an appellant] states the evidence as he would like it to be and not as it is.”⁵² The courts held lengthy hearings just to settle the bill of exceptions, a procedure now almost wholly eliminated by electronic records. This meant that two trials inevitably took place, one leading to final judgment and a second to determine the facts relevant to appeal.⁵³ This time-consuming procedure was reformed in 1925 for capital cases so that a stenographer’s minutes provided a record of the whole trial.⁵⁴ The Judicial Council praised this reform by comparing a capital trial under the new procedures, which took only two months between the guilty verdict and the entry of final judgment, to the Sacco and Vanzetti trial, which had taken fourteen months.⁵⁵

Appeals were also cumbersome because defendants could file multiple motions for a new trial at any time before sentencing. A capital defendant had no incentive to gather all issues into one motion because part of the purpose was, understandably, to stall. Sacco and Vanzetti filed seven new trial motions in succession.⁵⁶ The Judicial Council urged that “the defendant should not have an unqualified right . . . to appeal from the decision [to the SJC] on every eleventh hour application for a new trial. Such applications rarely have any merit whatever and seldom present any substantial question.”⁵⁷ The Judicial Council therefore recommended one appeal of right on a motion for a new trial in capital cases, but to avoid miscarriages of justice, the SJC should not limit this review solely to issues raised below. Because capital defendants were “entitled to have that record scrutinized with the greatest care,” the SJC should

50. *See id.*; *see also* Commonwealth v. Pisa, 425 N.E.2d 290, 292 n.4 (Mass. 1981).

51. *See* THIRD REPORT, *supra* note 39, at 25.

52. *See id.*

53. *See id.*

54. *See id.*; *see also* Act of Apr. 29, 1925, ch. 279, 1925 Mass. Acts 310 (providing that murder and manslaughter cases on appeal to SJC go there on appeal, not on bill of exceptions). Additionally, the Act stated that the record would be provided by typewritten transcript. Act of Apr. 29, 1925, ch. 279, 1925 Mass. Acts 310. Both parties could still stipulate to materials to be omitted as irrelevant. *Id.*

55. *See* THIRD REPORT, *supra* note 39, at 38-39.

56. *See id.* at 39.

57. *See id.* at 39-40.

review the trial in its entirety for errors of both fact and law.⁵⁸ This was the essence of section 33E review: capital defendants should get only one appeal, but its thoroughness should set it apart from ordinary criminal procedure. This both protected the defendant and conserved judicial resources.

The first draft of section 33E proposed by the Judicial Council in 1927 contained all the essential elements of extraordinary review exercised today:

In a capital case the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence, and the court may order a new trial if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If a motion is so remitted, or if any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.⁵⁹

This first draft guaranteed plenary review of questions of both law and fact, rather than limiting review solely to questions of law as was the norm at the time. Beyond this, the draft statute accorded the justices broad discretion to order a new trial “for any . . . reason that justice may require.”⁶⁰ It also reduced frivolous appeals by imposing the requirement, after one plenary review, that a defendant had to pass the scrutiny of a single justice of the SJC acting as a gatekeeper. The SJC was thus never required to review a given capital case a second time, even if it came up on a reconviction after a second trial. The attention focused on anti-death-penalty activism has tended to underemphasize this later aspect of the reform. Section 33E was meant to give defendants one thorough, but also *final* review so that the death penalty could be administered swiftly as well as justly.

Nothing special about the crime of murder in the first degree prompted these changes, and no draft from 1927 through 1938 defined “capital case” by crime rather than by punishment. When the Judicial Council reviewed the twelve-year effort it took to get the measure “before the legislature, the bench, the bar and the public,”⁶¹ it discussed “capital cases,” not murder cases.⁶² The actual

58. *See id.* at 39.

59. THIRD REPORT, *supra* note 39, at 77.

60. *Id.* at 79.

61. JUDICIAL COUNCIL OF MASS., FIFTEENTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS 9 (1939) [hereinafter FIFTEENTH REPORT]; Judicial Council of Mass., *Fifteenth Report of the Judicial Council of*

practice of execution obviated any need to include a definition clause.

The General Court did not define “capital case” as a murder case until 1962, when the following sentence was added: “For the purpose of such review a capital case shall mean a case in which the defendant was . . . tried on an indictment for murder in the first degree and was convicted of murder wither in the first or second degree.”⁶³ For the first time, the General Court extended the SJC’s extraordinary power of review to non-capital cases by including second-degree murder. This was short lived, however, and in 1979 murder-two review was eliminated. The statute has applied only to murder in the first-degree ever since.⁶⁴ In 1962, the legislature also granted the court new authority to “direct the entry of a verdict of a lesser degree of guilt.”⁶⁵

These changes passed almost entirely without comment. The Boston Bar Association newsletter made no mention of it. Boston College’s Annual Survey of Massachusetts Law provided only a short and misleading summary by George McGrath, Commissioner of Correction for the Commonwealth, who wrote, “persons convicted of murder are traditionally accorded extraordinary protection in appellate review.”⁶⁶ Before 1962, however, no special appellate protections had ever attached to the crime of murder per se. Since the division of murder into first- and second-degree in 1858, no lesser homicide offenses—subject to a maximum of life imprisonment—had warranted extraordinary review.⁶⁷ Inexplicably, McGrath made no reference to the death penalty, perhaps because no prisoner had been executed in Massachusetts for fifteen years by the time he wrote. He stated only that the statute now provided “a clear definition of a capital case,” as if Massachusetts had previously been mystified by this subject.⁶⁸ No such confusion had ever existed, with the SJC writing, “proceedings before us [that] do not concern the death penalty . . . are

Massachusetts, 25 MASS. L.Q. 5, 8-9 (1940) (reprinting portions of report).

62. FIFTEENTH REPORT, *supra* note 61, at 8-9.

63. Act of May 16, 1962, ch. 453, 1962 Mass. Acts 260.

64. Act of July 2, 1979, ch. 346, § 2, 1979 Mass. Acts 229 (defining “capital case” to “mean a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree”); *see also* MASS. GEN. LAWS ANN. ch. 278, § 33E (2012).

