COMMENTS ON HOUSE BILL 2525

STEVE TWIST[1]

Wednesday, March 7, 1973 was overcast in Phoenix; the sky still carried the remnants of a spring rain that had soaked the Valley of the Sun for three days.[2] Because Kathy Koger and her high school boyfriend, James Burgoyne, had done well on their just completed final exams, they asked if they could take the day off from school.[3] A short trip into the desert, out of Phoenix, for a picnic would be a fitting reward for their hard work. With their parents' permission, Kathy and James decided to drive out to Saguaro Lake. It would be their last day alive.[4]

As reported by the Arizona Supreme Court:

> On 10 March 1973, both families were informed that the bodies of Koger and Burgoyne had been found in an area near Saguaro Lake. The victims had been shot to death on 7 March 1973. Burgoyne had been shot five times: four times with a .22 caliber weapon and once with a .38 caliber weapon; three of these shots were to his head. Koger was shot once with a .38 caliber weapon; this shot was fired into the back of her head.[5]

Kathy and James were murdered by Shawn Jensen.[6]

Kathy was a hardworking high school junior showing steady progress in her studies. Kathy and her mom, Nancy, were very close. James took classes at Scottsdale Community College. They both had promising futures.

Mr. Koger, Kathy's father, remembers the terror of not knowing what happened for several days and then learning of the murders. He still recalls those feelings and thinks about them every day:

> The murders were horrendous. We were robbed of the beautiful young lady we would never see graduate from high school, never see walk down the aisle, the beautiful young mother who would never have children. Jensen took so much from us that day, and we have lived with our loss every day since. Nancy has passed on, taking her grief to the grave. Jensen took our grandchildren from us also… so many years that we were robbed of her.[7]

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2. *See Daily Weather History*, THE OLD FARMER'S ALMANAC, http://www.almanac.com/weather/history/zipcode/ 85001/1973-03-04 (last visited Apr. 25, 2011).
3. Interview with Wayne Koger, (Sept. 16, 2010).
4. *Id*.
5. State v. Jensen, 735 P.2d 781, 783 (Ariz.1987).
6. *Id.*
7. Interview with Wayne Koger, (Sept. 16, 2010).

Since statehood, with the exception of a two-year period from December 8, 1916 to December 5, 1918,[8] the people of Arizona have determined death was a just punishment for first degree murder.[9] When Kathy and Jim were murdered, the statute prescribing the punishment for first degree murder provided that: "A person guilty of murder in the first degree shall suffer death or imprisonment for life, at the discretion of the jury trying the person charged therewith, or upon a plea of guilty, the court shall determine the punishment."[10] For murderers not receiving the death penalty, release on parole was not an option under the terms of this statute, unless the governor granted a pardon or commutation to a parole eligible sentence.[11]

On June 29, 1972, five justices of the United States Supreme Court determined that the death penalty was being administered in a manner that was "arbitrary and capricious." Specifically, the Court held that the law did not sufficiently guide the discretion of the sentencing authority, resulting in a denial of the Eighth Amendment's protection against "cruel and unusual punishment."[12] The Court's opinion had a national reach. Although Arizona's death penalty statute was not directly at issue, the Court's opinion applied with equal force to the Arizona law, and consequently, the state's death penalty was no longer enforceable.

When Shawn Jensen murdered Kathy Koger and James Burgoyne, the Arizona Legislature had not acted in response to the Supreme Court's decision in *Furman.* As a consequence, the only permissible sentence for his crime was life imprisonment without the possibility of release, except by way of commutation or pardon.[13]

The Arizona Legislature responded to *Furman* during its first legislative session following the Supreme Court's opinion.[14] The state of Arizona enacted Senate Bill 1005 during its First Regular Session of the 31st Legislature in 1973. The legislation amended section 13-453 of the Arizona Revised Statute as part of its restoration of the death penalty, and the enactment of a sentencing procedure that was intended to conform to the demands of the *Furman* majority.[15]

Section 13-453(A) of the Arizona Revised Statutes was amended to read, "A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison…."

