

**Mass(achusetts) Incarceration of the Elderly:  
Morally Questionable, Costly and Unnecessary  
for Public Safety**  
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## INTRODUCTION

The Massachusetts incarceration rate has tripled since the early 1980's (Pew Center on the States, 2009; Forman and Larivee, 2013). Until then, Massachusetts incarcerated smaller numbers of people, while considerable efforts were expended on preparing prisoners for release and re-entry with active pre-release planning and opportunities. Furloughs allowed prisoners to prepare for re-entry by spending time in the community and three-year recidivism rates hovered around mid-20-percent, rather than at the current 40-percent levels. During the 1980's, because of public unrest about increasing crime rates, the growing crack epidemic, and the devastating political exploitation of Willie Horton's furlough release, the national and local political environment underwent a drastic shift with politicians, legislators, and police promoting 'tough-on-crime' agendas. Legislators enacted and prosecutors promoted a plethora of harsher punishments, imposing ever longer fixed, determinate sentences and effectively eliminating judicial discretion for many crimes. The Massachusetts prison population mushroomed (Greineder, 2011; Forman and Larivee, 2013). At the national level, the Federal Crime Bill provided monetary incentives for states to lengthen sentences, while reducing opportunities for prisoner rehabilitation. Massachusetts legislation, including the 1996 'Truth in Sentencing' bill, codified many of these changes, which substantially increasing time served by imposing mandatory minimum sentences for a wide range of offenses, while reducing parole eligibility, curtailing sentence reductions for good behaviour and providing multiple sentence enhancements for special circumstances and habitual prisoners. The overall result significantly lengthened new sentences and increased the effective time served for all prisoners, including those serving sentences that were imposed years earlier by judges expecting much earlier release. It is important to recognize that these increases in rates and lengths of incarceration were caused by attitudinal and policy changes, not by increases in criminal behaviour (Gottschalk, 2016). Ironically, by this time Massachusetts crime rates were already falling, a trend that continues into the present millennium.<sup>1</sup>

In recognition that increased incarceration was unnecessary, blue ribbon Massachusetts commissions on criminal justice recommended reforms. However, because crime and corrections remain so highly politicized, most of these proposals have never been implemented (Governors Commission on Corrections and Reform, 2004; Forman and Larivee, 2013). Although overall incarceration rates have remained relatively unchanged during the current millennium, the composition of prisoners has altered substantially. Minor reductions in the rates and lengths of sentences of incarceration for so called non-violent crimes (mostly drugs) have been off-set by the proliferation of life sentences, both with and without the possibility of parole and other extremely long sentences. For example, as recently as 2012, the legislature enacted a 'Crime Bill' which, although providing a limited reduction in mandatory minimum sentences for drug offences, also newly required mandatory Life Without the Possibility of Parole (LWOP) sentences for 19 new third strike felonies where previously there had been only one offence (first-degree murder) which had such a requirement (Massachusetts General Laws, 2012). Additionally, the practical elimination of clemency and sharply decreased paroling rates have further lengthened sentences. As a result, the Massachusetts Department of Corrections (DOC) has one of the highest percentages of elderly prisoners in any state. In 2011, Massachusetts ranked third nationally with 19.4 percent prisoners aged 50 and older, trailing only New Hampshire at 19.8 percent and West Virginia 20 percent (ACLU, 2012). By January 2015, these elderly prisoners had increased to comprise 24 percent of total state prisoners (Research and Planning Division, 2015; also see tables 3 and 4). Such a rapid and sizable increase suggests that Massachusetts may now actually lead the nation in percentage of prisoners 50 and over. This should not be surprising since Massachusetts also ranks at the top in percentage of prisoners serving LWOP sentences (Nellis and King, 2009; Nellis, 2013a; Nellis, 2013b; Research and Planning Division, 2015), who currently represent 11 percent of the prison population.

An important consequence of these policy changes is that the state prison population has and continues to skew heavily towards aging and long-term prisoners. What makes this especially problematic is that there is a growing consensus that prisoners aged 50 years and older typically need to be considered elderly because they have aged pre-maturely (Aday, 2003; Williams and Abraldes, 2007; Williams *et al.*, 2011; ACLU, 2012;

Roberts, 2015). This is also the definition of elderly prisoners adopted by the National Institute of Corrections (Morton, 1992). In sum, evidence suggests that prisoners are appropriately considered to have the physiological age some 10 to 15 years greater than their chronological age. Among the many contributing factors for this outcome are that prisoners have experienced high levels of stress due to confinement. This is further aggravated by separation from family and community (Williams and Abraldes, 2007; Williams *et al.*, 2011; ACLU, 2012). Additionally, often substandard healthcare and nutrition during lengthy incarcerations accelerate this deterioration which often has begun prior to incarceration. Many prisoners have histories steeped in poverty, low education levels, substance abuse and lack of access to health care starting out long before their confinement. All of these factors are associated with poor health outcomes (Mallik-Kane and Visser, 2008; Rich *et al.*, 2011; ACLU, 2012; Greineder, 2012). Beyond that, prisoners have a high incidence of mental illness (James and Glaze, 2006), which further predicts poor health outcomes (Mallik-Kane and Visser, 2008; Rich *et al.*, 2011; ACLU, 2012; Greineder, 2012). Consequently, most correctional authorities have appropriately classified prisoners aged 50 and over as elderly to assess required resources.

Concomitantly, independent data clearly show that most individuals “age out” of criminal behaviour as those over the age of 50 are much more less likely to commit new crimes or recidivate after release (Aday, 2003; Greineder, 2011; ACLU, 2012; Foreman and Larivee, 2013; Roberts, 2015). Massachusetts data similarly document marked decreases in commitments for new crimes and recidivism as prisoners age, especially beyond the age of 50 (see *Table 7* and *Figure 3*) (Research and Planning Division, 2015). National data also reveal that many aging prisoners, who typically have aged in prisons while serving life and extremely long sentences, have committed one offence, suggesting that many are not serial criminals and readily could be released without endangering public safety (Aday, 2003; ACLU, 2012; Roberts, 2015).

Massachusetts has very high state prison costs, calculated at an average of \$45,000 per prisoner per year in 2013 (Forman and Larivee, 2013). Current costs are estimated at over \$50,000 per prisoner annually. It has been realistically estimated that annual costs to incarcerate elderly prisoners (50 and over) typically run two to four times greater than the overall average costs for all prisoners (ACLU, 2012; Roberts, 2015). The

increasing percentage of elderly prisoners, coupled with the high costs of living and healthcare in Massachusetts, will continue to impose ever greater burdens upon the DOC budget and state resources.

The confluence of these factors has brought Massachusetts to circumstances that are not only costly, but also morally questionable and unnecessary. They are costly since the elderly are especially expensive to incarcerate because of high healthcare costs and need of special accommodations. They are morally questionable on multiple levels. The excessive and immutable nature of the long-term incarceration of elderly prisoners denies them hope, motivation to rehabilitate and the possibility of a second chance to demonstrate that many years of reflection, maturation, and reform have changed them so that they may no longer need to be defined by what may have been their single worst act. It also robs their families and communities of hope, along with restored stability. It simultaneously deprives the state of urgently needed resources by diverting critical funding for other essential public services, including education, public health and social services. Finally, it is unnecessary, because evidence shows that individuals “age out” of criminal behaviour such that the elderly more rarely offend or recidivate, suggesting that many could be released without endangering public safety (Aday, 2003; Greineder, 2011; ACLU, 2012; Forman and Larivee, 2013; Roberts, 2015).

This paper summarizes the current state of Massachusetts incarceration with special attention to the aging and long-term prisoner population, as well as the resulting social, humanitarian, public safety, and economic consequences. It is important to remember that these outcomes have resulted from deliberate policy and legislative decisions, mostly propelled by fear – whether realistic or exaggerated – leading to ‘tough on crime’ strategies. Due to the proliferation of harsh and long sentences, coupled with politicized reductions in paroles and the abolition of executive clemency, prisoners have aged in prison to a degree never before seen. Below, I review evidence suggesting that excessive incarceration with the concomitant accumulation of elderly prisoners may be unnecessary to preserve public safety. In fact, it may actually diminish it by diverting funds from other public benefit needs that are more effective at reducing crime. Finally, this paper will end by providing specific and succinct guidelines and strategies to mitigate and reverse the current excessive levels of incarceration and the unnecessary and costly build-up of the elderly prison population. These measures offer

opportunities to improve our communities, while preserving public safety, reducing costs and respecting a more humanitarian viewpoint that provides the criminalized with the possibility of a second chance. Evidence that this reflects the expressed will of Massachusetts citizens can be found in a recent survey which has determined that, by an approximately 2:1 ratio, Massachusetts residents favour:

- Crime prevention and rehabilitation over enforcement and punishment;
- Reducing incarceration over building new prisons;
- Job training for prisoners over harsher restrictions and punishments in prison; and
- Increased use of lower security and halfway houses over preventing early releases.

By that same 2:1 ratio, Massachusetts citizens also expressed the opinion that incarceration is more likely to increase future crime than to decrease it (Forman *et al.*, 2014).

## **PROFILE OF MASSACHUSETTS STATE PRISON POPULATIONS**

### **Definitions**

The Massachusetts Department of Corrections (DOC) changed the definition of “jurisdictional population” in 2010 by adding non-criminally sentenced prisoners (Research and Planning Division, 2015). Table 1 summarizes the make-up of five of the many population groupings used by the DOC.

Prisoner data has been compiled and reported stratified by these varied populations which account for the difference in numbers and totals in the data and tables below. Also, prior to 2010, prisoner ages were reported by less informative age ranges: <20, 20-29, 20-39, 40-64, and 65 and over. This has complicated teasing out the population of special interest to this paper, those 50 and older. Since 2010, prisoner data is reported in 10-year age range brackets through age 59, plus 60 and older. These practices complicate longitudinal comparisons, especially since difference sub-groups may be heterogeneous. For example, the civil commitment group tends to be older and the pre-trial group younger.