65. Act of May 16, 1962, ch. 453, 1962 Mass. Acts 260 (allowing SJC to enter verdict of lesser degree of guilt). Another amendment that would have permitted the SJC to enter a verdict of not guilty by reason of insanity was rejected. *See* An Act to Extend the Power of the Supreme Judicial Court to Review Capital Cases, S.B. 289, 62d Gen. Ct. (Mass. 1962) (first draft of 1962 Amendment, and first proposed in the House by Mr. Wall, petition of Joseph K. Collins).

66. George F. McGrath, *Criminal Law, Procedure, and Administration*, 1962 ANN. SURV. MASS. L. 119, 126.

67. *See* Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 212-213 (2001); McGrath, *supra* note 66, at 126 (stating grant of extraordinary review in capital cases). McGrath’s short biography appears in the article. McGrath, *supra* note 66, at 119. He was also a former assistant professor of law at Boston College Law School.

68. McGrath, *supra* note 66, at 126; *see also* Commonwealth v. Gaulden, 420 N.E.2d 905, 913 n.9 (Mass. 1981); Commonwealth v. Baker, 190 N.E.2d 555, 557 (Mass. 1963); ROGERS, *supra* note 6, at 330 (discussing last executions in Massachusetts).

not required to exercise the ‘extraordinary power’ [granted by section 33E].⁶⁹

In rare cases, the court did review murder-two convictions on the whole record following indictment and trial for murder-one; but the court never felt bound to do so; and such plenary reviews only emphasized the robust affirmation of lower-court verdicts.⁷⁰ In *Commonwealth v. Vaughn*,⁷¹ the court held that defendants were not entitled to section 33E review if only sentenced to life and spared the death penalty, despite a murder-one conviction. Before the 1962 definition clause, the court thus consistently applied capital procedure only to capital cases.

Conflation of capital procedure with murder procedure arose only after the 1962 definition clause. Now, however, Massachusetts appears to be spreading the confusion. The Commonwealth’s courts as well as the First Circuit—which actually reviews real, rather than nominal, capital cases—have come to refer to first-degree murder under Massachusetts law as a capital crime.⁷² But simply defining first-degree murder as a “capital crime” does not make it so. Contrary to the statute’s original intent, this grants special review for a crime rather than a sentence. If for no other reason than linguistic precision, Massachusetts should at least amend the definition clause to apply section 33E straightforwardly to crimes punishable by life without possibility of parole. Preferably, however, the law should be restored to its pre-1962 purpose, as a true capital-procedure statute, used only if and when Massachusetts were to condemn a defendant to death.

IV. THE EXTRAORDINARY POWER OF REVIEW UNDER SECTION 33E

The impression is widespread that section 33E both addresses the unique severity of life imprisonment without parole (to which murder-one defendants alone are subject in Massachusetts) and uniquely protects defendants’ rights in ways that ordinary criminal procedure does not. As discussed below, however, both of these premises are dubious. Section 33E has always addressed the terrible power of the state to legally end a criminal’s life. Because it dealt in absolutes, no one—understandably—ever subjected section 33E review to analysis for its efficacy. It should be noted, however, that the SJC very rarely

69. *Commonwealth v. Coggins*, 87 N.E.2d 200, 203 (Mass. 1949).

70. *Id.* at 203 & n.1 (citing *Commonwealth v. Hall*, 78 N.E.2d 644, 648 (Mass. 1948); *Commonwealth v. Moore*, 80 N.E.2d 24, 28 (Mass. 1948); *Commonwealth v. Kavalauskas*, 58 N.E.2d 819, 823 (Mass. 1945); *Commonwealth v. Venuti*, 52 N.E.2d 392, 396 (Mass. 1943); *Commonwealth v. Goldenberg*, 51 N.E.2d 762, 766 (Mass. 1943)). In all these cases the SJC affirmed the trial court’s denial of a new trial applying the abuse of discretion standard but also stated that the more favorable standard of review under section 33E would have led to the same result.

71. 108 N.E.2d 559, 563 (Mass. 1952).

72. *Compare* *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007) (federal death penalty reviewed under Federal Death Penalty Act), *with* *Dickerson v. Latessa*, 872 F.2d 1116 (1st Cir. 1989) (Massachusetts first-degree murder procedure challenged on equal protection grounds, murder-one cases referred to as “capital cases”).

invokes its extraordinary power, either to order a new trial or (after 1962) to reduce a sentence to a lesser degree of guilt.

The understandable assumption is that the SJC uses its section 33E powers to correct injustices and that it invariably does this job more thoroughly than a three-judge panel of the Appeals Court under ordinary criminal procedure. Given that cases are randomly assigned to the trial courts, we should therefore expect the SJC to reverse a higher percentage of cases than the Appeals Court. But a survey of murder-two cases shows that this is not the case.

From 2001-2010, a total of 282 first-degree murder cases entered into the Supreme Judicial Court. Of these, the court reversed or reduced only twenty-three, a reversal rate of 8.2%.⁷³ But ten of these reversals, almost half, came in 2009 and 2010. Without these exceptional years, the reversal rate (from 2001-2008) was actually only 5.94%. There appears to be no pattern in these reversals, except that the 2009-2010 cases were more contentious, with only five unanimous opinions and four dissents. By comparison, in the previous eight years, twelve of the thirteen reversals were unanimous, with only one dissent.