Furman was not the only roadblock to imposing and carrying out the death penalty in Arizona. As the Arizona Department of Corrections reports:

> In 1978, the Arizona statute regarding executions was ruled unconstitutional and all executions came to a halt. In *State v. Bishop,* 118 Ariz. 263, 576 P.2d 122 (1978), the Arizona Supreme Court

8. "On Dec. 8, 1916 an initiative measure went into effect eliminating the death penalty as punishment for convictions of first degree murder. The death penalty was restored Dec. 5, 1918." (At the very next succeeding election one might note) *Arizona Death Penalty History Florence Prison*, ARIZ.DEPT. OF CORR., http://www.azcorrections.gov/adc/history/Prisca_History_DeathPenalty.aspx (last visited Jan. 14, 2011).

9. "First degree murder" is the intentional killing of another with premeditation.

10. ARIZ. REV. STAT. ANN. §13-453(A) (West, Westlaw through 49th Leg., 2010).

11. *See* State v. Parle, 521 P.2d 604, 606 (Ariz. 1974) ("Commutation to a parole eligible sentence" occurs when the Governor reduces a life sentence to a terms of years which then permits a parole eligibility calculation).

12. Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

13. ARIZ. REV. STAT. ANN. §13-453 (1972).

14. *See* Arizona Department of Corrections, *supra* note 8.

15. *Id*.

> construed the list of mitigating circumstances enumerated in [section 13-703(G) of the Arizona Revised Statute] to be exclusive. Shortly after the *Bishop* decision, the Ohio statutory scheme limiting the presentation of mitigation was found to be improper by the United States Supreme Court in *Lockett v. Ohio,* 438 U.S. 586 (1978). The Court held that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as mitigation any aspect of the defendant's character or record, and any circumstance of the offense argued by the defendant as mitigating the sentence to less than death.
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> Subsequently, the Arizona Supreme Court in *State v. Watson,* 120 Ariz. 441, 586 P.2d 1253 (1978), held Arizona's death penalty statute unconstitutional because of its limitation on the presentation of mitigation. However, the Court found that the unconstitutional portion of the statute was severable from the constitutional portion, and the Court remanded the case to allow the defendant to present any circumstance showing why the death penalty should not be imposed. After the Court's decision in *Watson,* all prisoners on death row were remanded for new sentencing hearings to allow presentation of any evidence tending to mitigate the sentence as described in *Lockett*.
> In 1979, the Arizona Legislature revised Arizona's death penalty statute and the death sentence again became effective May 1, 1979.
> On April 5, 1992, thirty years after the execution of Manuel E. Silvas, Donald E. Harding was put to death by lethal gas. [16]

As a consequence of the 1973 legislation, first degree murderers sentenced to life imprisonment for crimes murders committed after the effective date of the law, became parole eligible after serving twenty-five years. In contrast, murderers sentenced to life imprisonment for murders committed before the effective date of the 1973 amendments only become parole eligible if their sentence is commuted to a term of years.

This difference has led some to argue that the sentencing laws for those murders sentenced to life imprisonment for murders committed before the effective date of the 1973 amendments, "Old Code Lifers", be retroactively amended to establish that they too may become parole eligible after serving twenty-five years. Reports show that twenty-nine inmates fit into this category.[17] Notably, each of them would become parole eligible on the effective date of the reform. Among these inmates is Shawn Jensen.[18]

The Arizona Justice Project ("AJP"), an organization affiliated with the Sandra Day O'Connor College of Law that helps inmates who are alleged to have been wrongly convicted or falsely accused, is the leading proponent of the reform. AJP has sought the

16. *Id*.; *see generally Arizona Crime Rates 1960-2009*, THE DISASTER CENTER, http://www.disastercenter.com/crime/azcrime.htm (last visited Jan. 14, 2011) (The homicide rate during the decade of the sixties was 5.79 per 100,000 inhabitants; during the last half of the decade of the seventies it was 8.9. Had the murder rate remained steady at the sixties average there would have been 436 fewer murder victims from 1974 to 1979).

