

LIFE WITHOUT PAROLE IS A MASSACHUSETTS DEATH SENTENCE:
Aging and Dying in Massachusetts Prisons

A Lifers' Group Report

Prepared by
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March 2020

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Abstract

Massachusetts state prisoners are the oldest in the U.S., largely due to 14.2% of prisoners serving Life Without Parole (LWOP) sentences, the highest percentage in the nation. Data shows that LWOP prisoners are 2-3 times older than other prisoners. In 11 years, 2009-2019, 348 new LWOP prisoners were committed; 86 died in prison; 49 reversed their cases because of false convictions; 65 juveniles at the time of the crime were reclassified and made eligible for parole; and 1 medical parole was granted. The accrual of LWOP prisoners diminished from an average rate of 25/yr (1999-2014) to 15/yr (2014-2018) and leveled off after July 2018. This trend appears due to a composite of decreased new commitments because of decreased homicides, increasing numbers of reversals, and increasing numbers of deaths. A recommendation to make LWOP prisoners eligible for parole after 25 years is reviewed. Reasons include the aging and hopelessness of this population, the low risks of releasing elderly and rehabilitated prisoners including murderers, and the staggering increase in costs of incarceration. The recognition that false convictions occur and the real possibility that others may be unable to prove that they were falsely convicted adds further incentives to give all LWOP prisoners a second chance.

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INTRODUCTION

Massachusetts state prisoners have become the oldest in the United States.¹ A major reason is that 14.2% of Massachusetts state prisoners are serving Life Without Parole (LWOP) sentences,² a rate which has risen to become the highest percentage in the nation.³ In Massachusetts LWOP sentences are mandatory for first degree murder and, under historical felony murder statutes, frequently have been meted out to those who did not actually participate in killing or even had any intent to kill.⁴ Further, few if any mitigating factors such as developmental impairments, mental health disorders, or extreme intoxication have successfully shielded defendants from this sentence in Massachusetts. The sentence remains mandatory as long as participants are felt to have any capacity to form an intent to cause serious bodily injury or to kill.⁵ Until 2014, even those between the ages of 14 to 17 committing first degree murder were subject to mandatory LWOP sentences.⁶ This persistent imposition of LWOP sentences has caused an inexorable increase in the numbers of Massachusetts prisoners with this sentence.⁷

Although Massachusetts eliminated the death penalty in 1950, that sentence has been replaced with routine and very liberal use of mandatory LWOP

**OVER 11 YEARS, 86 LWOP PRISONERS
DIED IN PRISON AND ANOTHER 49,
FALSELY CONVICTED, WERE FINALLY
RELEASED AFTER DECADES IN PRISON**

sentences. Compounding the consequences of that change is the fact that LWOP defendants have also lost the important and robust protections offered to death-sentenced defendants under

U.S. Supreme Court precedent. Among other safeguards, this includes the loss of special "death-qualified" defense attorneys and bifurcated jury trials that determine guilt and sentence separately while requiring comprehensive consideration of mitigating factors. Additionally, those sentenced to LWOP do not receive the benefits of the extensive post-conviction legal assistance and the multiple procedural and evaluative safeguards afforded to those sentenced to death. It has been reported that these factors contribute to the findings

that a mere 10-20% of non-death penalty cases are reversed on appeal, while almost 70% of death sentences are reversed.⁸ These conditions have contributed to the substantial increase of LWOP prisoners. The inevitable consequence is that a steady flow of LWOP prisoners are dying in prison because, succinctly stated, LWOP sentences are nothing other than death-by-incarceration sentences.

In the past, there may have been some hope for executive clemency in the form of commutation for LWOP prisoners who demonstrate that they have become rehabilitated and whose advanced age, by itself, drastically reduces the risk of reoffense. It has been independently shown that older and rehabilitated prisoners, especially those convicted of murder, have the lowest rates of recidivism and pose no more than minimal risks to public safety.⁹ However, since 1987, despite hundreds of applications, there have been only four commutations granted for Massachusetts LWOP prisoners--and the last one, in 1997, was for a prisoner already known to have been falsely convicted.¹⁰ Clearly this option has withered to the point of nonexistence, effectively denying all LWOP prisoners, no matter if rehabilitated or elderly, any opportunity for executive clemency. This failure to offer any hope of redemption or the possibility of a second chance violates what many consider a basic tenet of American fairmindedness.