TABLE 1  
DOC POPULATIONS

Population Titles	Criminally Sentenced		Civil	Pre-Trial
	Held by DOC	Held by Others	Commitments	Custody
"Old" Jurisdiction	+	+	-	-
"New" Jurisdiction	+	+	+	+
Custody	+	-	+	+
Criminally Sentenced Jurisdiction	+	+	-	-
Criminally Sentenced Custody	+	-	-	-

+ means included; - means excluded

### **Aging of the DOC Resident Population**

Tables 2, 3, and 4 summarize age data for DOC Prisoner populations between 1 January 1999 and 1 January 2015. Table 2 describes the “old” jurisdiction population, showing the age ranges typical for that period. In an attempt to tease out those 50 and older from the 40-64 age group, the last two rows in the table take advantage of the historical observation that the 40-49 age group consistently clusters around 25 percent of the total population. Consequently, the “50-64 Est” row is derived by subtracting 25 percent of the total count from the 40-64 row and the “50+ Est” row is derived by subtracting 25 percent of the total count from the 40-64 row and the “50+Est” row is the sum of the “50-64 Est” plus the 65+ row. The last two columns in the table quantify the changes between 1999 through 2005 and 1999 through 2009. The 2005 point was chosen because that year represents the low point in DOC prisoner counts over the last two decades. Prisoner numbers fell 20 percent from 1999 to 2005, then increased by 15 percent by 2009. It is apparent that the number, as well as the percentage of the older groups is increasing, while the younger age groups are decreasing. The 40-64 age group increased by 30 percent, those 65 and older increased by 99 percent and the hypothetical “50+Est” group increased by 270 percent and 1,251 prisoners.

Table 3 extends the data through to 1 January 2015, the most recent numbers reported and reveals the same trend. All groups under 40 show decreases, both in number and percentage. The 40-49 age group, as expected, holds steady around 25 percent. The older age groups continue to increase: 50-59 increasing by 368 (28 percent) and 60+ adding 271 (47 percent) between 2009 and 2015. The bottom row combines these two into

TABLE 2  
PRISONER AGE DISTRIBUTION 1999-2009<sup>a</sup>

AGE	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Change 1999-2005	Change 1999-2009
<20	215 2%	169 2%	117 1%	84 <1%	82 <1%	91 <1%	72 <1%	70 <1%	77 <1%	73 <1%	57 <1%	-143 -67%	-158 -74%
20-29	3555 32%	3236 30%	2876 29%	2648 28%	2458 27%	2394 26%	2406 27%	2591 28%	2690 28%	2738 27%	2779 27%	-1149 -32%	-776 -22%
30-39	4134 37%	3927 37%	3693 37%	3461 36%	3197 35%	3025 33%	2896 32%	2909 31%	3088 31%	3198 32%	3206 31%	-1238 -30%	-928 -22%
40-64	3131 28%	3247 30%	3260 32%	3259 34%	3325 36%	3394 38%	3437 38%	3652 39%	3769 38%	3892 38%	4055 39%	+306 +10%	+924 +30%
65+	123 1%	133 1%	149 1%	155 2%	161 2%	155 2%	168 2%	183 2%	205 2%	231 2%	245 2%	+45 +37%	+122 +99%
50-64 Est	341 3%	569 5%	736 7%	857 9%	1019 11%	1129 12%	1192 13%	1301 14%	1324 14%	1359 13%	1470 <sup>b</sup> 14%	+851 +250%	+1129 +331%
50+ Est	464 4%	702 7%	865 9%	1012 11%	1180 13%	1145 12%	1360 15%	1484 16%	1529 16%	1590 16%	1715 <sup>b</sup> 17%	+896 +193%	+1251 +270%
Total	11158	10712	10095	9607	9223	9060	8979	9405	9778	10132	10342	-20%	-7%

<sup>a</sup> "Old" Jurisdiction population (criminally sentenced, housed inside & outside DOC) on January 1.

<sup>b</sup> Estimates. The true counts for these two values are independently reported: 50-64 = 1495 and 50+ = 1740. The concordance of the estimates with the actual count provides validation for the estimation method.

TABLE 3  
PRISONER AGE DISTRIBUTION 1999/2009-2015<sup>a</sup>

Age	1999 <sup>b</sup>	2009 <sup>b</sup>	2010	2011	2012	2013	2014	2015	Change 2009-2015	Change 1999-2015
<20	224 2%	62 <1%	85 <1%	82 <1%	62 <1%	56 <1%	49 <1%	28 <1%	-34 -55%	-195 -88%
20-29	3766 32%	3053 27%	2851 25%	2881 25%	2925 25%	2693 24%	2581 23%	2527 23%	-526 -17%	-1239 -33%
30-39	4369 37%	3523 31%	3377 30%	3424 30%	3445 29%	3348 29%	3231 29%	3126 29%	-397 -11%	-1243 -28%
40-49		2813 25%	2918 26%	2901 25%	2943 25%	2848 25%	2658 24%	2580 24%	-233 -8%	
50-59		1339 12%	1475 13%	1454 13%	1608 14%	1701 15%	1710 16%	1707 16%	+368 +28%	
60+		574 5%	655 6%	667 6%	740 6%	757 7%	805 7%	845 8%	+271 +47%	
50+	496 <sup>c</sup> 4%	1913 17%	2130 19%	2121 19%	2348 20%	2458 22%	2515 23%	2552 24%	+639 +33%	+2056 +515%
Total	11807	11364	11361	11409	11723	11403	11034	10813	-5%	-8%

<sup>a</sup> "New" Jurisdiction population (total custody population plus those housed outside DOC) on January 1.

<sup>b</sup> 1999 & 2009 data adjusted to reflect "new" jurisdiction population definition adopted in 2010

<sup>c</sup> Estimate. See Table 2 and text.

the 50 and older group, increasing 33 percent between 2009 to 2015 and 515 percent between 1999 and 2015. The latter comparison adds well over 2,000 prisoners to this group despite the 8 percent decrease in the total population. Equally impressive, and of concern to the budgeting process, is that by 2015 almost one quarter of prisoners (now numbering 2,552) are 50 years and older. This contrasts with the national percentage of such prisoners which as of 21 December 21 2012, was only 16.7 percent, two thirds of the 24 percent for Massachusetts (Carson and Golinelli, 2013).

Table 4 elaborates on the oldest age groups, showing available data between 1 January 2011 and 1 January 2015 for the more limited criminally sentenced population. Once again, even with only a four-year interval, the continued aging of the population is manifest. The oldest age groups show the largest percentage increases. These changes reflect the increasing numbers of very old prisoners, a disproportionate fraction of whom are lifers and long-termers. As of January 2015, 43 percent of lifers were 50 and older and 21 percent were 60 or older; the corresponding numbers for non-lifers were 17 percent and 4 percent respectively. Since less than 10 percent of newly committed prisoners (which includes any returning recidivists) are aged 50 and over (see *Table 7*), one can confidently conclude, as suggested above, that the resident population is aging *in situ* and that we are not in the midst of a large influx of older prisoners participating in an elderly crime wave.

TABLE 4  
ELDERLY PRISONER AGE DISTRIBUTION<sup>a</sup>

AGE	2011	2012	2013	2014	2015	Change 2011-2015
<50	8129 81%	8292 81%	7804 79%	7318 77%	7186 77%	-943 -11%
50-59	1272 13%	1338 13%	1435 15%	1453 15%	1431 15%	+159 +13%
60-69	463 5%	488 5%	494 5%	528 6%	553 6%	+90 +19%
70+	121 1%	133 1%	144 2%	154 2%	167 2%	+46 +38%
Total	9985	10251	9877	9453	9337	-648 -6%

<sup>a</sup> Criminally sentenced custody population on January 1.



### Sentence Length of DOC Prisoners

Between 1 January 2000 and 1 January 2015, there was a substantial decrease in prisoners receiving sentences less than ten years (-2,125 or -30 percent) while those with sentences of 20 years or more, second degree life, and first-degree life have grown by 218 percent (see *Table 5*). No breakdown is available for the actual sentence length of those sentenced to 20 years or more years. Second degree lifers are eligible for parole after 15 years and many remain incarcerated long after becoming eligible. First degree lifers serve mandatory Life Without the Possibility of Parole (LWOP) sentences; their only means of release is commutation or pardon, only one of which has been granted over that past several decades or by having their verdict overturned, which is rare. By 2015, 2,847 individuals constituting 29 percent of the criminally sentenced jurisdiction population were serving life or more than 20-year sentences. This is an increase of 1,013 prisoners or 55 percent between 2000 and 2015 despite the fact that the total prison population decreased by 1,042 (10 percent) during the same time. This proliferation of very long sentences is a major factor contributing to the rapid aging of the Massachusetts prison population.

TABLE 5  
PRISONER SENTENCE LENGTH<sup>a</sup>

YEARS	2000	2002	2004	2006	2008	2012	2013	2014	2015	Change 2000-2015
<10 yrs	7052 66%	6033 63%	5433 60%	5779 62%	6435 64%	5691 54%	5320 52%	5015 51%	4927 51%	-2125 -30%
10-<20 yrs	1837 17%	1684 18%	1552 17%	1553 17%	1541 15%	2072 20%	2053 20%	1956 20%	1896 20%	+59 +3%
20+ yrs	261 2%	294 3%	414 5%	393 4%	395 4%	822 8%	837 8%	835 9%	829 9%	+568 +218%
2nd Deg	867 8%	862 9%	865 10%	842 9%	868 9%	888 9%	916 9%	932 10%	988 <sup>b</sup> 10%	+121 +14%
1st Deg	706 7%	756 8%	808 9%	851 9%	917 9%	1017 10%	1042 10%	1070 11%	1030 <sup>b</sup> 11%	+324 +46%
20 yrs-life	1834 17%	1912 20%	2087 23%	2086 22%	2180 22%	2727 26%	2795 28%	2837 29%	2847 29%	+1013 +55%
Total	10712	9610	9060	9405	10132	10491	10148	9808	9670	-1042 -10%

<sup>a</sup> Criminally sentenced jurisdiction population. 2010 data not available at publication.

<sup>b</sup> During 2014, 62 juvenile 1st degree lifers were made eligible for parole (*Diatchenko v District Attorney*, 466 Mass 655 (2013)) and the DOC reclassified them as 2nd degree lifers.

**Lifers in the DOC**

Although LWOP prisoners have continued to increase in number, the population of second degree lifers was held relatively constant (see *Figure 1*) until 2011 when, as the result of a politically motivated change in the Parole Board following the murder of a police officer by a parolee, parole granting rates precipitously decreased. An additional and sudden increase in second-degree lifers (and decrease in first-degree) in mid-2014 reflects the re-classification of juvenile first-degree lifers as a consequence of U.S Supreme Court and Massachusetts Supreme Judicial Court decisions that revised their sentences (although not their verdicts).