17. *Report on Arizona's Pre-August 1973 Life Sentenced Inmates*, ARIZONA'S OLD CODE LIFERS, http://www.oldcodelifer.com/more.htm (last visited Apr. 25, 2011).

18. *Id*.

introduction of legislation to make Old Code Lifers retroactively eligible for release on parole.[19] The most recent legislation was House Bill 2525, introduced in the 2nd Regular Session of the 49th Arizona Legislature.[20] The purpose of the legislation is to extend parole eligibility to the Old Code Lifers; thereby avoiding what the proponents argue is a system of release through commutation that "has stopped working."[21]

House Bill 2525 contains four operative paragraphs:

> A. A person who was convicted of murder for an offense that was committed before August 8, 1973 and who was sentenced to life in prison shall be eligible for parole after serving twenty-five calendar years.
> B. If the person was convicted of any other offense for which the person is serving a sentence that runs consecutively to the murder conviction, the person shall be eligible for parole only to the consecutive sentence.
> C. Parole eligibility pursuant to subsections A and B takes effect immediately on the effective date of this section.
> D. Within thirty days after the effective date of this section, the state department of corrections shall notify all persons who are eligible for parole pursuant to subsections A and B of their parole eligibility.[22]

The authors of the legislation expressed the following intent:

> It is the intent of the legislature to ensure that persons who are sentenced for the same crime should receive the same sentence and the same opportunity for sentence review. This legislation is not intended to release any currently serving inmate but rather to correct sentencing inequities that may have occurred and to afford and require similar circumstances of sentence and review opportunities to inmates who were sentenced for the same crime. [23]

The AJP argues that without this reform there remains an "unintended and inconsistent leniency" that resulted when the legislature added parole eligibility to the sentence for first degree murderers, but did not apply it retroactively to those sentenced

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19. *Id*.

20. H.B. 2525, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp? Bill_Number=HB2525&Session_ID=93.

21. *Facts*, ARIZONA'S OLD CODE LIFERS, http://oldcodelifer.com/ (last visited Jan. 14, 2011).

22. H.B. 2525, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/FormatDocument.asp? inDoc=/legtext/49leg/2r/bills/hb2525p.htm

23. *Id*. (a review of the "intent" clause does raise some questions. What exactly does "sentenced for the same crime should receive the same sentence" mean? The authors don't mean that all murderers should receive the death penalty. Presumably they don't literally mean what the write. And what of the phrase, "to correct sentencing inequities that may have occurred?" They do not mean "sentencing inequities" that "may have occurred" during the sentencing phase of each case. But then, is it a "sentencing inequity" to be sentenced according to the law in effect at the time the crime occurred, assuming no constitutional defect in the sentence? Our law has never so held. What of the phrase "require similar circumstances of sentence and review?" It is unclear to what the phrase "circumstances of sentence" refers to).

before the restoration of the death penalty.[24] In light of the fact that governors have granted fewer commutations since 1989[25] for those sentenced for crimes committed before August of 1973, AJP argues that the Old Code Lifers are now being treated more harshly than those sentenced under the post-August of 1973 law that made them eligible for the death penalty. AJP argues the only way to resolve the "inconsistency" is to apply retroactively new parole eligibility that is not dependent upon commutation.[26] In support of this view, AJP tries to answer the following questions:

> (1) How did this inconsistency in sentencing originate and perpetuate? (2) Was it the legislature's intent to create more lenient sentences for lifers after August of1973? (3) Did the 29 Old Code Lifers receive the sentence of life without parole? (4) Were the crimes committed by these 29 Old Code Lifers significantly different than the crimes of the over 1,225 lifers who have parole eligibility at 25 years? (5) Do these 29 Old Code Lifers pose material risk to the community if they were to become parole eligible?[27]

HOW DID THIS INCONSISTENCY IN SENTENCING ORIGINATE AND PERPETUATE?