In 2014, 65 LWOP prisoners, whose murders were committed while they were between the ages of 14 through 17, were removed from the rolls of those sentenced to LWOP. As the result of decisions by the United States Supreme Court and the Massachusetts Supreme Judicial Court (SJC)¹¹, these 65 "juvenile" LWOP prisoners became retroactively eligible for a parole hearing after serving 15 years. It was concluded that juvenile murderers are less responsible and culpable than older counterparts, and also are particularly likely to be rehabilitated. While still considered guilty of first degree murder, they as well as future juvenile murderers, are now parole eligible under the law.

A full discussion of all the pros and cons of LWOP sentences is beyond the scope of this report but is well reviewed in a comprehensive parallel work.¹² There the authors argue that there is an urgent need to offer LWOP prisoners a meaningful possibility (although not any guarantee) of being granted discretionary parole after serving 25 years provided the prisoner demonstrates that they have become rehabilitated. As stated by those

authors,¹³

A life sentence with the possibility of parole after 25 years addresses all these factors: needless tax burden, indiscriminate punishment, public safety, and justice for the victims. Such a sentence can motivate offenders to seek successful rehabilitation, ...reduce prison violence while also obviating the costs of housing aging and progressively more infirm prisoners who no longer pose a risk to public safety ...[w]hile offenders would continue to be held accountable during their lifetime of supervised release.

DATA

Table 1 lists the age distribution of first degree LWOP prisoners as compared to all other prisoners in the jurisdiction of the Massachusetts Department of Correction (DOC) as of January 1, 2020. It is apparent that the LWOP cohort (1083, 14.2% of total criminally sentenced prisoners) is notably older. More than one half (52%) are 50 and older, as compared to only 25% of

TABLE 1
AGE DISTRIBUTION OF MASSACHUSETTS PRISONERS^a

Age (yrs)	LWOP Population		All Others	
	#	% ^b	#	% ^c
<20	0	0%	17	0%
20-29	62	6%	1364	21%
30-39	183	17%	2025	31%
40-49	280	26%	1478	23%
50-59	264	24%	1023	16%
60-69	190	18%	449	7%
70-79	95	9%	148	2%
80-89	9	1%	14	0%
90-99	0	0%	1	0%
Total	1083	100%	6519	100%
% Total Population	14.2%		85.8%	
Subtotals				
<50 yrs old	525	48%	4884	75%
50+ yrs old	558	52%	1635	25%
60+ yrs old	294	27%	612	9%

^a Criminally sentenced jurisdiction population, Jan. 1, 2020.²⁶

^b Percent based on jurisdiction LWOP population.

^c Percent based on jurisdiction "All Others" population.

the remainder of the state prison population. Similarly, 27% of the LWOP cohort are 60 and older, three times the rate (9%) of all other prisoners. The group of prisoners not sentenced to LWOP is made up of second degree lifers (975, 12.8% of total) as well as prisoners sentenced to term-of-year sentences of 25 years or more (274, 3.6% of total) and prisoners serving less than 25 year terms (5270, 69.3% of total). It is well-known that a substantial proportion of second degree lifers, although eligible for parole after 15 years, are repeatedly denied parole and so age in prison along with the LWOP cohort. Similarly, a portion of the longer term-of-year sentenced prisoners are also aging in prison, especially those serving "virtual life" sentences of 40 or 50 years.