During the 2000s, the Appeals Court reversed eleven of the sixty-three second-degree murder cases it reviewed, 17.5%. The SJC, which may take murder-two cases on further appellate review, direct appellate review, or on its

73. See generally *Commonwealth v. McNulty*, 937 N.E.2d 16 (Mass. 2010); *Commonwealth v. Berry*, 931 N.E.2d 972 (Mass. 2010); *Commonwealth v. Durand*, 931 N.E.2d 950 (Mass. 2010); *Commonwealth v. Rodriguez*, 931 N.E.2d 20 (Mass. 2010); *Commonwealth v. Sliech-Brodeur*, 930 N.E.2d 91 (Mass. 2010); *Commonwealth v. Bacigalupo*, 918 N.E.2d 51 (Mass. 2009); *Commonwealth v. Santos*, 912 N.E.2d 985 (Mass. 2009); *Commonwealth v. Stewart*, 911 N.E.2d 161 (Mass. 2009); *Commonwealth v. Zanetti*, 910 N.E.2d 869 (Mass. 2009); *Commonwealth v. Silva-Santiago*, 906 N.E.2d 299 (Mass. 2009); *Commonwealth v. Colleran*, 895 N.E.2d 425 (Mass. 2008) (reducing verdict to second-degree murder); *Commonwealth v. Williams*, 882 N.E.2d 850 (Mass. 2008); *Commonwealth v. Hinds*, 875 N.E.2d 488 (Mass. 2007); *Commonwealth v. Cannon*, 869 N.E.2d 594 (Mass. 2007); *Commonwealth v. Murphy*, 862 N.E.2d 30 (Mass. 2007); *Commonwealth v. Conkey*, 819 N.E.2d 176 (Mass. 2004); *Commonwealth v. Swafford*, 804 N.E.2d 931 (Mass. 2004) (reversing one co-defendant's conviction and upholding the other in joint trial); *Commonwealth v. Baker*, 800 N.E.2d 267 (Mass. 2003); *Commonwealth v. Coren*, 774 N.E.2d 623 (Mass. 2002); *Commonwealth v. Seng*, 766 N.E.2d 492 (Mass. 2002); *Commonwealth v. Lapage*, 759 N.E.2d 300 (Mass. 2001); *Commonwealth v. Johnson*, 754 N.E.2d 685 (Mass. 2001); *Commonwealth v. Depace*, 742 N.E.2d 1054 (Mass. 2001). In addition, the court twice reinstated first-degree murder convictions that the Superior Court had reduced to second-degree murder under Rule 25(b)(2) of the Massachusetts Rules of Criminal Procedure. See *Commonwealth v. Auclair*, 828 N.E.2d 471 (Mass. 2005); *Commonwealth v. Rolon*, 784 N.E.2d 1092 (Mass. 2003). Some authors have celebrated Rule 25(b)(2) for granting trial judges a power similar to the extraordinary power of section 33E to reduce verdicts to a lesser degree of guilt and thus avoid miscarriages of justice. Under Rule 25(b)(2):

If a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any [lesser] offense included in the offense charged in the indictment or complaint.

MASS. R. CRIM. P. 25(b)(2). This is another protection for all criminal defendants unavailable in 1939 when section 33E was enacted. See Daniel Barry, Comment, *Commonwealth v. Woodward, A Failure of Justice Averted*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 295 (1999); Tymann, *supra* note 46.

own motion, reversed an additional four cases.⁷⁴ All these appeals, whether disposed in the Appeals Court, directly in the SJC, or reviewed by the SJC after an initial appeal of right to the Appeals Court, were heard under ordinary criminal procedure, including the rule that issues not raised at trial are waived upon appeal. Overall, the reversal rate (out of the total seventy appeals) was 21.4%.⁷⁵ This survey strongly suggests that ordinary criminal procedure offers greater hope for defendants seeking appellate relief pursuant to section 33E.

A recent empirical study by Suffolk University Professor Stephanie Hartung buttresses this finding. Hartung compared the reversal rate under section 33E in the decade from 1998 to 2008 to five different appellate jurisdictions (California, Colorado, Illinois, Maryland, and Rhode Island) that apply ordinary criminal procedure to first-degree murder cases.⁷⁶ The rate of reversal in her ten-year sample was 7.5% in the SJC, compared to 8.5% in the other jurisdictions.⁷⁷ Even if we count the higher reversal rate when 2009 and 2010 are considered, there is simply no evidence that section 33E affords greater protection to defendants than ordinary criminal procedure. Alternatively, assuming section 33E review is more thorough, the result has been to *affirm* a greater proportion of life sentences without parole.

Historically, reversal rates since section 33E was first introduced have been remarkably stable, and the SJC clearly never found the need to reverse many murder cases. From 1939 until 1962, when the crucial definition clause was added, the SJC reversed only 8.7% (two out of a total of twenty-six cases).⁷⁸ In 1981, the court took stock of its track record and found that it had revised verdicts in only thirteen out of 230 section 33E reviews.⁷⁹ This rate of 5.7% was only slightly higher than the 4.6% reversal rate from 1892-1939, before section 33E authorized plenary review of death-penalty trials and the law exclusively limited the SJC's scrutiny to questions of law.⁸⁰

Section 33E unquestionably served a critical function during the long death-

74. See generally *Commonwealth v. Earle*, 937 N.E.2d 42 (Mass. 2010); *Commonwealth v. Benoit*, 892 N.E.2d 314 (Mass. 2008); *Commonwealth v. Acevedo*, 845 N.E.2d 274 (Mass. 2006); *Commonwealth v. McLaughlin*, 744 N.E.2d 47 (Mass. 2001).

75. This is an extraordinary reversal rate by any measure, and I have no explanation for it. An alternative explanation is that the SJC indeed does conduct a more thorough review and therefore reverses fewer cases, or tends to reverse reduced verdicts and reinstate convictions correctly handed down by the trial court.

76. Stephanie Hartung, *The Limits of 'Extraordinary Power': A Survey of First-Degree Murder Appeals Under Massachusetts General Laws Chapter 278, Section 33E*, 16 SUFFOLK J. TRIAL & APP. ADVOC. 1, 8 (2011).

77. See *id.* at 9-11. Hartung surveyed general criminal reversals, not just murder convictions, and found no significant difference due to the type of crime or the severity of sentence.