The foregoing discussion traces the history that led up to the 1973 amendments made to section 13-453 in the Arizona Revised Statues. As the AJP correctly points out in its analysis, it was certainly the legislature's primary intent to restore the death penalty.[28] In addition, the legislature considered the average length of time a first degree murderer served before release[29] and intended to lengthen that time served by extending parole eligibility to twenty-five years. It should be noted that the legislature did not eliminate eligibility for commutation or pardon.

Nothing in the record suggests that the legislature intended to alter sentences for those whose crimes were committed before the effective date of the legislation; the focus of the legislation was to conform the law to the mandates of the U.S. Supreme Court. Indeed, the Arizona Supreme Court has held that the changes in parole eligibility brought about in the 1973 legislation were not intended to, and do not apply to Old Code Lifers.[30]

What of the alleged "inconsistency?" AJP does not argue that there is an inconsistency resulting from the fact that some post-1973 murderers could and did receive the death penalty, while pre-August 1973/post-*Furman* murderers could not. Actual consistency does not seem to be AJP's main concern; rather, it seems to be leniency, or more directly, the failure to make sentencing reductions retroactive.[31] It seems the AJP would always require the legislature to apply a reduction retroactively. What AJP proposes, is the proverbial one-way ratchet by which sentences could only be

24. *Report on Arizona's Pre-August 1973 Life Sentenced Inmates*, *supra* note 17.
25. *Id.*
26. *Id*.
27. *Id.*
28. *Id*.
29. *Id.* (prior to 1973, AJP reports that the average time served to release was 10.2 years).
30. State v. Jensen, 970 P.2d 937, 940 (Ariz.1998) ("Thus 'an offender must be punished under the law in force when the offense was committed and is not exempted from punishment by a subsequent amendment to the applicable statutory provision.'" (quoting State v. Stine, 906 P.2d 58, 60 (Ariz. Ct. App. 1995))).
31. *Report on Arizona's Pre-August 1973 Life Sentenced Inmates*, *supra* note 17.

reduced. Given that a new penalty cannot apply retroactively if it is harsher, the only "inconsistency" AJP is concerned about occurs when penalties are reduced but not made retroactive. Such retroactive leniency, of course, is not required by any right of the defendant.[32] Instead, it is, a political judgment made by the legislative and executive branches. Of course, this is precisely why the AJP is pursuing its goals politically and not judicially.

WAS IT THE LEGISLATURE'S INTENT TO CREATE MORE LENIENT SENTENCES FOR OLD CODE LIFERS AFTER AUGUST OF 1973?

The legislature intended to restore the death penalty and to extend the average length of time served to parole release for first degree murderers not sentenced to death.[33] Given the statistics reported by the AJP, the legislature accomplished its intent, However, the legislature did not eliminate commutation eligibility for first degree murderers.[34] The governor still maintained the ability to commute a sentence to time served.[35] One might infer from this that the legislature intended to maintain this release opportunity. In that sense, there is no "inconsistency" to the sentences imposed. The AJP argues:

> When the Arizona Legislature amended A.R.S. § 13-453 in August, 1973, it never intended to select a small group of lifers for harsher and more punitive sentencing (by limiting them to a means of parole eligibility which has become archaic and practically nonexistent commutation) while at the same time creating a more lenient standard for thousands of future lifers (automatic parole eligibility at 25 years). Yet that is exactly what has occurred. As has been demonstrated, the Legislature's intent was the opposite—to make life sentences for future offenders more punitive.[36]

Consider the foregoing argument: Whether or not it was the legislature's intent, did the legislature "select a small group of lifers for harsher and more punitive sentencing . . . [?]"[37] No, it did not. The legislature prospectively reenacted the death penalty and longer times served to parole eligibility. It did not alter commutation eligibility, prospectively or retroactively. In this sense it did not create a more lenient standard, it continued the same standard. Could the legislature have foreseen the change in commutation grant rates in 1973? Hardly. The legislature's intent to reenact the death penalty and establish longer times served than those up to 1973, in fact, was precisely carried into effect.