Table 2 provides a detailed summary of the annual census of Massachusetts DOC first degree LWOP prisoners, January 1, 2009 through December 31, 2019. During these 11 years, 348 LWOP prisoners were newly committed. As previously mentioned, 65 first degree lifers, originally sentenced to LWOP, who were juveniles at the time of their crime, received a one-time, retroactive, reclassification in 2014, removing them from the LWOP population. 49 additional LWOP prisoners were released by the courts, 2009 to 2019, because of reversals of their convictions. 86 LWOP prisoners died while in prison between 2009 - 2019; and, one LWOP prisoner was released on medical parole in 2019, based on a new law enacted in April 2018.¹⁴ For clarity's sake, it is important to note that the individual yearly tallies of prisoners often do not add up, likely because of delays in reporting between various branches of the DOC and other agencies. The overall totals, however, appear to be reliable. Data shows that 348 were added as newly committed; 201 were removed (86 died; 49 received court releases; 65 juveniles were reclassified; and 1 was granted medical parole) for a difference of +147. By contrast, the cumulative total between January 1, 2009 through December 31, 2019 shown in Table 2 equals +145 (1083-938). At present, there is no apparent explanation for this small discrepancy.

Figure 1 graphically displays the evolution of lifer populations January 1, 1999 through January 1, 2020 as well as death rates in prison, 2009-2019. It is apparent that the annual rate of increase in the first degree, LWOP population has slowed in recent years. Between January 1999 and January 2014, the annual rate of increase averaged 25 LWOP prisoners per year. Between July 2014 and July 2018, the average rate of increase diminished to 15 per year;

TABLE 2
ANNUAL CENSUS OF MASSACHUSETTS FIRST DEGREE LWOP PRISONERS^a

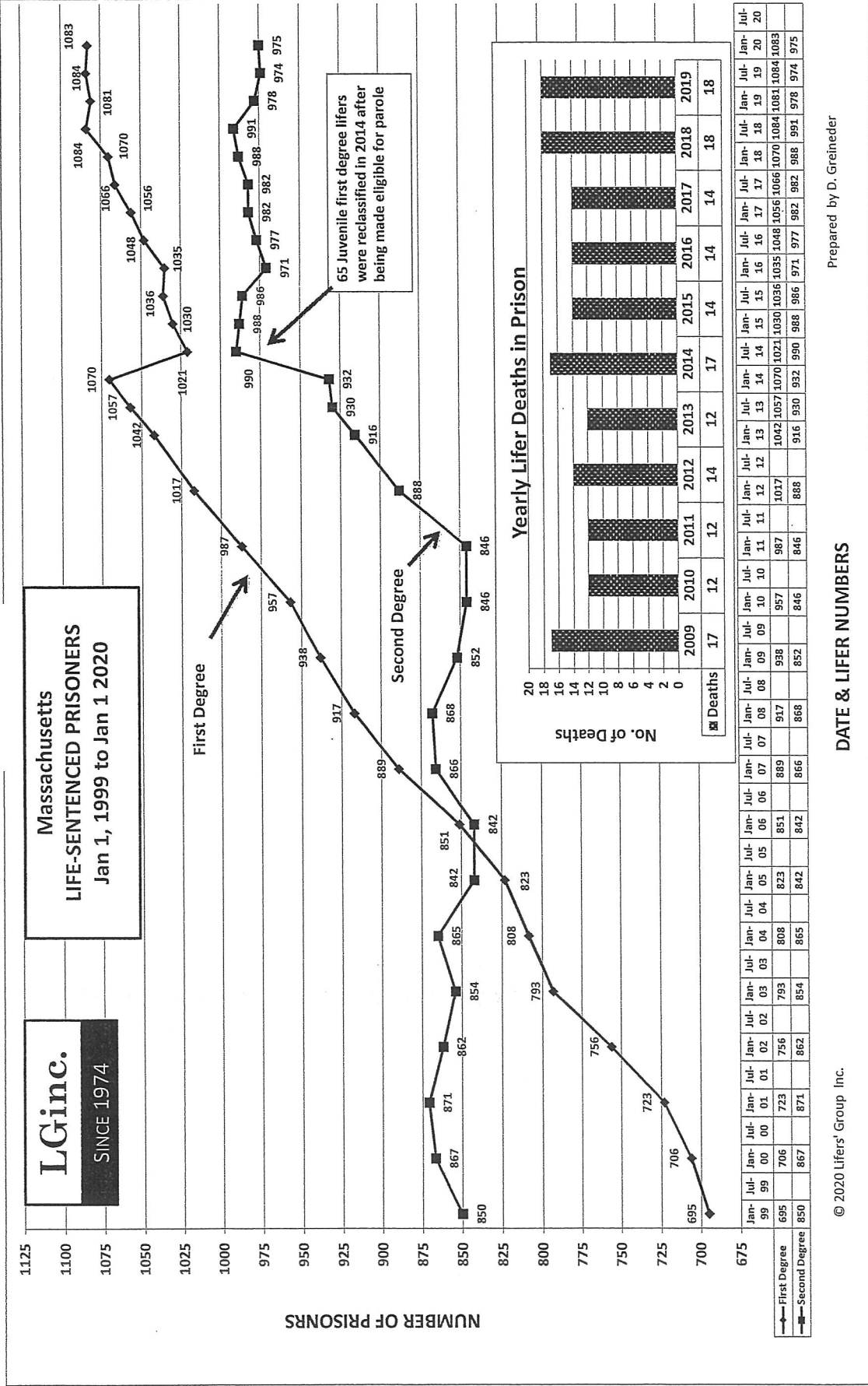
Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	Total
LWOP Census on January 1	938	957	987	1017	1042	1070	1030	1035	1056	1070	1081	
# of New LWOP Commitments	39	38	26	41	40	35	24	35	21	25	24	348
LWOP Prisoner Deaths	11	4	7	6	8	10	8	12	4	8	8	86
Court Releases	2	7	1	4	4	0	8	4	6	3	10	49
End of Year Census	957	987	1017	1042	1070	1030 ^b	1035	1056	1070	1081	1083	+145 ^c