78. See generally *Commonwealth v. Baker*, 190 N.E.2d 555 (Mass. 1963); *Commonwealth v. Cox*, 100 N.E.2d 14 (Mass. 1951). Cox was one of thirty-eight cases subjected to section 33E review.

79. *Commonwealth v. Gauden*, 420 N.E.2d 905, 912 n.9 (Mass. 1981). From 1962-1979 the definition clause included non-capital, second-degree murder convictions as nominal "capital cases" in addition to murder-one appeals. Only eight of the total of thirteen reversals were actually real capital trials.

80. See Rogers, *supra* note 28, at 521.

penalty era, notwithstanding low rates of reversal. No prisoner ever returns from beyond the grave, and therefore every individual spared a death sentence by the SJC prevented a miscarriage of justice irrevocably sealed by execution. Section 33E pledged the Commonwealth to exhaust every means and leave no measure untested before calling down the terrible power of the State to take a defendant's life. But the SJC rarely exercised this authority. Even when the court reverses, it should be noted, this does not guarantee a different outcome. Most reversals turn on legal technicalities rather than, say, evidence sufficient to acquit, and retrial frequently results in another conviction.⁸¹ If section 33E review rarely leads to reversals, it is more rare still that a defendant gains freedom. Most initial murder convictions end with a sentence to some form of life imprisonment.

It is also worth pointing out that Massachusetts instituted section 33E review before the intermediate Appeals Court came into being in 1972.⁸² At the time, the SJC was the sole appellate court. Since 1972, however, all ordinary criminal defendants, including those indicted for lesser homicide crimes, have an appeal of right to a three-judge panel of the Appeals Court.⁸³ This multi-layered system protects defendants from arbitrary or erroneous rulings in ways that were simply unavailable in the 1920s and 1930s when section 33E was first passed into law. The Judicial Council began to make a strong case for the Appeals Court in 1967, arguing that "the interests of justice are better served if the court of last resort [i.e. the SJC] is given the time to consider those cases which are of major importance."⁸⁴

By the early 1970s, cases entering into the SJC were mounting faster than the justices could dispose of them, and Chief Justice Tauro warned:

81. See Hartung, *supra* note 76, at 13-29 (reviewing grounds for reversals from 1998-2008). There are also examples of convictions on retrial. See *Commonwealth v. Carlino*, 865 N.E.2d 767 (Mass. 2007) (after reversal and remand jury conviction in second trial affirmed); *Commonwealth v. Sena*, 809 N.E.2d 505 (Mass. 2004) (after retrial due to ineffective assistance of counsel, guilty verdict for murder of girlfriend's teenage son at baby shower before numerous witnesses affirmed); *Commonwealth v. Kater*, 734 N.E.2d 1164 (Mass. 2000) (first trial reversed in 1979 because certain testimony might have been "hypnotically aided" nevertheless followed by affirmation of conviction for murder in first degree after fourth jury trial); *Commonwealth v. Olszewski*, 625 N.E.2d 529 (Mass. 1993) (defendant's motion denied for third new trial for murder of girlfriend after first trial reversed); *Commonwealth v. Haas*, 501 N.E.2d 1154 (Mass. 1986) (after reversal in first trial and mistrial in second, murder-one convictions upheld in third trial); *Commonwealth v. Brown*, 390 N.E.2d 1107 (Mass. 1979) (after reversal and remand based upon judge's improper jury charge, jury again returned convictions for murder and armed burglary, which were affirmed); *Commonwealth v. Smith*, 258 N.E.2d 13 (Mass. 1970) (second conviction in retrial pursuant section 33E did not require a new trial or entry of verdict of lesser degree of guilt).

82. Daniel Johnedis, *Creation of the Appeals Court and its Impact on the Supreme Judicial Court*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992*, at 445, 473 (Russell K. Osgood ed., 1992); Act of July 17, 1972, ch. 740 (codified as amended at MASS. GEN. LAWS ANN. ch. 211A §§ 1-15 (2012)).

83. MASS. GEN. LAWS ANN. ch. 278, §§ 28, 28A, 28B (2012). Although direct appeal to the SJC is possible, if granted by the court, appeal to the appellate division is of right.

84. See Johnedis, *supra* note 82, at 471.

The choice is simple. Either abolish the right to judicial review in some cases—a concept alien to our jurisprudence—or establish an alternative appellate forum. . . . Its establishment would afford the Supreme Judicial Court the time necessary for more complete study of important cases which could have a broad impact on the whole public.⁸⁵

Routine murder-one reviews were neither always “complex” nor was their “importance” invariably “major,” but so long as the death penalty was at stake, no one suggested relegating section 33E review to the Appeals Court. First-degree murder continued to be docketed for mandatory review in the SJC.⁸⁶ These appeals did not depend upon merit but rather upon the severity of the punishment. Yet no evidence suggested that the Appeals Court, under the watchful eye of the SJC, was incapable of doing the job.

V. COLLAPSING DISTINCTIONS BETWEEN MURDER IN THE FIRST DEGREE AND OTHER GOVERNING OFFENSES

Section 33E review was originally predicated on the unique difference in kind posed by capital punishment. Quite literally an eternity divided those sentenced to death and those sentenced to life imprisonment. The SJC frequently invoked this stark difference, as did Chief Justice Tauro in his concurrence in *O’Neal*: “Capital punishment, involving as it does the taking of life, is qualitatively different from other punishments. . . . ‘The tremendous mental strain of inexorably approaching a foreordained death is unique to the condemned man.’”⁸⁷ As one anti-death-penalty activist has complained, “[T]he entire judicial process [is] sentimentalized and sensationalized by injection of life or death questions.”⁸⁸ In Massachusetts, that qualitative distinction has long ceased to exist, and although the possibility of parole still sets murder-one sentences apart from all others,⁸⁹ the mere “possibility” of parole has never

85. See *id.* (quoting Hon. G. Joseph Tauro, *The State of the Judiciary*, 56 MASS. L.Q. 207, 216 (1971)).

86. See *id.* at 487-89 & n.303 (section 33E review belonged among few categories that appeals court lacked authority to review, and this included appeals to a single justice of SJC in section 33E “gatekeeper” role).