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32. Jensen, 970 P.2d at 941 ("fact that others allegedly less worthy than defendant received lesser punishment does not violate equal protection" (quoting State v. Castano, 360 P.2d 479, 481 (Ariz. 1961)).
33. *Report on Arizona's Pre-August 1973 Life Sentenced Inmates*, *supra* note 17.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.

DID THE TWENTY-NINE OLD CODE LIFERS RECEIVE THE SENTENCE OF LIFE WITHOUT PAROLE?

The law at the time of the murders committed by the Old Code Lifers provided for death or life in prison.[38] In fact, there was no express eligibility for parole. Unless the governor chose to commute the life sentence to a fixed term, thereby making the murderer eligible for parole, the sentence imposed was a life sentence. The fact that different governors, or different parole boards, might be more or less likely to commute sentences does not alter the legal effect of the sentence.

WERE THE CRIMES COMMITTED BY THESE TWENTY-NINE OLD CODE LIFERS SIGNIFICANTLY DIFFERENT THAN THE CRIMES OF THE OVER 1,225 LIFERS WHO HAVE PAROLE ELIGIBILITY AT TWENTY-FIVE YEARS?

It does not appear that there is a direct answer to this question posed by the AJP. Let us concede, for the sake of argument, that the crimes are not "significantly different." When the legislature enacts sentencing changes, it does so prospectively. Indeed, there is a movement to amend the first degree murder sentencing laws in Arizona to mandate "life means life" by eliminating parole eligibility for first degree murderers.[39] The legislation does not purport to apply retroactively, nor could it legally. If this legislation passes, the murderers sentenced to life without parole will likely not be "significantly different" than those sentenced for crimes committed before the effective date of the law. But the purpose of sentencing reforms is hardly ever to harmonize the sentences of past and present; rather, the changes are meant to reflect the contemporary understanding of what justice requires for those whose crimes come after the change. The legislature has identified the purposes of the criminal law, and sentencing goals are included in those purposes.

> It is declared that the public policy of this state and the general purposes of the provisions of this title are:
> 1. To proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;
> 2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;
> 3. To define the act or omission and the accompanying mental state which constitute each offense and limit the condemnation of conduct as criminal when it does not fall within the purposes set forth;
> 4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each;
> 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized;
> 6. To impose just and deserved punishment on those whose conduct

38. *Id*.

39. S.B. 1037, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1037&Session_ID=93.

threatens the public peace; and
7. To promote truth and accountability in sentencing.[40]

The sentencing related provisions of these purposes focus on proportionality between serious and minor offenses, deterrence, just and deserved punishment, and truth and accountability.[41] The legislature did not see fit to establish a purpose to conform past sentences to future sentences by applying sentencing reductions retroactively. Indeed, such a task would seem to undermine its other stated purposes of deterrence, just desserts, and truth and accountability.

If it were generally thought that sentences were not fixed at the time of sentencing, but rather subject to politically driven downward revisions, the deterrent effects of those sentences—dependent as they are on some degree of certainty—would be diminished. In the same manner, if penalties that are fixed for criminal conduct are considered just and deserved when they are enacted, for those punishments to be later reduced would call into question the contemporaneous assessment that accompanies the concept of just desserts and further undermines the "truth" of the sentences imposed.

DO THESE TWENTY-NINE OLD CODE LIFERS POSE MATERIAL RISK TO THE COMMUNITY IF THEY WERE TO BECOME PAROLE ELIGIBLE?

Perhaps the key word in this question posed by the AJP is "material." It is not likely that anyone would argue there is no risk that any of the twenty-nine released murderers would kill again. Indeed, the modern press is filled with examples of this sometimes occurring.[42] So the question arises, if there is any risk, who should bear it? As is always the case, the risk is never born by those responsible for the release, but rather the murderer's next victim. What obligation, if any, is owed to those unknown victims? Perhaps the risk of re-offense should be borne by the murderer in the form of having to forego any early release.