^a Criminally sentenced jurisdiction population.²⁷

^b 65 juvenile first degree LWOP prisoners were reclassified in 2014 as the result of SJC rulings (Diatchenko v District Attorney for the Suffolk District, 466 Mass 655 (2014) and Commonwealth v Brown, 466 Mass 676 (2014)) converting their LWOP sentences to ones with parole eligibility.

^c Incremental increase January 1, 2009 to December 31, 2019 (1083-938).

FIGURE 1

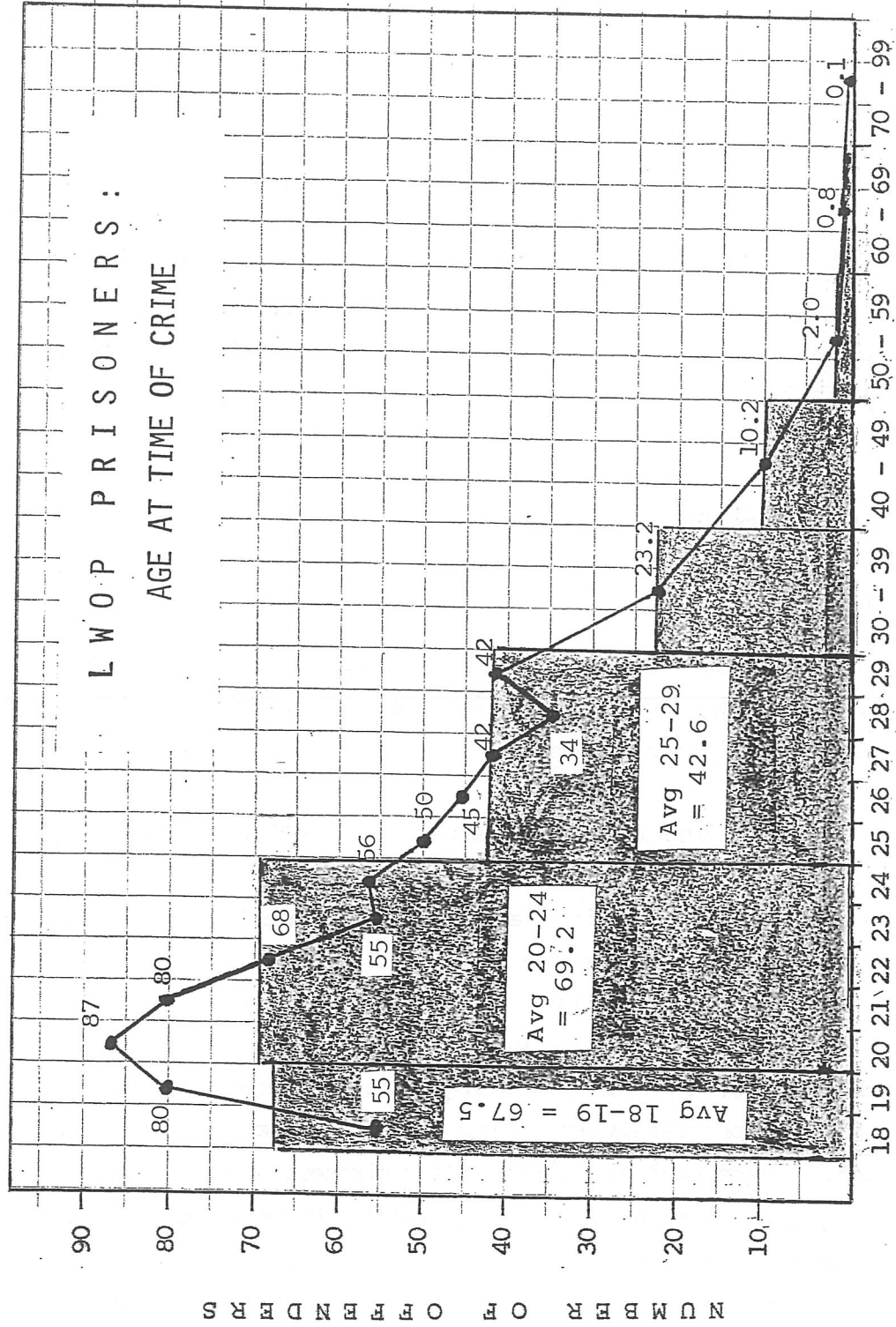


Prepared by D. Greineder

DATE & LIFER NUMBERS

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FIGURE 2



AGE / AGE RANGE

and, there has been no net increase in the LWOP population since July 2018. It is likely that these changes are the composite result of the gradual uptick in the numbers dying in prison plus the increased numbers released due to false convictions, along with a gradual reduction of new LWOP commitments. This latter almost certainly reflects the progressive decrease in violent crime and homicide rates seen across the U.S. and Massachusetts over the last 20 years. For example, relevant data shows that Boston homicides decreased by almost half between 2010 and 2019, from 74 to 38.¹⁵

Figure 2 summarizes, for the current Massachusetts custody LWOP population, the frequency of murder convictions based on the age of the offender at the time of the crime. It is apparent that the peak occurrence of first degree murder is between the ages of 19-21, with a steady drop-off for offenders during their 20s, which continues over the subsequent decades of aging. Shown are numbers of offenders committing their crimes at the ages of 18 through 29, as well as 10 year averages over subsequent decades, 30-39, 40-49, 50-59, 60-69, and 70-99. Also shown are the averages for the age ranges of 18-19, 20-24 and 25-29 which show the average number of offenders per year of the range, 67.5, 69.2 and 42.6, respectively.