As of 1 January 2015, of the 1,000 first-degree lifers held in custody by the DOC (30 are housed elsewhere), 425 were 50 years of age or older. Of these, 44 prisoners were in their seventies, and 12 were 80 or older. Under current Massachusetts laws, LWOP sentences are functionally “death by incarceration” sentences and these elderly prisoners are now dying while in custody. This is shown by the data in Table 6 which demonstrates that at years end in every

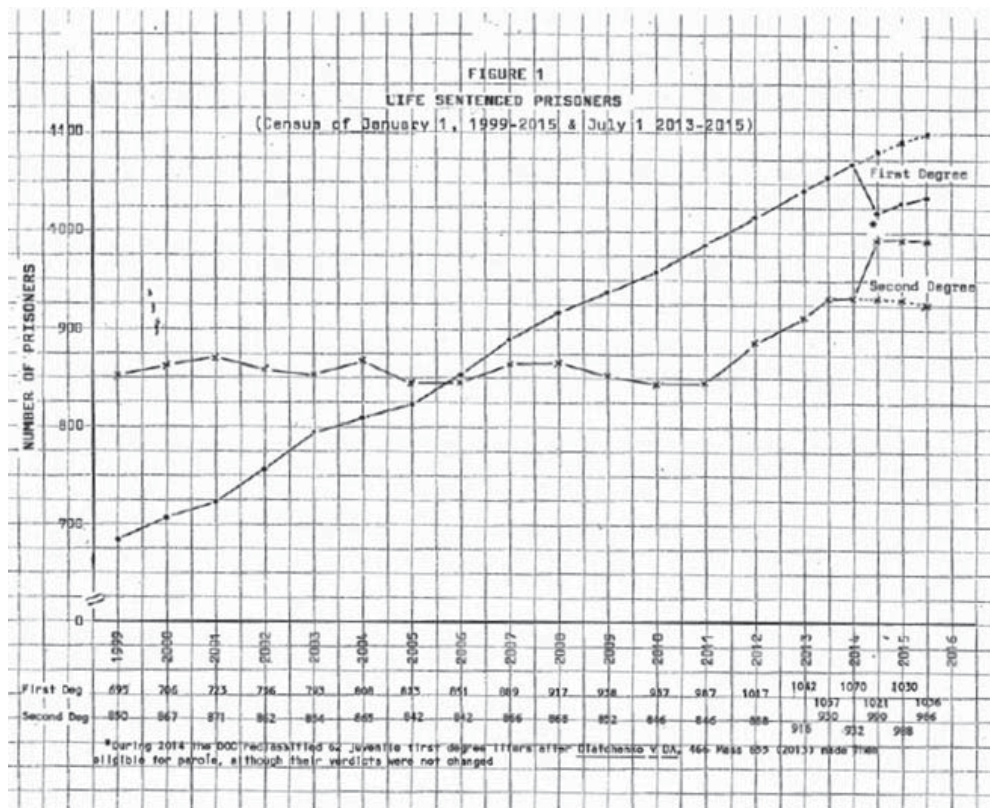


TABLE 6  
FIRST DEGREE LIFER ANNUAL CENSUS

	2009	2010	2011	2012	2013	2014
Census January 1	938	957	987	1017	1042	1070
New Commitments same year	39	38	26	41	40	35
Expected census December 31	977	995	1013	1058	1082	1105
Reclassified Juveniles <sup>a</sup>	0	0	0	0	0	-62
Actual census December 31	957	987	1017	1042	1070	1030
Reversed or Died in Prison <sup>b</sup>	20	8	[4] <sup>c</sup>	16	12	13

<sup>a</sup> During 2014 the DOC reclassified 62 juvenile first degree lifers after Diatchenko v District Attorney, 466 Mass 655 (2013), declared their sentences unconstitutional and imposed sentences equivalent to second degree (although their verdicts were not changed).

<sup>b</sup> First degree lifers are sentenced to LWOP and none have received pardons or commutations for decades. While some may have been released because their convictions were reversed, the bulk of those unaccounted for likely died in prison.

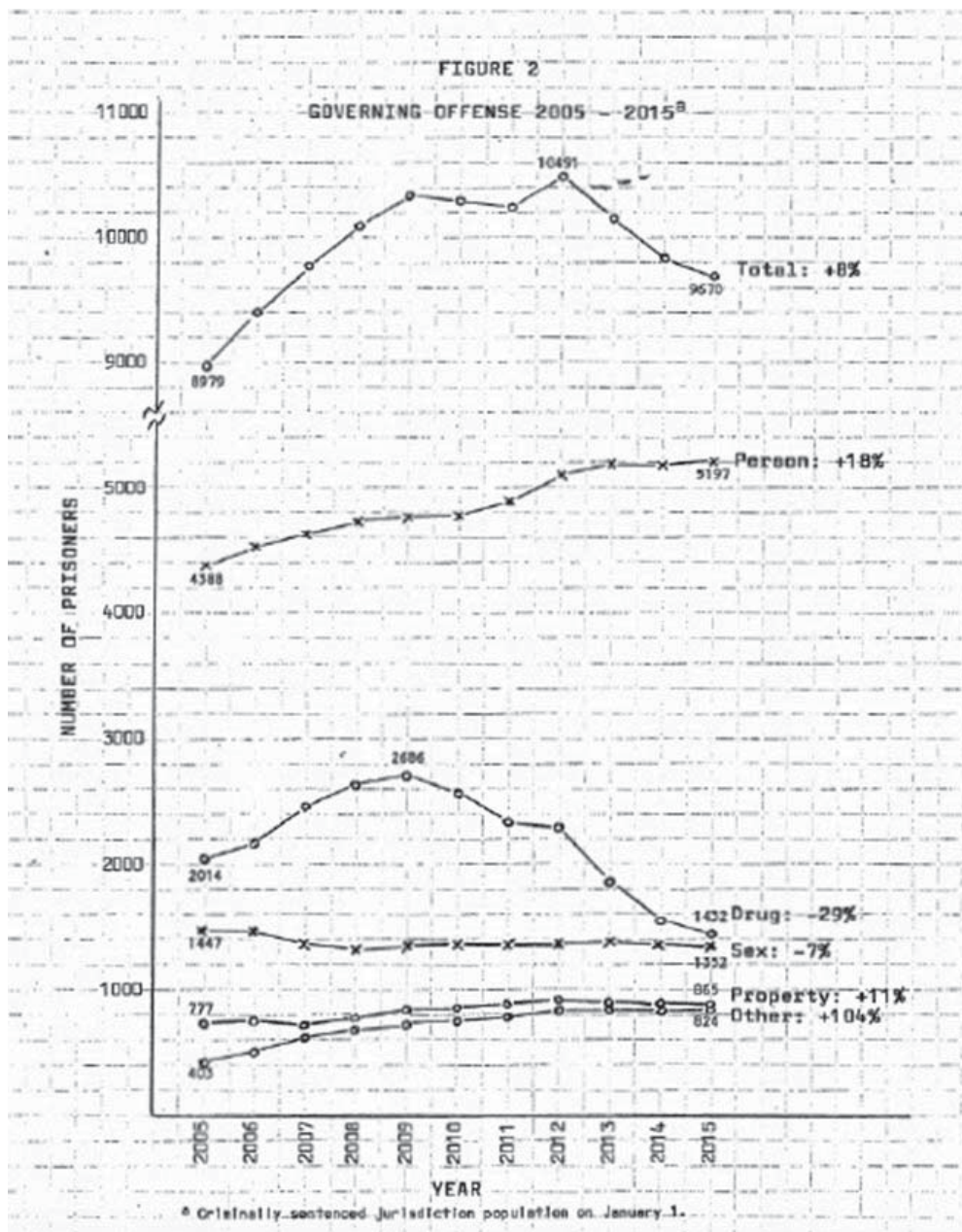
<sup>c</sup> There is no reported explanation for the 4 additional lifers counted on December 31, 2011. The number of new commitments reported may be in error.

year except 2011, the numbers of first-degree lifers are fewer than the sum of new convictions and the prior year's total. This is the result of death in prison, since there are no longer any releases due to commutation or pardons.

### Distribution of Prisoners by Governing Offense

Although individuals may be incarcerated for multiple offenses, the governing offense is defined as that associated with the longest maximum discharge date (Research and Planning Division, 2015). Figure 2 depicts the changing numbers of DOC criminally sentenced jurisdiction population from 2005 to 2015 in six categories: Total, Person, Sex, Drug, Property, and Other. As is apparent the most important changes, also reflected in the totals, were for the number of persons imprisoned for drug offences. This category increased 33 percent between 2005 and 2009, then decreased gradually until January 2012 before plunging sharply by 851 prisoners during 2012 through 2014

for a decline of 47 percent between 2009 and 2015. This notable one-time reduction in drug sentenced prisoners, was the combined result of a flurry of court releases associated with data falsification by an analyst at the State Crime Lab (approximately 350 releases), along with the implementation of a retroactive reduction in mandatory minimum sentences for drug offenses that was part of the “Crime Bill” passed in August 2012 (Massachusetts General



Laws, 2012). Additionally, between 2009 and 2014, there was a gradual decrease in the annual number of new commitments for drug offenses. Also shown in Figure 2, the number of those convicted of Person and Other offenses has steady increases 2005 to 2015 while prisoners convicted of property and sex offences demonstrated only modest changes.

### New Commitments by Age

A review of new court commitments between 2009 and 2015 shows that the vast majority (90-92 percent) are incurred by people under the age of 50. Only 7-8 percent and 1-2 percent, respectively are incurred by individuals 50-59 and 60 and older. The largest contributor is the 20-29 year-old age group, accounting for 36-41 percent of new commitments, followed by the 30-39 year olds (29-31 percent). These data validate, for Massachusetts, the observations made nationally and in other states, that those 50 and older typically “age out” of crime and relatively rarely commit new offenses (Greineder, 2011; ACLU, 2012; Forman and Larivee, 2013; Roberts, 2015). This is a factor that Massachusetts lawmakers need to consider as they look to future criminal justice policy. Possible rational responses include

Age	2009	2010	2011	2012	2013	2014	Average
<20	126 4%	108 3%	83 3%	72 3%	55 2%	40 1%	81 3%
20-29	1107 37%	1154 38%	1200 41%	986 36%	1016 37%	1040 38%	1086 38%
30-39	905 30%	918 30%	862 29%	840 31%	830 31%	848 31%	857 30%
40-49	654 22%	644 21%	551 18%	518 19%	537 20%	526 19%	527 20%
50-59	190 6%	201 7%	208 7%	238 9%	223 8%	222 8%	214 7%
60+	42 1%	37 1%	37 1%	55 2%	51 2%	54 2%	46 2%
<b>Total</b>	<b>3024</b>	<b>3072</b>	<b>2941</b>	<b>2709</b>	<b>2712</b>	<b>2730</b>	<b>2866</b>

<sup>a</sup> Criminally sentenced jurisdiction population

abolishing mandatory LWOP and other excessive sentences by restoring judicial discretion and providing mechanisms for the release of low-risk elderly prisoners, including those with LWOP sentences.