The AJP concludes as follows:

> When the Arizona Legislature amended A.R.S. § 13-453 in August, 1973, it never intended to select a small group of lifers for harsher and more punitive sentencing (by limiting them to a means of parole eligibility which has become archaic and practically nonexistent—commutation) while at the same time creating a more lenient standard for thousands of future lifers (automatic parole eligibility at 25 years). Yet that is exactly what has occurred. As has been demonstrated, the

40. ARIZ. REV. STAT. ANN. §13-101 (West, Westlaw through 49th Leg., 2010).
41. *Id*.
42. *See generally* Michael Daly, *Double Jeopardy- Freed Murderers Who Kill Again*, N.Y. MAG,., Sept. 14, 1981, *available at* http://books.google.com/books?id=muYCAAAAMBAJ&pg=PA35&lpg=PA35&dq=freed+murderer+kills+again&source=bl&ots=Paq-tBlVOw&sig=BD947dnVl0teBsyjdYS-zOxpbPE&hl=en&ei=JDe6TI-VHpKssAPM4am1Dw&sa=X&oi=book_result&ct=result&resnum=8&ved=0CDIQ6AEwBzgK#v=onepage&q&f=false (last visited Jan. 15, 2011); Murray Waas, *Documents Expose Huckabee's Role In Serial Rapist's Release*, THE HUFFINGTON POST (last updated Mar. 28, 2008, 2:45 AM), http://www.huffingtonpost.com/2007/12/04/documents-expose-huckabee_n_75362.html (last visited Jan. 15, 2011); Red Vixen, Lakewood Washington Cop Killer Was Pardoned by Mike Huckabee, ORANGE JUICE (Nov. 29, 2009, http://www.orangejuiceblog.com/2009/11/lakewood-washington-cop-killer-was-pardoned-by-mike-huckabee/ (last visited Jan. 15, 2011); Wesley Lowe, A Short List of Murderers Released To Murder Again, http://www.wesleylowe.com/repoff.html (last visited Jan. 15, 2011).

> Legislature's intent was the opposite—to make life sentences for future offenders more punitive. The subject 29 Lifers were not sentenced to "life without parole" since "life without parole" was not a sentence in Arizona until 1994, between 25 and 35 years after their crimes were committed. Attempts have been made over the years to legislatively address this sentencing inequity but so far such attempts have been unsuccessful.[43]

To which it might be replied: The legislature in 1973 did *nothing* to select a small group of lifers for harsher sentencing. It merely left intact the law that was in place when the crimes of those Old Code Lifers were committed, thereby promoting goals of deterrence and just desserts, among others. The legislature did not create a more lenient sentencing standard in its 1973 enactment; in fact, it both reinstated the death penalty and increased the likely time served, while keeping commutation as an option. The twenty-nine murderers who remain eligible for commutation were sentenced under a law that did not expressly provide for parole, other than by way of commutation.[44] That law was left unchanged. What are the dictates of justice in the cases of the twenty-nine? Do they command that sentences be reduced because other murderers might have received shorter sentences or served less time? Where does that analysis end but in the infinite regression of a term that must always be shortened?

WHAT DID THE AJP FORGET TO ASK?

In Arizona, crime victims have enumerated constitutional rights.[45] The rights that are established include the core rights to "justice" and "due process."[46] Among the rights involving sentencing are not only the rights to be informed, present, and heard at any proceeding related to sentencing, but also those same rights in connection with any post-conviction release.[47] The people of Arizona also established a right to reasonable finality when they established a right to a "prompt and final conclusion of the case after the conviction and sentence."[48]

Significantly, the AJP does not ask whether the victims of the murderers, the surviving family members, have any interests worth protecting, or indeed even discussing, when it comes to considering, as a matter of "justice," retroactive sentence reductions. For the AJP, the concept of justice seems limited to the interests of the murderers and the inanimate state; the human victims are simply not addressed.

Is there room for the victim in the AJP's definition of justice? What if any interests or rights might the victims have with respect to the question of whether the murderers of their loved ones should have their sentences reduced? The AJP is silent on these questions.