DISCUSSION

Two important and troubling conclusions emerge from the preceding facts. Over the 11 years, 2009-2019, 86 LWOP prisoners died in prison, and another 49 had their convictions reversed by the courts because they were falsely convicted.

First, an intrinsic consequence of LWOP sentences is that all LWOP prisoners will die in prison, regardless of whether they have changed and become rehabilitated. This reality is now compellingly before us. With the current and politically motivated abolition of meaningful executive clemency, these prisoners will die in prison without ever having any opportunity for a second chance. It is well established that people age out of committing crime as they mature, naturally leaving behind youthful impulsive and reckless behaviors and progressively losing their propensity for violence or criminal behavior.¹⁶ Nevertheless, these LWOP prisoners must remain incarcerated even when they have changed and become rehabilitated. And, after a lifetime of imprisonment, they are left to succumb to this unique and slow death-by-incarceration sentence, by that time often elderly, toothless, wheelchair- or

bed-ridden, and certainly harmless beyond any reasonable doubt.

The inanity and futility of this practice was poignantly summarized by a most unlikely protagonist, Burl Cain, long the brutal and repressive warden of Louisiana State Prison in Angola:¹⁷

[Y]ou actually create victims by not letting [elderly prisoners] go and us[ing] your resources on rehabilitation for the ones that are going to get out... When I came here and saw the elderly population, I said, "God, well, why are they here? Our name is Corrections to correct deviant behavior [but] there's nothing to correct in these guys, they're harmless..." Prison should be a place for predators and not dying old men. Some people should die in prison, but everyone should get a hearing.