## Recidivism of DOC Prisoners

### *Effect of Security Level on Recidivism*

Since the new millennium, the DOC has begun tracking three-year recidivism rates in select cohorts of released prisoners. Data for overall recidivism rates and rates for those released from differing levels of security are tabulated in Table 8. It is apparent that those released from minimum or pre-release recidivate at significantly lower rates than those from medium- or maximum-security. The 10-11 percent of prisoners released from maximum security, recidivate almost 60 percent of the time, accounting for almost as much recidivism and re-incarceration as more than 30 percent of people released from low security. By releasing the largest group from the medium, the DOC loses the benefits that might have been achieved were these prisoners transitioned through low security.

This policy has several consequences. Higher security is significantly costlier than lower security because of the need for increased security staffing which accounts for almost 70 percent of DOC budgets. Additionally, prisoner access to programs and vocational training is more restricted in maximum-security settings, impairing prisoner rehabilitation and preparation for re-entry.

TABLE 8  
RELEASE & RECIDIVISM BY SECURITY LEVEL

PERCENT OF RELEASES BY SECURITY LEVEL

Level	1991	1993	1995	1997	1999	2002	2004	2007	2008	2009	2010	2011	2012	2013	2014
From Max	3%	3%	2%	3%	10%	NA	NA	NA	NA	10%	11%	10%	11%	10%	11%
From Med	47%	50%	53%	56%	52%	NA	NA	NA	NA	56%	53%	57%	52%	51%	50%
From Min/PR	50%	47%	45%	41%	38%	NA	NA	NA	NA	34%	35%	33%	37%	38%	39%

RECIDIVISM RATES BY SECURITY LEVEL<sup>a</sup>

From Max	50%	57%	62%	60%	57%	51%
From Med	41%	44%	45%	40%	42%	38%
From Min/PR	35%	37%	34%	33%	34%	27%
Overall	40%	43%	43%	39%	41%	35%

<sup>a</sup> 3 year recidivism data including technical violations for cohorts released in the years indicated. No data is available for cohorts before 2002 and not yet for cohorts released after 2011. NA = not available.

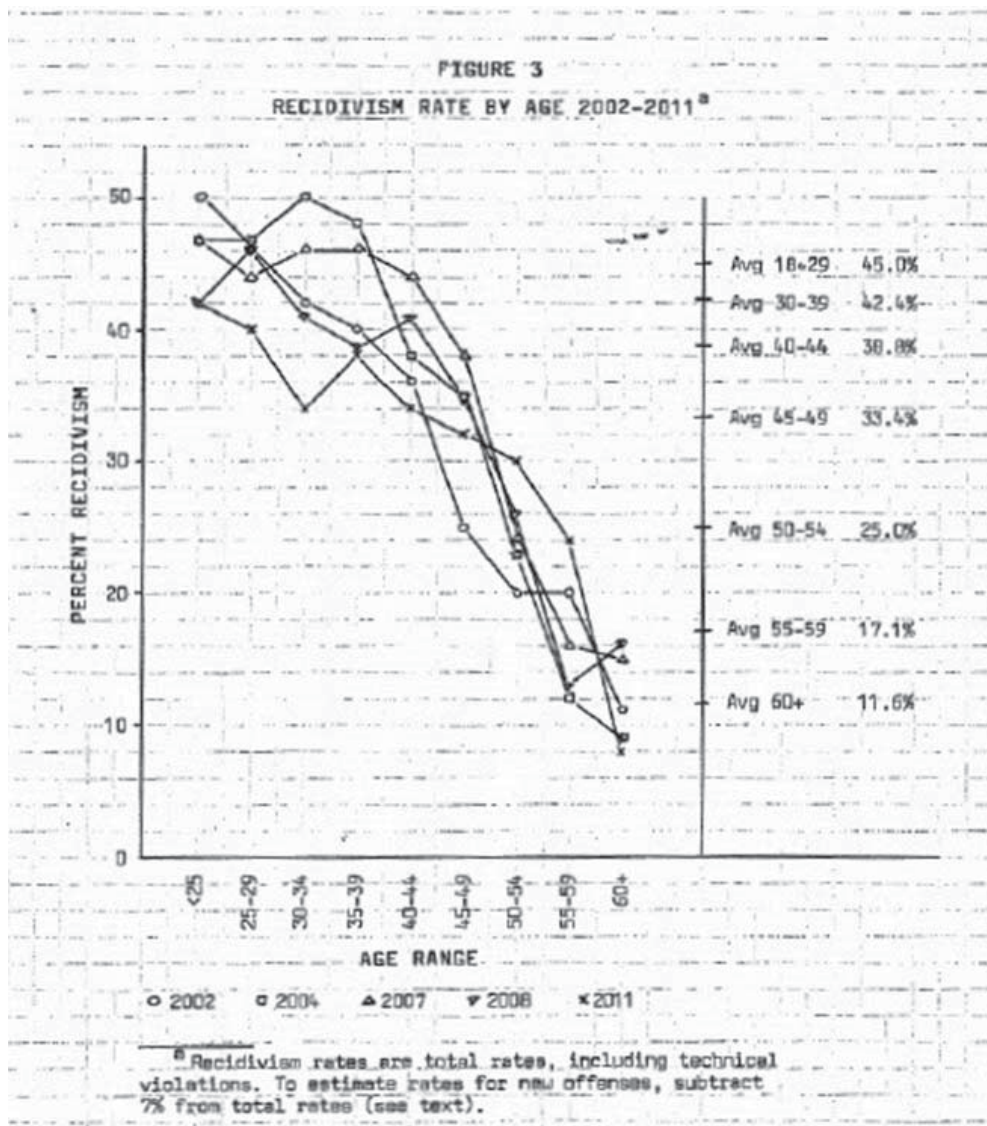
Finally, the highly restrictive and regimented environment of maximum-security provides little opportunity for social maturation or to foster behaviour compatible with life in the free world. Transition to the street is dramatically more difficult for prisoners released from high security who are therefore often without adequate resources or outside contacts. The flexibility of minimum and pre-release settings allows prisoners to gradually acclimate to free world behaviors, environment stresses, while also providing them with opportunities to earn money, find housing, and make work-related contacts. Without these opportunities, the likelihood of recidivism is much greater (Brooks *et al.*, 2008; Kohl *et al.*, 2008). It seems clear that current DOC release policies are counterproductive, costly and harmful to public safety.

### ***Effects of Aging on Recidivism***

“Research has conclusively shown that long before age 50, most people have outlived the years in which they are most likely to commit crimes” (ACLU, 2012). This statement by the ACLU holds true for initial crimes, but also for tendencies to commit new crimes after release from prison. In a key study reviewing recidivism rates for almost 300,000 new prisoners from 15 states (almost two-thirds of all prisoners released in the United States in 1994), Lanigan and Levin (2002) reported that only 17 percent of those released at age 45 and older committed new offenses within three years in comparison to 30-40 percent of those under the age of 25. Similar data has been reported by most states (ACLU, 2012) and makes clear that recidivism decreases substantially as prisoners age. Although not available in Massachusetts, data from other states does support that many elderly incarcerated persons are in prison for the first time (ACLU, 2012). For example, a 2009 Ohio study showed that 71 percent of prisoners aged 50 and over were first time prisoners. Data from the Bureau of Justice Statistics confirmed that the elderly prisoner population is comprised predominately of those convicted and sentenced when they were much younger.

While it is true that many of these aging first-time offenders have received life sentences for murder, if and when such murderers have been released, even after long sentences, they also have been shown to have the lowest recidivism rates of any prisoners (Marquart and Sorensen, 1989; Weisberg *et al.*, 2011). Such results are consistent with data that suggest that the elderly “age out” of crime even if they have committed serious crimes at younger ages.

Massachusetts, unfortunately, does not track post-release recidivism rates for second-degree murderers who are sentenced to life with the possibility of parole after 15 years. Recent data, however, has revealed that such paroles have been granted more frequently to younger rather than older prisoners who statistically would pose lower risks (Greineder and Haas, 2016). Similarly, those candidates scoring as higher risk on evidence-based risk assessment instruments have been paroled at higher percentages than those scoring low-risk (Haas, 2016). To date, there have been no explanations for these paradoxical trends.





Overall data from Massachusetts recidivism reports are shown in Figure 3. The individual lines show three-year overall recidivism rates, including technical violations, for five release cohorts. The legend on the right shows the averaged rates for each age group. It is apparent that rates decrease markedly with age. It is important to remember that these rates include technical violations and not new offenses. The data sets reported by the DOC do not provide age adjusted rates excluding technical violations, but on average, those rates are 7 percent lower. This suggests that subtracting 7 percent from the rates shown in the figure would yield the true rate of new offenses. Clearly, public safety concerns are minimized as the age of released prisoners increases.

### ***Effect of Programming and Rehabilitation on Recidivism***

A subset of prisoners have limited levels of education upon commitment and many have little or no vocational training. Acquiring education and vocational skills are important for prisoners seeking employment after incarceration as jobs and housing are the two most important factors in predicting successful re-entry and decreased recidivism (Brooks *et al.*, 2008; Kohl *et al.*, 2008). However, acquiring necessary education, programming and vocational training has become a challenge in the DOC. In 1990, \$7 million dollars (inflation adjusted) were assigned to prison education. This declined to \$5 million by 2004 and was entirely eliminated as a line item from the DOC budget soon after (Forman and Larivee, 2013). Additionally, changes in federal law have virtually eliminated college-level education for prisoners. Currently, the DOC allocates less than 2 percent of its budget to prisoner programs and even this portion continues to decrease by both dollar amounts and percentage in recent years (\$10.8 million or 2.09% in fiscal year 2011; \$10.7 million or 1.96 percent in fiscal year 2013) (Massachusetts Department of Corrections, 2015).