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43. *Report on Arizona's Pre-August 1973 Life Sentenced Inmates*, *supra* note 17.
44. *See* Pearle, 521 P.2d at 606.
45. ARIZ. CONST. art. II, § 2.1.
46. ARIZ. CONST. art. II, § 2.1(A).
47. ARIZ. CONST. art. II, § 2.1(A) (9) ("To be heard at any proceeding when any post-conviction release from confinement is being considered.").
48. ARIZ. CONST. art. II, § 2.1 (A) (10).

The dictates of justice include justice for the victim. The state constitution commands it. As a matter of a victim's right to justice, a crime victim has the right to a final conclusion of the case after the conviction. This right includes the right to have some certainty with respect to the sentence imposed. These rights of victims form part of our collective textual understanding of what justice means.

Justice is no longer seen as simply a contest wholly between the state and the defendant. We now recognize and honor three distinct interests: those of the defendant, the state, and the victim. I have no doubt that it is in the interests of the murderer to be released early. Whether such a release would fulfill the state's purposes for its criminal laws is in doubt. And to find out the victims' interests we need not speculate, we need only ask Wayne Koger and his family, or James Burgoyne's family, or the scores of other families similarly affected. They have a right to be heard and their views deserve to be considered. A just society would not silence them.

Some might argue that victims only want vengeance and that our law must be more objective. But murderers seek leniency, often with raw emotion in their arguments and the arguments of their supporters, yet we do not silence their voices. Perhaps the best statement on the allegation of victim vengeance was given by Candy Lightner, who founded Mothers Against Drunk Driving after her daughter Cari was murdered by a serial drunk driver.[49] Standing in Wesley Bolin Plaza, in 1990, at a rally for the Arizona Victims Bill of Rights she said, "[c[rime victims don't want vengeance, they want healing; but there is no healing until justice is done."[50] There stated succinctly, is a broader concept of justice than mere leniency for the defendant. It is a concept of justice that includes the victim and notions of just desserts. Surely it is just to impose a punishment for a crime that is applicable at the time the crime is committed, regardless of how it might change in the future. And surely victims have a right to rely on the certainty and the reasonable finality of those sentences imposed.[51] Wayne Koger has his sense of justice, and in a just society he deserves his healing.

This broader concept of justice has been recognized earlier in our jurisprudence. As Justice Cardozo famously wrote, in a different, yet relevant context:

> The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

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49. 25 YEARS OF SAVING LIVES, MOTHERS AGAINST DRUNK DRIVING 10, (2005) http://www.madd.org/about-us/ history/madd25thhistory.pdf.

50. Candy Lightner, Speech at Mothers Against Drunk Driving Rally in Arizona (1990) (the author was present).

51. There is doubtless some irony in the fact that opponents of the death penalty often argue that life imprisonment is the humane alternative, while opponents of life without the possibility of parole argue that warehousing inmates until they reach old age is both unjust and too costly . . . and they very often are the same people.

> The Constitution and statutes and judicial decisions of the commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (Otis v. Parker, 187 U.S. 606, 609, 23 S.Ct. 168, 47 L.Ed. 323), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt-that discredit will even touch the great immunities assured by the Fourteenth Amendment-if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.[52]

It is not unjust to sentence a convicted offender to the punishment established when the offense occurred. Indeed, it is a part of the social contract. The law requires that a criminal statute give fair warning of the conduct proscribed and the consequences of a violation.[53] That requirement is not simply for the benefit of the offender, but also for society at large and the offender's victims. It is the standard that defines us as a government of laws and not of men and women. To undermine the clarity of the resulting social contract undermines the rule of law and our respect for the rule of law. House Bill 2525 is not about justice or fidelity to the rule of law; it is simply about leniency. There may be individuals among the class of "Old Code Lifers" who deserve leniency. The process to determine whether they do is the commutation process, in which the governor is intended to have the final word. There is no good reason to change that process.

52. Snyder v. Mass., 291 U.S. 97, 122 (1934).
53. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).