But such relief is explicitly denied to those with LWOP sentences. Instead, these prisoners languish, hopelessly and helplessly, for entire lifetimes in prison. And, all the while, their now no longer necessary imprisonments add to the increasing costs of incarceration through their burgeoning special needs and health care requirements.

This growing elderly prisoner population disproportionately contributes to the by now staggering cost of incarceration. Paradoxically and inexplicably for a department of correction whose mission is rehabilitation, only 1.15% of the FY2019 budget was expended for rehabilitative programs and education.¹⁸ Despite this, the average annual cost of incarceration for each Massachusetts state prisoner in FY2019 exceeded \$80,000.¹⁹ And, current DOC budget projections suggest that the average annual cost for FY2021 will rise to between \$90,000 to 95,000 per prisoner.²⁰ These sums not only vastly exceed the annual cost of a college education, but in this "challenging fiscal environment, every additional dollar spent on corrections is offset by cuts to other state agencies."²¹ These are cuts that reduce access to education, job creation and other public services in the community²² which would actually help prevent crime rather than delaying intervention until after the offense has occurred, necessitating subsequent conviction and incarceration.²³

Second, and perhaps even more concerning and inhumane, is that this data requires us to recognize that not all LWOP prisoners are in fact guilty. The 49 prisoners released by the courts over the last 11 years were all released because of serious flaws in their convictions. Many are indisputably shown to have been innocent all along. Even those cases which were overturned on procedural grounds are not being reprosecuted. This casts serious doubt on the reliability of the original convictions because the failure to reprosecute is

a tacit admission that the evidence is insufficient to convict.

As for the fortunate few who have been able to successfully overturn their unjust first degree murder conviction, most have suffered at least 10 and more commonly 20 or 30 years of imprisonment before finally achieving these hard-won reversals. This number of false convictions is not inconsequential. The 49 reversals represent 14% of the newly committed prisoners over the 11 years. However, because of the long delay in achieving a reversal, it is difficult to assign a meaningful fraction to the proportion of false convictions. What is certain is that it is not a trivial number. Moreover, these false convictions and punitive delays have destroyed prisoner's lives and exacted a desperate toll on their families and communities.

The awareness that such a sizeable number of LWOP prisoners eventually are able to prove that they were falsely convicted should arouse additional grave concerns. This is especially true because the fraction of prisoners actually successful at overturning their false conviction is likely only a very small subset of the total number suffering this fate. LWOP prisoners do not enjoy the robust post-conviction resources offered to death penalty cases. Many are indigent and need to rely on jailhouse lawyers and over-burdened public defenders for their appeals. No surprise then that even when successful, it takes these defendants so long to achieve this overdue and just result.

There are many more first degree lifers who continue to adamantly assert their innocence but who have been unsuccessful at overturning their cases. As mentioned, LWOP prisoners have only limited access to effective post-conviction assistance and relief despite the finality of their sentences. While legal counsel is constitutionally mandated for their direct appeals (which are limited only to the existing trial record) such assistance is optional for often critical "New Trial Motions". These appeals are essential to expand often incomplete records to reveal previously unavailable evidence, including false statements by confidential informants, misleading forensic evidence, mistaken eyewitness identification, ineffective assistance of trial counsel, and other important shortcomings before and during trial. Without such successful motions, the chance of reversal remains vanishingly small.

Additionally, there is a clear reluctance by the SJC to reverse first degree murder convictions. "Judicial finality" is a deeply entrenched legal

principle. Finally, the SJC very rarely makes meaningful use of the comprehensive "capital review" under G.L.c. 278, §33E as the basis for reversal.²⁴ This situation has been further exacerbated by the passage of the very restrictive AEDPA (Antiterrorism and Effective Death Penalty Act) of 1996 which severely restricts access to meaningful Habeas Corpus review in Federal courts.²⁵ These days, relief in such federal appeals is almost never granted.