Not surprisingly, this limited effort about what should be a core function for the DOC (i.e. prisoner rehabilitation) has resulted in inadequate prisoner programming. The number, variety and access to programs are limited. Not all programs are available in some prisons and the ones that are, are typically over-booked, with waitlists of hundreds waiting for access. Most programs are affected, including basic education, as well as rehabilitative programs such as “Violence Reduction” and “Criminal Thinking”, a cognitive behavioral program proven to reduce recidivism (Forman and

Larivee, 2013). Both have had over one thousand prisoners waiting for entry. An additional concern is that the paucity of available programs and the long waiting lists keep long-term life sentenced prisoners from being able to participate because access is based on the “earliest release date”. This means that those with long or life sentences are denied access until shortly before their eligibility for release or only after being granted parole. There is little doubt that these failings contribute to the stubbornly high rate of recidivism in Massachusetts.

Research at the national level concerning costs of recidivism suggests that failure to provide prisoners with the tools for successful re-entry can be foolhardy and expensive. Studies have demonstrated that recidivating felons may be responsible for up to half of the costs of crime (Reeves, 2006) and that a reduction of a mere 5 percent in the rate of recidivism would provide up to \$150 million in annual savings in Massachusetts (Forman and Larivee, 2013). The state did much better in earlier years achieving recidivism rates at half of today’s rates. That earlier success was based on a greater emphasis on education and rehabilitation. Programs were much more accessible and there was much more liberal use of lower security, pre-release, and furloughs to prepare prisoners for success in the community. These approaches provide a blue-print for reform by recapitulating the past.

## **CONSEQUENCES OF THE AGING POPULATION**

### **Costs of Elderly and LWOP Prisoners**

As of 1 January 2015, there were 2,552 prisoners aged 50 and over in the Massachusetts DOC. This group alone is estimated to require expenditure of some \$255 million each year based on expert predictions at twice the average annual cost of imprisonment (Aday, 2003; Williams and Abraldes, 2007; Williams *et al.*, 2011; ACLU, 2012; Roberts, 2015). This subpopulation likely represents the bulk of the 29 percent of prisoners serving life or 20 years or more. While some may be eligible for eventual release, there are 1,000 serving LWOP who will be incarcerated until their deaths. Of these, on 1 January 2015, 575 were under the age of 50, 200 between 50-59 and 225 were 60 or older. A final group of 303 were between ages 40 and 49. This LWOP subpopulation alone is expected to require costs in excess of \$80 million per year.<sup>2</sup> Furthermore, as they age, costs will rise due to declining health and other needs. Even as the very oldest die off,

others will age up to take their place and there is ample evidence that even with the accelerated aging of prisoners, many of those in their 60s will live for more than 10 years,<sup>3</sup> such that each one will likely incur additional costs averaging \$1 million or more before dying. Additionally, as larger numbers move into their seventies, it is likely that the cost to incarcerate this current crop of LWOP prisoners, even if no others were added to their number, will soon exceed \$100 million per year.

As ghoulish as the grim accounting of these “death-by-incarceration” LWOP sentences may be, the prisoners subject to them face an even greater fear. Every single day they witness the terribly inadequate facilities and resources for elderly prisoners who are unfortunate enough to become incapacitated or merely debilitated by age. Prisons are designed for the young and able-bodied with only rudimentary facilities for the disabled, whether physical or mental, offering no privacy and little humanity. Such aging, long-term prisoners are typically sequestered, literally ripped apart from their fellow prisoners who are their sole remaining social sustenance. They are frequently left to vegetate and die in total isolation, without any physical or emotional supports. This reality is, in fact, much more fearsome than simply dying in prison.

### **Necessity for Special Care for Sick and Elderly**

It is clear, especially with the aging prisoner population, that current DOC special care facilities are totally inadequate and will need to be expanded and new facilities established, unless policies are changed to provide meaningful medical and compassionate release procedures for the elderly. At present, the DOC operates only two skilled nursing facilities (SNF’s) units (MCI-Shirley and SBCC), which are able to provide skilled nursing care to prisoners. Various prisons also have assisted daily living (ADL) units that are able to provide only supportive, but not skilled care. The SNF units at Shirley and SBCC were fully utilized with an average census of 21 patients each month (Research and Planning Division, 2014). During a typical three-month period in 2014, 15 percent of patients were aged 46-55 and 85 percent were aged 56 and older. During fiscal year 2010 to fiscal year 2014 there were 195 deaths in the DOC, 85 percent of which were from long-term, chronic illness. Of the 164 deaths in those with chronic illness, 14 deaths were in those 45 or younger, 26 in those aged 46-55 and 124 (76 percent) of those aged 55 and older. The data confirms the importance

of age as a predictor of chronic illness and medical needs (Research and Planning Division, 2014).

Acute inpatient care beyond the level of prisons and skilled nursing facilities is provided by a secure unit at Shattuck Hospital which operates as a correctional institution within the DOC. Operating costs for this unit of 29 beds are included in the regular DOC budget. Average costs range between \$260,000 to \$300,000 per bed every year. Boston Medical Center (BMC) provides overflow and tertiary inpatient care, as well as advanced tertiary consultations, procedures and imaging. The exact nature of financial arrangements between the DOC, MPCH (the medical contractor) and the state are unpublished. They also may be complex since BMC is partially supported by the city and state. In any case, all future escalating costs will come to the state, either through increased contract expenses or supplemental budgets. The Shattuck unit is shared with counties and is typically filled to capacity and, as the prison population ages, it will likely need to expand (physically difficult) or be supplemented. Complex tertiary care for surgery and hospitalizations already are transferred to BMC and this too will likely increase with an aging population. This will require more complex procedures (e.g. cardiac stenting and bypass, hepatitis-C-induced liver cancer treatments, spinal stenosis, etc.). Additionally, age-exacerbated ailments like heart failure, cancer surgery and chemotherapy, chronic obstructive pulmonary disease, stroke diabetic complications, and others, all requiring prolonged hospitalizations will substantially stress inpatient facilities serving the DOC and disproportionately escalate costs.

In recognition that current facilities are limited and severely overburdened, the legislature has requested that the DOC research the feasibility and costs of additional SNF-level resources. Two responses, which are discussed below, have been offered.

#### ***Proposal for LSH Chronic Care Unit***

Lemuel Shattuck Hospital, the current provider and host of the DOC's correctional acute care inpatient unit has developed a proposal for a Correctional Chronic Care Unit (SNF) at the hospital (Lemuel Shattuck Hospital, 2014). Using metrics based on the hospital's free world geriatrics unit (SN), the hospital proposed a 22-bed unit with an annual budget of \$3.5 million. This well documented proposal includes ancillary and operational costs, and is designed to "treat medical needs including dementia, but not

with a primary diagnosis of psychiatric illness” (Lemuel Shattuck Hospital, 2014). The \$3.5 million estimated operating cost would provide skilled nursing care for 22 prisoners at an approximate cost of \$160,000 per prisoner per annum, not including costs for security staffing.

### ***MPCH Proposal for 90-bed Facility***

Massachusetts Partnership for Correctional Health (MPCH), the current contractor for DOC health care, provided a preliminary proposal for a 90-bed facility, comprised of three integrated 30-bed units featuring a 30-bed sub-acute skilled care (SNF) unit with ability to shift beds to the ADL unit, a 30-bed ADL supportive care unit with the ability to shift beds to the SNF unit, and a 30-bed dementia unit (Research and Planning Division, 2014). The estimated personnel costs are \$7.5 million per year, but these do not include necessary capital or ongoing ancillary and operational costs, which will be substantial even if the unit is integrated into an existing hospital or other advance care facility. Security staffing also was not included and personnel estimates appear somewhat conservative in terms of the professional level of staff required for such a complex facility.

These two proposals are a necessary starting point if less costly and more humane community-based alternatives are not enacted, but are likely to be totally inadequate to cope with the demand of the rapidly debilitating and increasingly ailing and aging DOC population. Fare better economic and humanitarian alternatives would include new legislation for compassionate and emergency medical release for the terminally ill or permanently incapacitated. Medical care and costs, even if shifted to other state agencies, would be dramatically improved without the encumbrances and costs of security staffing. Additionally, Medicare and Medicaid would shift much of the costs, at least partially, to the federal budget. Beyond that, developing procedures for the possible release of at least some of the elderly prisoners who have served substantial sentences, have demonstrated that they are rehabilitated, and have a realistic likelihood of living out their lives without endangering public safety would further reduce the economic and moral burdens of incarcerating this expanding elderly population. This need is even greater because these responsibilities are not limited to the DOC, since resources currently required by corrections are therefore not available for the other vital public benefit needs in the state.

### **Competition for Funding of Critical Public Benefit Needs**

The ever-increasing costs for the DOC are mandated by the structure and needs of the department. Personnel, custody and health care costs are not deferrable as most are mandated by law. Current program costs, which might be more discretionary even though vital to improve rehabilitation and reduce recidivism, are far too limited and too important to curtail. Consequently, short of decreasing the prisoner population to allow for the closing of entire prisons to effectively reduce the levels of staffing which drive DOC budgets costs are not going to decrease. This inflexible drain adversely impacts many other necessary state functions. In a 2009 analysis by the Boston Foundation, some of the collateral and reciprocal consequences of correctional funding on other critical public service agencies were exposed (Engel and Atkisson, 2009). That report showed that between 1998 and 2010, as DOC funding increased, funding for higher education, public health, legal aid, K-12 education and social services were all reduced. This competition for vital state public services continues to date, as the DOC and Sheriff's budgets continue their inexorable rise, largely forced by legally mandated requirements of current criminal justice policies. Meanwhile, the Commonwealth struggles to meet its vital responsibilities to communities, students and citizens. This tension was clearly exposed, for example, by the \$285 million increase in criminal justice expenses between 1998 and 2010, while higher education suffered a \$220 million decrease (Engel and Atkisson, 2009). Other public service needs, as mentioned, were also curtailed. The problems certainly are not due only to criminal justice expenditures, but it is clear that all these vital state public services are inextricably interwoven, and that the costs of each do affect the others. There is little doubt that currently too much is being expended on corrections and incarceration. The elderly prisoner population, many of whom represent little on-going risk to public safety if released, also represent the greatest economic and humanitarian burdens, and should be the most attractive targets for reform.