87. *Commonwealth v. O’Neal*, 339 N.E.2d 676, 680 (1975) (Tauro, C.J., concurring) (quoting Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L.REV. 814, 830 (1972)) (citing *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring)).

88. Moyer, *supra* note 13, at 664 (quoting MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 22 (1973)) (objecting to emotionalism of capital trials).

89. Twenty-two out of seventy-seven Massachusetts penal statutes defining crimes against the person authorize life sentences; some of these crimes include murder, manslaughter, indecent assault and battery on a child under fourteen, armed or unarmed robbery, breaking and entering while armed, kidnapping or assault and kidnapping for the purpose of stealing, rape or assault with intent to rape, and, finally, poisoning. MASS. GEN. LAWS ANN. ch. 265, §§ 13, 17, 18A, 19, 21, 22, 24, 26, 28 (2012). Four property crimes are subject to life sentences: armed burglary, two crimes of counterfeiting, and fraud or embezzlement. MASS. GEN. LAWS ANN.

inspired the same high-minded, admonitory rhetoric.

Nevertheless, the perception persists that the unique severity of life without parole justifies special review under section 33E. Advocates of this position presume a qualitative difference between life with and without the possibility of parole, but this “possibility” is actually misleading for several reasons. In practice, no sharply drawn differences exist; rather there are fluctuating as well as converging distinctions. Since the early 1970s, when the judiciary abolished the death penalty, there have been three discernible phases in policy regarding lifers, which are illustrated in Table 1 below.

TABLE 1

	Phase 1: 1975-1984	Phase 2: 1985-1999	Phase 3: 2000-2007
1 st Degree Murder	Lenient	Harsh	Harsh
2 nd Degree Murder	Harsh	Harsh	Lenient

The ten years from 1975-1984 were marked by harshness toward lifers with the possibility of parole but relative lenience toward murder-one convicts. The number of murder-two inmates constantly increased during this phase and consistently outstripped the population of murder-one lifers, a trend that continued for a quarter of a century (see graph 4). What distinguished this first phase was the relatively high release rate of murder-one convicts. Some murder-one convicts are inevitably released in any prison system due to pardon or the commutation of sentence.⁹⁰ The SJC recognized this common practice in 1983 when it wrote that an attorney was not ineffective when he advised his client that “first degree murder was punishable by life imprisonment, and that the sentence might be commuted by the Governor after the fifteenth year.”⁹¹ Until recently, murder-one releases occurred almost every year, but there was a high of six in 1978, 1979, and 1981 and five in 1975 and 1977, numbers that have never been matched since (either in proportional or absolute terms). The thirty-nine murder-one convicts set free over this period amounted to slightly more than thirty percent of all lifers released, and it is hard to imagine that this number would have been appreciably higher with a formal possibility of parole. We would never expect the release rate for first-degree murderers, the most

ch. 266, §§ 14, 42, 43, 50 (2012). In addition, treason, classified by the Massachusetts General Laws as a crime against government, carries a life sentence. MASS. GEN. LAWS ANN. ch. 264, § 2 (2012).

90. See Moyer, *supra* note 13, at 634.

91. See *Commonwealth v. Perry*, 450 N.E.2d 615, 619 (Mass. 1983) (noting governor’s pardon power).

serious criminal offenders, to exceed murder-two releases. In phase one, for all practical purposes, the sentences of life with or without parole converged.

This first phase gave way to a uniformly harsh phase from 1985-1999, the very decade when death-penalty debates raged in the Commonwealth. Murder-one releases almost ceased, with zero in eleven out of sixteen years (although the Commonwealth still released five in 1993). This trend continues to the present, and the proportion of murder-one releases has fallen to only eight percent of all lifers released.⁹² Yet in phase two, second-degree murder parolees also declined in proportional terms from an already low level. With dismal irony, this era might be considered the “golden” age of life imprisonment because all categories of lifers expanded faster than the general prison population (which itself ballooned). High retention rates drove the trend (see Graphs 2 & 3). During this period, the sentence of life with the possibility of parole converged with the sentence of life without parole because it was very difficult to get released.

Finally, in phase three after 2000, a new era of leniency began, but only for murder-two convicts. Their release rates exceeded commitments for the first time. This “lenience” is very deceptive, however, because it had much to do with a decline in commitments unrelated to parole policy. In the first and second phase, the average commitment rate for second-degree murder remained almost constant, climbing from 30.5 per year to 32.1 per year, but in the “lenient” third phase, commitments dropped to an average of 21.8 per year. Moreover, the release rates in the 2000s are also deceptive because, despite roughly doubling—climbing from an average of ten per year in phase one and fourteen per year in phase two to thirty-five per year in phase three—in proportional terms, Massachusetts merely returned to release rates common in the 1970s (see Graphs 1, 2, & 3).

In the 1970s, a steady stream of commitments outpaced declining release rates to contribute to an ever-growing lifer population of murder-two convicts. Only in the 2000s, when releases returned to 1970s levels, combined with sinking commitment rates, did the murder-two lifer population begin a (slow) decline. This study offers no explanation for the decreasing commitments, but the point is that the recent decline in the murder-two inmate population does not necessarily indicate a sudden radical increase in paroles. Murder-two inmates can still expect to spend a very, very long time in prison.