## **DISCUSSION**

### **Too Many Prisoners**

While the Massachusetts rate of incarceration ranked 47th out of 50 states in a 2009 report entitled *One in 31* (Pew Center on the States, 2009), this apparently benign statistic is belied by the reality that this rate is still double

or triple the rates of much of the rest of the world. The Massachusetts rate still far exceeds the rates of all other developed countries and vastly exceeds similar levels prevalent in the United States in the 1970s before the prison boom. Of concern is that many experts feel that current levels are at or over the “tipping point” of 325-400 per 100,000 where increased incarceration becomes counter-productive, failing to reduce crime and may actually increase it (Pew Center on the States, 2009). Family and community disruption and increased resources expended on lower level crime progressively decrease the effectiveness of wide-spread enforcement until the costs may actually surpass the cost of prevented crime. For example, Washington State found that the benefits to the community in terms of harm prevention diminished between 1980 and 2001 from \$9.22 to 37 cents for every dollar spent on incarceration (Aos, 2003; Pew Center on the States, 2009). While few states have made such a detailed analysis, there is little doubt that benefits are dramatically reduced as levels of incarceration become excessive (Pew Center on the States, 2009; Pew Center on the States, 2011; ACLU, 2012).

### **Too Many Elderly Prisoners**

The Massachusetts prison population is among the most elderly in the nation. Much of this results from long sentences that became the norm during the ‘tough on crime’ era, which continue to be prevalent even now because of political reluctance to appear ‘soft on crime’. The consequence is that Massachusetts state prisoners aged 50 and over now constitute at least 24 percent of the DOC population, a level approximately one-third above the national average of 16.7 percent (Carson and Golinelli, 2013). This represents a sizable number of prisoners (2,552 as of 1 January 2015), with considerable implications for care, costs and moral concerns.

What makes this so unfortunate and unnecessary is that it is well documented that crime is a young person’s game and that offenders typically “age out” of criminal acts. The longevity and universality of this phenomenon are clearly shown by a 2011 study demonstrating virtually identical curves when comparing national arrest rates by age distribution between 1979 and 2004 (Pew Center on the States, 2011). This study, like many others, shows that arrests are strongly skewed towards younger prisoners. Taken together with Massachusetts data already reviewed that less than 10 percent of new criminal commitments involve those 50 and

older, it is clear that those over 50 commit relatively few new crimes. Additionally, Massachusetts recidivism data emphasize the decrease in recidivism as ex-prisoners age. The recidivism rates shown in Figure 3 are total rates, which include technical violations. Since technical violations are shown to typically inflate rates by an average of 7 percent, the rates of new offenses committed by recidivating ex-prisoners 50 and over likely fluctuate between 5-10 percent. These values are consistent with national trends and affirm conclusions that public safety risks are markedly reduced as potential offenders age, whether they are new offenders or those released from prior incarceration (Aday, 2003; Greineder, 2011; ACLU, 2012; Roberts, 2015).

Such data raise questions whether it is not time to consider the release of appropriately screened elderly prisoners. While the federal government and some states already have procedures defined for so-called compassionate release, these are designed to release only the terminally ill or severely disabled. This approach is usually of limited benefit because, quite simply, it is too little and too late (Aday, 2003; Williams and Abralde, 2007; Williams *et al.*, 2011). There are very few cases that are considered and almost no one is actually released before dying in prison (Williams *et al.*, 2011). What is needed is to consider release or parole for the bulk of the elderly population once they have served significant portions of their sentence. Combining the use of modern, evidence-based risk assessment instruments with the data already presented, should allow parole boards to release many without endangering public safety. To successfully reintegrate these released elderly prisoners will also necessitate improved community resources with less punitive and more supportive parole supervision. Housing and job support are also of vital importance, however, measures which are far less costly than continued incarceration, especially for aging prisoners.

### **Too Many LWOP Prisoners**

The overall percentage of federal and state prisoners serving life sentences is 10.6 percent (Carson and Golinelli, 2013) and they currently number approximately 150,000, a 4.4-fold increase over 1984 levels (Nellis and King, 2009; Nellis, 2013a; Nellis, 2013b). About one-third of these are serving LWOP. Massachusetts has the dubious achievement of having sentenced 21 percent of state prisoners to life, and more than half, amounting to 11 percent of the total population, are serving LWOP. This latter fact gives the Commonwealth the added “distinction” of being in a virtual tie



for first place with Louisiana. There are also additional prisoners serving virtual LWOP sentences of 40, 50 or even more years that are hidden in the expanding >20-year sentence category.

The European Court of Human Rights recently ruled that LWOP sentences violate human rights norms by allowing no consideration for the possibility of future release (see the case of *Winter and Others v. United Kingdom*, European Court of Human Rights, 9 July 2013) (Mauer, 2015). This case was successfully brought even though the United Kingdom has only one-thousandth the number of prisoners serving LWOP (49 to our 49,000). Most European countries do not allow parole-ineligible life sentences, deeming that no one should be permanently declared beyond reform or redemption (Nellis, 2013a; Nellis, 2013b).

The excessive use of LWOP sentences in the United States has been extensively reviewed (Nellis and King, 2009; Ogletree and Sarat, 2012; Nellis, 2013a; Nellis, 2013b). One aspect emphasized has been the relative lack of protections from arbitrary and even capricious imposition of this immutable “death by incarceration” penalty, especially when contrasted with the constitutionally mandated limits on use of the death penalty itself by means of execution (Nellis, 2013a; Nellis, 2013b). Most importantly, none of the heightened scrutiny and legal protections uniquely provided for the usual death penalty apply to those sentenced to LWOP. Furthermore, many sentenced to LWOP have never actually taken a life. In Massachusetts, LWOP is a mandatory sentence for those convicted of first-degree murder, but this includes those who, via joint venture or felony murder convictions, have never killed. It also applies to most with mitigating circumstances, including psychological and mental handicaps and, until very recent court decisions, swept up even juvenile killers as young as 14.

The public perception that LWOP sentences, although as permanent as death sentences, are acceptable because they are always amenable to correction or exoneration is actually invalid, as there are so few resources available to those serving LWOP. The robust remedies and legal resources available to those receiving the death penalty do not apply. Similarly, legal protections unique to death penalty defendants are not available. This has been further exacerbated by the virtual abolition of realistic federal Habeas Corpus relief after the passage of AEDPA (Anti-Terrorism and Effective Death Penalty Act) and the subsequent revision of 28 U.S.C. §2254. While data shows that almost 70 percent of death penalty cases

are reversed because of the stringent review of cases mandated by federal law, no more than 10-20 percent of non-capital, non-death penalty cases, including LWOP, are reversed (Nellis and King, 2009; Nellis, 2013a; Nellis, 2013b). Under these circumstances and the growing annual trickle of exonerations that likely represent only the sentinel “canary in the mine” that exposes the fallibility of the American criminal justice system (Gonzalez, 2016), the excessive and routine use of mandatory LWOP sentences is inexcusable. These sentences provide so few remedies that there is little realistic probability of appropriate reversal or exoneration, while the sentence itself denies redemption, rehabilitation or even mercy since commutations also have gone the way of the dodo bird because of the politicization of criminal justice.

By contrast, when lifers have been released on parole, they have generally fared very well, only rarely re-offending. Practical experience in many states provides support for this and studies have confirmed these observations. For example, in 1972, the U.S. Supreme Court temporarily struck down the death penalty, resulting in the eventual release on parole of 243 (of 538) prisoners on Georgia’s death row (Marquart & Sorensen, 1989). 188 murderers and 51 capital rapists were released on parole (4 died) and were assessed after 5 years in the community. 19 (8 percent) had technical violations, 3 committed misdemeanors and 29 (11 percent) participated in felonies (mostly property and drug offenses). One murderer killed again and two rapists reoffended for a 1.2 percent incidence of serious crime. Of note, the Furman parolees had an average age of 32, an age at which the statistical risk of recidivism is relatively high. The authors of the Furman study also reviewed other studies which showed that less than 1 percent of murderers return for another murder. Of 11,532 murderers released between 1971-1975, only 26 killed again (0.2 percent). The authors conclude that “no other class of offender has such a low rate of recidivism” with regard to felonies and homicide.

In a recent study of 860 first- and second-degree murderers released on parole by California since 1995 (after mandated 25- and 15-year minimum life sentences), only five individuals had been returned by 2011. None of these were for a life-term crime (Weisberg *et al.*, 2011). By contrast, California’s overall three-year incarceration rate for new crimes is 49 percent. The average age of these parolees was 50 years. The authors expressed surprise at the “miniscule” rate of re-offense.

Coupled with other observational experiences, such studies provide reassurance that parole boards have been able to effectively screen those convicted of murder for successful release. The use of evidence-based risk assessment instruments, now commonplace, should further improve predictability.

While such hopeful results can provide reassurance about releasing murderers, the reality is that there is currently no such vehicle available in Massachusetts for first degree murder. Also, because of the immutable nature and duration of LWOP and very long sentences, such prisoners progressively build up in the DOC population, inevitably aging in custody. This accumulation of elderly prisoners has multiple moral and economic consequences, while providing very little additional public safety.

### **Too Many Costly Prisoners**

Incarceration is always costly. However, the incarceration of the elderly significantly exacerbates this problem. The accelerated aging of prisoners and the appropriate definition of elderly at an age of 50 and over for prisoners have been previously reviewed. While this increases the dimension and size of the elderly population, the reason for increased expense is not difficult to understand and has been thoroughly summarized and reported (Aday, 2003; Williams and Abralde, 2007; Rich *et al.*, 2011; Williams *et al.*, 2011). Costs due to the complex medical issues, problems and needs of elderly prisoners, as well as the constitutionally mandated requirement to provide appropriate health care for them are inevitably increased. These expenses often dwarf those of average younger prisoners. Historical examples include data showing that in Florida those aged 50 and over, making up only 11 percent of the population, were responsible for 38 percent of medical costs. In North Carolina, 72 percent of healthcare costs were attributable to prisoners aged 50 and older (ACLU, 2012).