All of these fluctuating policies demonstrate that, unlike the penalty of death, nothing is permanent about life with or without parole. It should therefore be no surprise that “lenient” lifer paroles seem to be coming to an abrupt end. On December 26, 2010, Dominic Cinelli shot and killed officer John “Jack” Maguire during an armed robbery (Cinelli was also killed in the

92. This absolute number of murder-one releases over two decades compares to thirty-nine releases in only a single decade from 1975-1984.

gunfight) after being paroled from three “consecutive” life sentences for, among other things, attempted murder and armed robbery.⁹³ In response to public outrage, Governor Deval Patrick called for the resignation of five members of the Massachusetts Parole Board⁹⁴ and promised to increase scrutiny applied to parole decisions.⁹⁵ Unsatisfied, House Republican Leader Bradley H. Jones Jr. issued a statement warning “that the most violent criminals would still have the possibility of being paroled. The fact is we can do better and we should do better.”⁹⁶ In the wake of the scandal, the newly installed Chairman of the Massachusetts Parole Board, Josh Wall, promised to reduce release rates and is on record criticizing the parole policy of the 2000s as too lenient.⁹⁷ “There is a strong disincentive for a sitting governor to approve the release of life-sentenced individuals,” and politicians (and parole officers) perceive the decision as a risk that can only come back to haunt them.⁹⁸ There appears little appetite to release prisoners, despite a ballooning prison population and the burden it places on the public fisc. Massachusetts is now almost certain to return to a “harsh” phase such as that of the late 1980s and 1990s, and, by the time of writing of this article, the general parole rate has dropped by as much as twenty-three percent.⁹⁹

In sum, differences in “degree” do not amount to real differences in kind between murder-one and murder-two sentences. During a lenient phase, life frequently does not really mean life for either degree of murder. In other eras, however, the Commonwealth ratchets up parole standards making life with possibility of parole little different from life without parole. A prisoner whose sentence spans several decades can expect to live through various policy trends, a see-saw that shows the protean nature of a life sentence, precisely the thing that always distinguished it from the finality of execution.

There are also other trends in Massachusetts policy that span every phase of

93. Laurel J. Sweet, O’Ryan Johnson, & Christine Mcconville, *Chief: Woburn Cop Slay Like ‘Wild West’: Shootout Ended in Hail of Bullets, Diamonds*, BOS. HERALD, Dec. 28, 2010, <http://www.bostonherald.com/news/regional/view.bg?articleid=1305786>; see also ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 26-28 (2009), http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf [hereinafter SENTENCING PROJECT 2009].

94. Dave Souza, *Deval Patrick Shakes up Parole Board After Cop Killing*, THE HERALD NEWS, Jan. 13, 2011, available at <http://www.heraldnews.com/news/x104370759/Deval-Patrick-shakes-up-parole-board-after-cop-killing>.

95. See *id.*

96. See *id.*

97. Michael Rezendes, *Paroled Lifers Pose High Risk of New Crimes: Serious Offenders Often Back in Jail in 3 Years, Review Finds*, BOS. GLOBE, June 19, 2011, http://www.boston.com/news/local/massachusetts/articles/2011/06/19/paroled_lifers_pose_high_risk_of_new_crimes/?page=full.

98. See SENTENCING PROJECT 2009, *supra* note 93, at 27-28.

99. Matt Murphy, *Mass. Parole Rates Drop in ‘11: Critics Say Fall Could Put Added Strain on Prisons*, BOS. GLOBE, Aug. 10, 2011, http://www.boston.com/news/local/massachusetts/articles/2011/08/10/after_board_shake_up_machusetts_parole_rates_down_in_2011/.

sentencing discussed above, and these only underscore the point that differences in “degree” do not amount to difference in kind. Over the past forty years, Massachusetts has become a national leader in the proportion of its prisoners serving life.¹⁰⁰ The lifer population also grew faster than the prison population, which itself grew by an order of magnitude (from 1,970 total prisoners in 1973 to 10,342 in 2009).¹⁰¹ For every lifer in the mid-1970s there are now over seven today (248 in 1973 and 1,774 in 2009), accounting for at least one in six prisoners.¹⁰² This trend is driven by the reluctance of Massachusetts to release lifers.

Murder-one convicts account for only about half this total and have grown from 110 in 1973 to 926 in 2009, expanding faster than the overall population of lifers in the system. They have grown by 8.4 times the 1973 population whereas lifers overall expanded “only” 7.2 times. By comparison, murder-two convicts increased from 146 in 1973 to 699 in 2009, an increase of just under five-fold and more comparable to the average expansion of the general prison population (i.e. an increase of 4.8 times versus an average of 5.2 since 1973). These trends are captured in Graph 4, which shows that the possibility of parole did not lead to a significant divergence in lifer populations until the 2000s.

By contrast, as the bottom line in Graph 4 shows, release rates have stagnated and remained relatively constant throughout. During the 1970s, Massachusetts released between five and seven percent of its lifers each year, either due to parole, commutation, or pardon. By comparison, in 2007, Massachusetts’s forty-five releases amounted to only 4.6%. Another noteworthy trend in Graph 4 is that homicides have actually declined since the mid-1970s, reaching a low point in 1997 and remaining under 200 per year for the last fifteen years.¹⁰³ Yet the number of prisoners serving life for murder has steadily increased.¹⁰⁴

100. Along with Alabama, California, Nevada, and New York. See SENTENCING PROJECT 2009, *supra* note 93, at 3.

101. All prison statistics are compiled by the Massachusetts Department of Corrections and Executive Office of Public Safety and Security, which releases a report. See MASS. DEP’T OF CORR., A DESCRIPTION OF THE RESIDENTS OF MASSACHUSETTS CORRECTIONAL INSTITUTIONS ON JANUARY 1, 1973, at 4 (1973) <http://www.mass.gov/eopss/docs/doc/research-reports/jan-1-population/011973.pdf> [hereinafter 1973 MASS. INMATES]; MASS. DEP’T OF CORR., JANUARY 1, 2009 INMATE STATISTICS iv (2009), <http://www.mass.gov/eopss/docs/doc/research-reports/jan-1-population/112009.pdf> [hereinafter 2009 INMATE STATISTICS]. The quintupling of Massachusetts’s prison population is in keeping with national trends. John Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73, 73 (2010) (noting national prison population has quintupled since mid-1970s).

102. This is also the case in Alabama, California, Nevada, and New York. See SENTENCING PROJECT 2009, *supra* note 93, at 3; 1973 MASS. INMATES, *supra* note 101 at 8; 2009 INMATE STATISTICS, *supra* note 101 at 13 tbl.11.

103. See COMMONWEALTH FUSION CTR., MURDER RATE 1960-2007 STATEWIDE DATA CRIME REPORTING UNIT, <http://www.mass.gov/eopss/docs/msp/crime-reporting/mass-stats-charts-and-numbers-1960-2007.pdf> (last visited Aug. 30, 2012). There was a high of 256 homicides in 1973 and 249 homicides as recently as 1991. *Id.*

104. See *id.* Of course, falling homicide rates cannot affect incarceration rates for years to come because

Finally, Graph 5 shows the number of lifers released as a proportion of all releases and emphasizes that little has changed in the prospects for release, with or without parole. Throughout the last quarter of the twentieth century, the number of annual releases fluctuated between ten and twenty, and only increased to the low forties in the 2000s. As a proportion of the total prison population, the release rate for lifers has usually bounced around below the 1% barrier and has almost never spiked above 1.5%. This is also why the higher release rates of the 2000s could not alone have led to a decreasing murder-two population, but had to be augmented by a large decline in commitments.

Massachusetts trends correspond with national trends. Throughout the United States, prisoners sentenced to life are now serving longer and longer terms regardless of parole.¹⁰⁵ If anything, this article understates the severity of punishment for lesser degrees of murder or non-homicide crimes. Many non-murder convicts will also spend their natural lives in prison due to consecutive sentences or the difficulty of achieving parole: “[T]he number of long-term prisoners is considerably greater [nationwide] than just the total of lifers, and contributes to the population of what can be considered ‘virtual lifers.’ These are persons serving very long sentences, or consecutive sentences, that will often outlast the person’s natural life.”¹⁰⁶ Due to the harshness of contemporary American justice, and Massachusetts justice in particular, criminals can serve life without ever being sentenced to life. These “virtual lifers” only further blur the boundary between a murder-one conviction and sentence to life for other serious offenses. This article takes no position on parole policy or the wisdom or folly of life sentencing. It merely points out the fact that shades of difference grounded in the possibility of parole do not create fundamental differences in how life sentences are actually served. As such, they cannot justify extraordinary review solely for first-degree murder verdicts under section 33E.

VI. CONCLUSION

Although the political winds buffeting parole policy or gubernatorial clemency may blow hot and cold during a lifer’s long sentence, the trap door beneath the gallows opens only once. The SJC repeatedly referred to the finality of execution in decisions leading up to the abolition of the death penalty: “[D]eprivation of life is a dread, ultimate sanction unique, standing

murder-two convicts are only parole-eligible after fifteen years. One might therefore expect releases to correspond closely to the number of prisoners entering the system on a murder-two charge fifteen, twenty, or twenty-five years earlier, but this is not the case, and no correlation exists. I ran simple linear regressions of the series, and the margin of error was consistently higher than the release rates for most years. The equation used was $N_{releases\ y} = \beta * (X_{entries\ y-15, 20, 25}) + \epsilon$, where “y” is year.

105. See SENTENCING PROJECT 2009, *supra* note 93, at 6.

106. See MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 11 (2004) (assessing life sentences as crime control policy).

apart from other exactions by the State . . . unique in its severity and irrevocability; it is different in kind from any other punishment imposed under our system of criminal justice.”¹⁰⁷ But this is precisely what life imprisonment is not; it is neither unique (differing little from long consecutive sentences) nor irrevocable.

Over the intervening seventy years since section 33E review became a fixture of Massachusetts appellate procedure, sharp differences in life sentences have all but disappeared. The Commonwealth sometimes shows leniency to murderers of the first and second degree alike; at other times, popular pressure to keep serious offenders in jail diminishes the chance of parole for lifers of any stripe. In this context, section 33E review merely affords murder-one defendants, for no justifiable reason, an extra measure of scrutiny and more favorable standards of review than other serious offenders. There is no evidence that the intermediate Appeals Court would review such cases ineptly, and, should a defendant’s appeal of right miscarry, the SJC still has the power to reach down and take cases on further appellate review.¹⁰⁸ What is clear is that the Appeals Court can, and routinely does, review serious criminal cases at much lesser cost to the Commonwealth, and, in so doing, it preserves the SJC’s resources to address serious issues at the cutting edge of the law.

There are two ways to address the problem. First, the Commonwealth may find that life imprisonment is such a unique and terrible punishment that our contemporary standards of decency now demand that it be treated as qualitatively different from others. If this is the case, all lifers should warrant the extraordinary review once reserved exclusively for capital cases. This would fit within a long tradition of gradually extending the protections of capital procedure to all criminal defendants.

However, it would also reverse another powerful trend, namely preserving the highest, law-making court’s resources for cases that require the most probing attention, leaving routine appeals to the capable justices of the Appeals Court. In 1941, shortly after the enactment of section 33E, Justice Lummus identified “the most important function of the full Court” as the obligation “to superintend the growth of the law.” Dumping all lifer appeals onto the SJC’s docket would make this high purpose even more difficult to achieve.

The second, and preferable, alternative is to delete the definition clause. Massachusetts should retain its capital procedure in the event that the Commonwealth once again reverts to a death-penalty state. The statute signed into law by Governor Edward King is still on the books as chapter 265, section 2 and chapter 279, sections 68-70 of the Massachusetts General Laws, as is the

107. Opinion of Justices, 364 N.E.2d 184, 187, n.10 (Mass. 1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976)) (internal citations omitted).

108. *Johnedis*, *supra* note 82, at 481 (SJC normally exercises power to transfer cases raising novel, constitutional or public interest issues).