While many prison costs are universal to all ages, the elderly, both expensive and representing a population at low risk of re-offending, should be an attractive target to release for correctional systems and legislators to control costs and revitalize communities devastated by crime. The potential social, moral and economic benefits of releasing low risk elderly prisoners have been thoroughly analyzed (ACLU, 2011; ACLU, 2012; Gottschalk, 2016). These include, among others, restoring family structure and integrity (leading to reduced crime by subsequent

generations), improved family incomes and emotional well-being, repopulation and greater economic vitality for communities decimated by excessive incarceration, the restoration of hopefulness, and the creation of opportunities for individuals and entire communities. A seminal report by the ACLU (2012) that has direct applicability to Massachusetts includes an analysis of savings that can be achieved by releasing low risk elderly prisoners. When coupled with costs delineated by others (Engel and Atkisson, 2009; Pew Center on the States, 2009; Greineder, 2011; Forman and Larivee, 2013; Research and Planning Division, 2015), it becomes apparent that Massachusetts and the DOC fall into the highest cost category referenced by the ACLU analysts. However, even at the mid-range of national costs, the ACLU report estimates that savings from the release on parole for each elderly prisoner comes to \$66,294. Adjusted to more appropriate higher cost estimates for Massachusetts, the likely savings would increase substantially, possibly exceeding \$100,000 every year per prisoner (*Table 9*). Keeping in mind that, as of 1 January 2015 there were 2,552 prisoners 50 and older, it seems credible that considerable savings could be achieved by selecting for parole a reasonable number of older prisoners determined to be at low risk of re-offending.

TABLE 9  
ESTIMATED ANNUAL FISCAL SAVINGS  
PER ELDERLY PRISONER PAROLED

	ACLU Estimate <sup>7</sup>	Adjusted MA <sup>a</sup>
Incarceration costs	+ \$68,270	+ \$100,000-150,000
State Income Tax Revenue	+ 1,145	+ 700
Parole Costs	- 2,738	- 5,000
State Public Benefits	- 298	- 1,000
Public Cost ER Use	- 65	- 123
<b>Net Annual Savings</b>	<b>+ \$66,294</b>	<b>+ \$ 94,578-144,578</b>

<sup>a</sup> Incarceration costs for elderly at 2-3 x DOC average. State income tax revenue taken from analysis in appendix of ref 2. Other state costs are rounded values from the highest cost estimates in the ACLU report.

### **Hidden Collateral Budget Busters**

Evidence that the estimates by the ACLU are not illusory comes from recognition that almost all states have hidden costs that are not accounted by their DOC budgets. These are collateral costs that are often hidden in separate centralized budgets as studies by the Vera Institute and others have documented (Henrichson and Delaney, 2012; Prison Legal News, 2013). Unfortunately, Massachusetts did not participate in the detailed study by the Vera Institute which found, for the forty states that did, that correctional costs needed to be increased by an average of 13.9 percent because of collateral costs borne by centralized budgets (Henrichson and Delaney, 2012). These centrally funded expenses included such items as underfunded contributions to healthcare for retirees, direct contributions to retiree healthcare, employee benefits and pensions, and underfunded pension contributions. Additionally, legal costs and judgements, statewide administrative costs, capital costs and some educational and training costs were also frequent collateral expenditures. A high-end example was Connecticut where supplemental costs added 34 percent to that state's DOC budget.

### **Escalation of Costs by Medical Technology and New Medication**

Future expenditures for the elderly and the specialized care facilities, beyond those previously mentioned, include hospice care and increasing numbers of prisoners needing complex, high technology care that will further inflate healthcare expenses to unprecedented levels. The advent of proliferating, very high cost medications for advanced treatment of virtually all illnesses, including heart disease, stroke, atherosclerosis (high cholesterol), cancer (all types), immunologic (Crohn's, rheumatic diseases), and infectious diseases (HIV, Hepatitis C) that have become "standard of care" requirements will also disproportionately affect the elderly. Furthermore, these medications are converting previously lethal illnesses (e.g. heart attacks, cancers, HIV) into chronic illnesses requiring on-going, long-term treatment. Prisoner healthcare is already second only to staffing in the budget, but this portion risks an explosive growth in the near future to meet constitutional standards because of the sharply escalating costs of advanced technology and medications plus the substantial expansion of modern "precision" medicine. For example, the necessity to provide extraordinarily expensive \$40,000 ICDs (implantable defibrillators) to cardiac patients (Kidiak, 2016) or Hepatitis C medicine to the 17 percent of prisoners that are infected amounting to tens of thousands

of dollars (Liang and Ghany, 2013; also see Diorio, 2018) are only harbingers of future needs to come. It is not unreasonable to anticipate that the dramatic increases in healthcare expenditures will soon make the current estimates of costs for the elderly seem far too conservative.

There can be little doubt that correctional health care costs, like those in the community, will continue to escalate sharply. Additionally, the inevitable delays in receiving appropriate care in prisons, as well as the complexity and expense of security supervision during diagnosis and treatment will add even further and likely unsustainable costs. Developing an entire complex of nursing homes, hospice and end-of-life facilities to care for debilitated, aging and ailing prisoners who present low risk of re-offending would seem to make little sense. If the most expensive prisoners, the elderly, are returned to the community with appropriate safeguards as previously reviewed, this care can be provided much more cheaply and efficiently, and without the need for security supervision. Furthermore, existing systems, including Medicaid and Medicare, will share and distribute these costs, spreading them between private, state and federal budgets that are designed to absorb them.

### **Public Resources and Funding**

As resources are consumed by potentially unnecessary incarceration, there will be collateral costs that extend far beyond simply building, staffing and operating prisons and providing mandated care for prisoners. These concerns are not unfounded as the Boston Foundation reviewed the reciprocal relationship between increases in criminal justice expenditures and those available for other urgently needed, critical public benefits like education, public health, social services, and local aid (Engel and Atkisson, 2009). As reported, between 1998 and 2008, criminal justice expenditures for the DOC, Sheriff's departments, Parole, and Probation increased by 12.4 percent, 20.5 percent, 2.6 percent, and 16.3 percent respectively. During that same period, higher education, public health, and local aid decreased by 7.6 percent, 3.3 percent, and 0.9 percent respectively. Only K-12 education was spared, increasing by 13.9 percent. DOC expenses continued to increase through 2010 and continue to do so even after stringent efforts, as did Parole and Probation, while education, public health, local aid and social services suffered further losses.

The areas being curtailed are precisely the areas required to alleviate the social stressors that have contributed to today's carceral state. As

legislatures work to prevent tax increases, contain expenses and balance budgets, the subsequent commonplace slashing of social programs actually “incubates” the crime which leads to incarceration as society’s backstop. Medicaid, welfare, social services, public health and housing, education, and public-sector jobs are the very programs that help to prevent crime (Gottschalk, 2016).<sup>4</sup> Today’s frequently vaunted criminal justice interventions (the 3R’s of re-entry, recidivism and justice reinvestment) are mostly limited to so-called “non-violent, non-sexual, non-serious” issues, and are mostly designed to hide away those convicted of violent and sex offenses (Gottschalk, 2016). These current efforts are crippled by ignoring the social realities that crime and the underlying poverty, unemployment and inequality can be ameliorated by addressing their structural causes, if only appropriate social policies were enacted, thereby preventing the need for mass incarceration. Changing this course, however, will require forward looking government action (Gottschalk, 2016). It is also important to remember how we got here. Surging crime first incubated in the crucible of poverty, inadequate public education, and inaccessible and meaningful employment. Public policy responded not by addressing the underlying causes, but by incarcerating the individuals creating problems, who are also the victims of this social inequality at the same time. As one student of mass incarceration has summarized: “Changes in public policy, not criminal behavior, propelled the prison boom in the United States. In short, it was about the time, not about the crime” (Gottschalk, 2016, p. 258).

It is also almost certain that limiting our concerns only to the fiscal issues will not, in itself, be sufficient to motivate and sustain the political momentum required to effect meaningful and lasting change. We must recognize that there are substantial societal benefits associated with sensible reduction of the progenitors of crime and mass incarceration. A small but symbolically important step is to recognize that releasing those long-incarcerated elderly who are able to demonstrate positive rehabilitation and who are unlikely to diminish public safety, will empower and enhance the decimated communities from which they were removed. The societal benefits will include, but are not limited to, family restoration and stability, and improved outcomes for the children of released prisoners (including less criminal behavior). Returning rehabilitated parolees to communities devastated by mass incarceration (Clear, 2007) can begin to revitalize depleted neighbourhoods, education, jobs and public services. Also, these ex-prisoners, even the elderly, will add to

the emotional and financial security of their families and neighborhoods and also will contribute to economic growth, whether by joining the work-force and/or through the consumption of goods and services outside prison walls (ACLU, 2012; Gottschalk, 2016).

Such first-step measures would provide hope that the unwarranted decimation of mass incarceration can be permanently ended and the vitality of our poorest communities restored. Some have called for a “Marshall Plan”, akin to the one that propelled devastated post-WWII Germany to the social and economic powerhouse that sustains much of Europe today (Gottschalk, 2016). While such a grand movement still seems far removed, the example that helping those communities devastated by crime, trauma and loss could lift that portion of our over-incarcerated society to similar success is an attractive image. In 2016, Massachusetts lawmakers, judges and the executive branch, recognizing the need to reduce excessive incarceration, have jointly invested in and contracted help from the Justice Center of the Council of State Governments to analyze the Massachusetts criminal justice system and make recommendations. It can only be hoped that these will inspire all three branches of government to act decisively and creatively and to begin abolishing the carceral state which has shown itself to be morally questionable, costly and unnecessary for continued public safety. It will be a noble challenge and Massachusetts deserves no less.

## **MOVING FORWARD**

This paper argues that the United States and Massachusetts are incarcerating many more people than needed and often for far longer than necessary to deter crime and uphold public safety with consequences that include a burgeoning aging population. Nationally and locally, prisons have become commonplace and neglectful reservoirs of those afflicted with mental health problems and now we are entering an era where we threaten to make them the largest nursing home and elder care facilities in the state with results that are certain to be equally disturbing and morally questionable. It is time for Massachusetts to once again become a leader in the fight for human rights and dignity. Aging prisoners are among the most vulnerable members of society and, as we have seen, pose the lowest risk of committing new crimes while costing the most. As also discussed, elderly prisoners, even those convicted of murder and



rape, have the lowest likelihood of recidivating, very rarely committing any serious crimes if released. Practical and financial outcomes can be further improved by applying evidence-based strategies to improve prison rehabilitation, provide support to ex-prisoners after release, and by curtailing unnecessary excessive sentences that exist now.