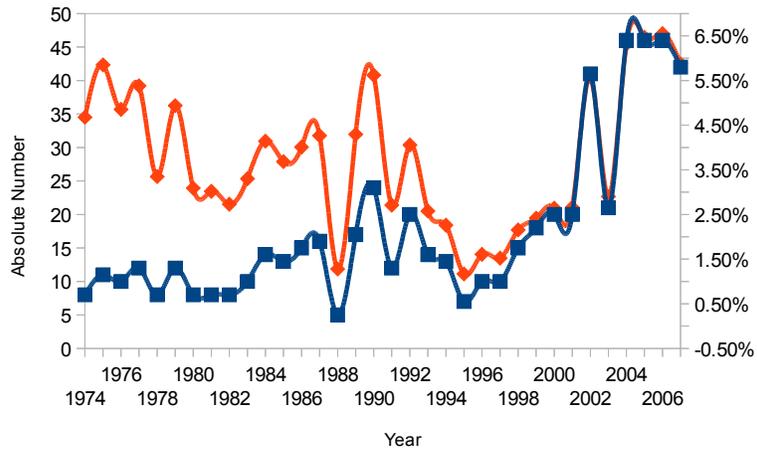
constitutional amendment of 1982. Massachusetts has had popular death-penalty movements as recently as the late 1990s, and there is no historical inevitability to the abolition of capital punishment.¹⁰⁹ The passionate declarations of activists that “[t]he death penalty is impermissibly cruel and repugnant to contemporary standards of decency” fly in the face of opinion polls, which demonstrate abiding support for the death penalty over the past forty years.¹¹⁰ Like the celebrations of “state constitutionalism” or the “new federalism,” this high moral rhetoric seems stubbornly indifferent to the reality of the political process.

It would be unwise and unrealistic to repeal section 33E root and branch, and it does no harm to retain it. Deleting section 33E’s definition clause would eliminate a large caseload of unmeritorious murder-one appeals that are automatically entered in the SJC so that the court could expand its docket of cases that raise novel issues of law, constitutional issues, or issues that have attracted such political or public interest that only the SJC can decide them effectively. To the extent that miscarriages of justice, special procedural difficulties, or new questions of law appear in murder cases—as they inevitably will—the court will still intervene with its usual thoroughness.

109. See generally *Death Penalty Debate*, *supra* note 9.

110. See Rogers, *supra* note 28, at 532. Compare Brian Hauck, Cara Hendrickson & Zena Yoslov, *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 480 (1999) (noting results of Massachusetts voters indicate that death penalty enjoys popular favor), with Moyer, *supra* note 13, at 640-41 (citing high popularity of death penalty in Massachusetts in opinion polls and 1968 referendum).

Graph 1: Murder-Two Releases



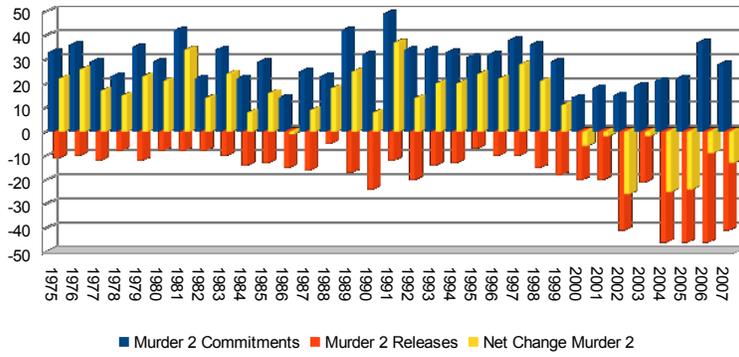
- ◆ As a percentage of prisoners serving sentences for murder two
- Releases of lifers serving under a governing charge of murder in the second degree

2012]

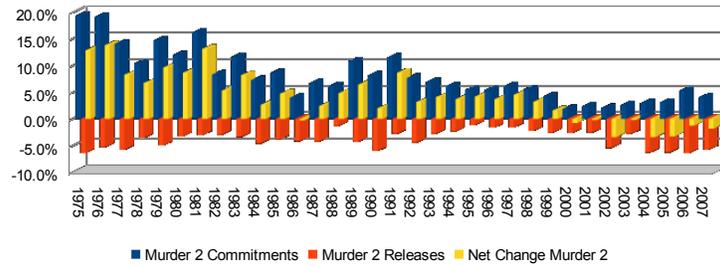
SECTION 33E SURVIVES THE DEATH PENALTY

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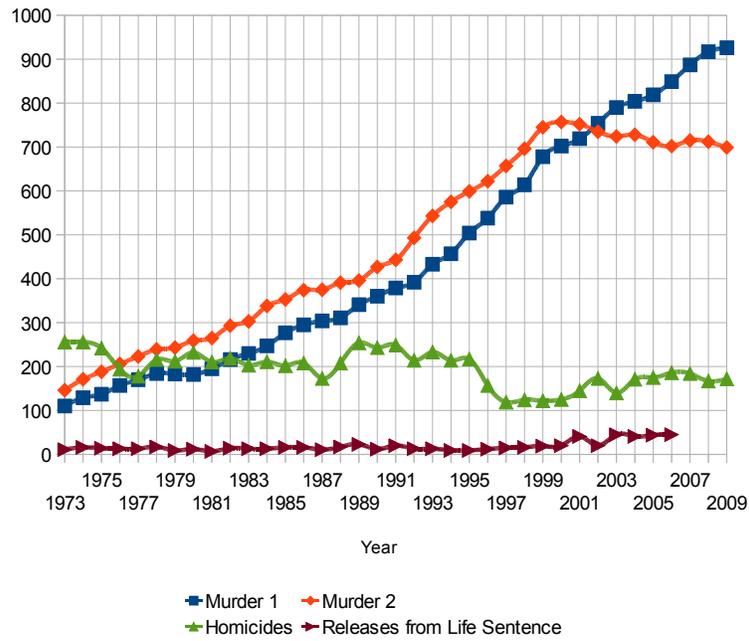
Graph 2: Second Degree Murder Commitments, Releases, and Net Change in Absolute Numbers



Graph 3: Second Degree Murder Commitments, Releases and Net Change in Proportional Terms



Graph 4:
Prison Population of Lifers, Homicides, and Releases from Life



Release of Lifers as Percentage of Total Releases