By reducing future likelihood of unnecessary and excessive incarceration terms (see *Table 10*), improving and accelerating the

<u>Responsible Parties</u>	<u>Measures to Reduce Unnecessary and Excessive Sentences</u>
Leg	<ul style="list-style-type: none"> <li>• Abolish LWOP and &gt;20 year sentences               <ul style="list-style-type: none"> <li>- Parole eligibility after 15-25 years<sup>a</sup></li> <li>- Excessive sentences do not increase deterrent effect</li> <li>- Parole eligibility does not mean automatic release</li> </ul> </li> </ul>
Leg	<ul style="list-style-type: none"> <li>• Increase juvenile age limit for life sentences to under 21               <ul style="list-style-type: none"> <li>- Consistent with brain science demonstrating limited impulsivity controls</li> <li>- Young have greater capacity to change and outgrow violent behavior</li> </ul> </li> </ul>
Jud/Exe/Leg	<ul style="list-style-type: none"> <li>• Empower Sentencing Commission to develop strong guidelines               <ul style="list-style-type: none"> <li>- Based on sound penologic principles regarding efficacy and deterrence</li> <li>- Apply lessons learned from U.S. experiences before 1980 and international law</li> </ul> </li> </ul>
Leg/Jud	<ul style="list-style-type: none"> <li>• Eliminate 3-strikes/habitual offender enhancements               <ul style="list-style-type: none"> <li>- Politically motivated sentences not grounded in science</li> <li>- Do not increase deterrent effect</li> <li>- Disproportionately lead to excessive sentences and aging in prison</li> </ul> </li> </ul>
Leg/Jud	<ul style="list-style-type: none"> <li>• Eliminate mandatory minimums               <ul style="list-style-type: none"> <li>- Judges to use new, rational sentence guidelines</li> <li>- Judges to provide written justification for departures from guidelines</li> </ul> </li> </ul>
Leg/Jud/Exe	<ul style="list-style-type: none"> <li>• Give judges authority to limit maximum prosecutorial charges               <ul style="list-style-type: none"> <li>- Prevents current frequent prosecutorial over-reach</li> <li>- Especially needed during plea negotiations</li> <li>- Decision to be based on "probable reach" of evidence</li> </ul> </li> </ul>
Leg/Jud	<ul style="list-style-type: none"> <li>• Reclassify low-level felonies as misdemeanors<sup>b</sup> <ul style="list-style-type: none"> <li>- Without prison time sentences</li> <li>- Use alternate, community-based sanctions</li> </ul> </li> </ul>
Jud/Leg	<ul style="list-style-type: none"> <li>• Reduce pre-trial detention with release as the default<sup>b</sup> <ul style="list-style-type: none"> <li>- Unless there are meaningful threats to public safety</li> <li>- Use electronic monitoring/modern border security measures to ensure trial appearance</li> </ul> </li> </ul>

<sup>a</sup> If LWOP sentence must be retained for rare cases, the protections and legal supports currently offered for those subject to the death penalty should apply (bifurcated guilt/penalty phases and robust trial and post-conviction legal access and supports)

<sup>b</sup> These two measures would alleviate disproportionate detention of the poor who are unable to afford even low bail and reduce crowding in prisons/jails. Also, it would, in a single stroke, eliminate 50% of female imprisonment (currently 16% serve <1 year and 37% are only on pre-trial detention)

rehabilitation of those already incarcerated terms (see *Table 11*), and supporting and increasing the ability of ex-prisoners to successfully re-integrate into society after release terms (see *Table 12*), we can provide a path to the release of a meaningful portion of the aging prisoners without compromising public safety. This will free resources to support other critical, but often neglected public initiatives that can be used to revitalize and enhance our communities and the lives of our citizens. We can and must end this cycle at this critical juncture for both those inside and outside prison walls.

<u>Responsible Parties</u>	<u>Measures to Improve and Accelerate Rehabilitation</u>
Leg	<ul style="list-style-type: none"> <li>• Parole eligibility for all prisoners 50 and over               <ul style="list-style-type: none"> <li>- After serving 15 or more years</li> <li>- Apply retroactively to all sentences, including LMOP</li> <li>- Parole eligibility does not mean automatic release</li> </ul> </li> </ul>
Exe	<ul style="list-style-type: none"> <li>• Strengthen prison rehabilitation &amp; incentives to participate               <ul style="list-style-type: none"> <li>- Increase number, availability and relevance of validated programs to individual needs</li> <li>- Offer opportunities, facilitate and provide substantial incentives for education, including vocational</li> <li>- Provide blocks of good-time as incentives for successfully completing programs rather than compelling participation</li> <li>- Provide access to all programs early and throughout incarceration, not limited only to period prior to release</li> </ul> </li> </ul>
Leg/Exe	<ul style="list-style-type: none"> <li>• Establish system of "presumptive" parole               <ul style="list-style-type: none"> <li>- Parole to be granted unless, by a preponderance of evidence:                   <ul style="list-style-type: none"> <li>• prisoner poses substantial risk to public safety</li> <li>• there are no conditions that can be imposed after release that adequately reduce that risk</li> </ul> </li> <li>- Parole Board should not retry the original crime but focus on prisoner's rehabilitation and maturation</li> <li>- Make objective assessments using risk assessment instrument</li> </ul> </li> </ul>
Exe/Leg	<ul style="list-style-type: none"> <li>• Expand availability of Good-Time credits               <ul style="list-style-type: none"> <li>- For participation in programs, education and work</li> <li>- Eliminate "Truth in Sentencing" restrictions</li> <li>- Grant day-for-day good-time for blocks of 90-day clean disciplinary records</li> <li>- Apply good-time credits to reduce sentence up to half</li> </ul> </li> </ul>
Exe	<ul style="list-style-type: none"> <li>• Provide robust computer/internet fluency for all               <ul style="list-style-type: none"> <li>- Fluency is critical for re-entry, especially for the elderly and long-incarcerated</li> <li>- Introduce corrections compatible tablets with download capability and access to allow individual in-cell study</li> <li>- Provide appropriately censored and site-limited internet access, especially to education sites</li> <li>- Provide access to Harvard/MIT EdX classes</li> <li>- Provide access to books, educational materials including voc-ed, secondary education, licensing materials and civics information</li> </ul> </li> </ul>
Leg/Exe	<ul style="list-style-type: none"> <li>• Open prisons to public oversight               <ul style="list-style-type: none"> <li>- Establish independent ombudspanel to hear visitor and prisoner complaints and grievances</li> <li>- Provide subpoena power to investigate abuses</li> <li>- Facilitate media access to prisons and prisoners</li> </ul> </li> </ul>

<u>Responsible Parties</u>	<u>Measures to Support and Improve Successful Re-integration</u>
Lag/Exe	<ul style="list-style-type: none"> <li>• Provide robust post-release services               <ul style="list-style-type: none"> <li>- Actively assist job search and acquisition</li> <li>- Supplement vocational training started in prison as necessary</li> <li>- Provide support while training and/or actively seeking job (up to two years)</li> <li>- Provide housing support, including limited subsidy if taken in by family</li> </ul> </li> </ul>
Lag/Exe	<ul style="list-style-type: none"> <li>• Narrowly tailor employment, licensing and housing restrictions               <ul style="list-style-type: none"> <li>- Prohibit access only for specific, relevant and clear public safety concerns</li> <li>- Rein in sex offender registration and housing restrictions except clearly articulated safety concerns</li> </ul> </li> </ul>
Exe	<ul style="list-style-type: none"> <li>• Use non-prison alternatives for parole violations               <ul style="list-style-type: none"> <li>- Implement swift, graduated non-prison sanctions for violations that do not involve new crime</li> <li>- Structure sanctions to avoid interfering with parolees' employment</li> <li>- Provide meaningful incentives for adherence to rules (e.g. reducing restrictions and/or duration of parole)</li> </ul> </li> </ul>
Exe	<ul style="list-style-type: none"> <li>• Empower parole department and officers to support parolees               <ul style="list-style-type: none"> <li>- Provide tools/resources to encourage support and assistance for parolees, not simply monitoring behavior</li> <li>- Provide financial incentives to divisions and/or parole officer for reducing assigned population revocation rates</li> </ul> </li> </ul>

## ENDNOTES

- <sup>1</sup> Crime rates in Massachusetts are down 37 percent since 1990 and continue to decrease state-wide and in Boston homicides have fallen by more than half from the rates in the 1980's and early 1990's. Violent and total crime (except for vehicular theft) continue to decrease year by year. The total crime index and criminal case filings are down 10 percent from 2005 to 2014. Arrests are down 12 percent since 2008 and convictions decreased 31 percent since 2004 Council of State Governments Massachusetts Working Group Report published in 2016.
- <sup>2</sup> 575 at \$50,000 = \$28 million; 200 at \$100,000 = \$20 million; 225 at \$150,000 = \$34 million; Total = \$82 million. Not all will expend the average, but some will far exceed it.
- <sup>3</sup> The average life expectancy for American males is 76 (81 for women) (Marczk *et al.*, 2016) but the CDC reports that once men attain age 65, their life expectancy increases by an additional 18 year (Associated Press, 2014). Even after discounting their survival for the known premature aging of prisoners, these elderly lifers, once they have reached their 60's are likely to live for 10 or more years (Cruz *et al.*, 2013).
- <sup>4</sup> The current Massachusetts poverty rate is the highest in 50 years. 12 percent live below the poverty level and 25 percent below double the poverty level (Johnson, 2014). The very counties that contribute the greatest number of prisoners are the ones with the highest rates of childhood poverty: Hampden, 31 percent; Suffolk, 26 percent; Berkshire 21 percent; Bristol, 18 percent; Essex and Franklin, 17 percent;

Worcester, 15 percent (ibid). Additionally, poverty impacts school quality and dropout rates which remain high in urban areas: Boston, 5.9 percent; Springfield, 6.5 percent; Lawrence, 5.8 percent; New Bedford, 5.8 percent (Vaznis, 2014). In Suffolk County only 63 percent of ninth graders graduated from high school in four years (Johnson, 2014). Alleviating these dismal statistics would be a major factor in reducing crime and the influx of prisoners into the prison system.

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*Dirk Greineder*, 77 years old, is a physician and former molecular biologist currently serving a Life Without Parole sentence for murder in Massachusetts. He has been incarcerated since 2000 and continues to appeal his sentence. He is currently waiting on a federal court Habeas decision. For the last decade, he has been an active member of the Lifers' Group Inc. at MCI-Norfolk, an organization of activist prisoners working to provide meaningful opportunities for release for all prisoners, while also working to improve conditions for those behind bars. This paper was prepared as part of ongoing efforts to inform and assist Massachusetts legislators and activists in reforming excessively punitive and outdated criminal justice policies in the state.