Recognizing that the system is not flawless should add a strong incentive that true justice requires that all those sentenced to LWOP should be eligible for a second chance. Making such prisoners eligible for discretionary parole after 25 years, provided they show a high likelihood that they are rehabilitated, exhibit responsible behavior, and have only minimal risks of violating the law upon release, should be a rational response. It is important to recognize that some are innocent and many others have matured to become much better persons than they were 25 years earlier when, in a desperate and often irrational period, they committed murder--a tragic act many subsequently deeply regret. The time to reform our laws to allow a parole hearing to consider giving them a second chance is now.

ENDNOTES

1. **McKillop M & Boucher A.** "Aging Prisoner Populations Drive Up Costs" (Pew Charitable Trusts, Washington, DC, February 20, 2018).
2. **Research & Planning Division, MA DOC.** Public Records Request, Feb. 2020.
3. **Nellis A.** "Still Life: America's Increasing Use of Life and Long-Term Sentences", p10 (The Sentencing Project, Washington, DC, May 2017). Louisiana is listed at #1 with 13.4% of the population serving LWOP.
4. Under the felony-murder rule "a person who knowingly participates in one crime as part of a joint venture is 'ipso facto also guilty' of [murder] committed by an accomplice in furtherance of the joint venture". Com v Brown, 477 Mass. 805, 823 (2017). In Brown, the SJC ruled, prospectively only, that in order to be convicted of murder, the defendant would need to be proven to have the intent to kill. None of the currently joint venture convicted LWOP prisoners will benefit from this change.
5. Establishing diminished capacity or responsibility because of mental defect or severe intoxication when committing murder is very difficult according to MA precedent. See, among others, Com v McHoul, 352 Mass. 544 (1967); Com v Shuman, 445 Mass. 268 (2005); Com v McDermott, 448 Mass. 750 (2006); Com v Odgren, 455 Mass. 171 (2009); Com v Berry, 457 Mass. 602 (2010); Com v DiPadova, 460 Mass. 424 (2011); Com v Miller, 477 Mass. 415 (2016).
6. Diatchenko v District Attorney for the Suffolk District, 466 Mass. 655 (2014); and Com v Brown, 466 Mass. 676 (2014).
7. See figure 1 and Table 2, infra.
8. **Nellis A.** "Tinkering With Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty" (U. of Miami Law Rev. 67: 439-458 (2013); Miami, FL).
9. ACLU. "At America's Expense: The Mass Incarceration of the Elderly" (ACLU, New York, NY, June 2012); **Greineder D.** Mass(achusetts) Incarceration of the Elderly: Morally Questionable, Costly and Unnecessary for Public Safety" J. of Prisoners on Prisons, 27(1) 17-54 (2018) Univ of Ottawa Press, Ottawa, Ont. Canada; **Durose MR, Cooper AD & Snyder HN.** "Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010" (Bureau of Justice Statistics, No. 244205, Washington, DC, April 2014); **Haas G & Fillion L.** "Life Without Parole: A Reconsideration", 2nd Ed. (Criminal Justice Policy Coalition, Boston & Norfolk Lifers' Group Inc., Norfolk(2016)).
10. **Haas & Fillion**, (see note 9); p8.
11. Miller v Alabama, 132 S.Ct. 2455 (2012) & Diatchenko v District Attorney for the Suffolk District, 466 Mass. 655 (2014).
12. **Haas & Fillion** (see note 9).
13. Ibid.
14. **Mass. General Laws**, chapter 69 of the Acts of 2018.
15. **Andersen T & Vaccaro A.** "Homicides Drop Sharply in Boston" (Boston Globe, 1/1/2020, A1).
16. See references in note 9.

17. Quoted in ACLU, "At America's Expense" p. i (see note 9); and in Haas & Fillion, p. 1 (see note 9).
18. Haas G. "MA DOC Expenditures and Staffing Levels for Fiscal Year 2019", p. 6 (Lifers' Group Inc., Norfolk, Oct 2019). This report available at www.realcostofprisons.org/writing.
19. Ibid.
20. MA DOC. FY2021 Budget Proposal, and projected prisoner population trends.
21. Forman B & Larivee J. "Crime, Cost and Consequences: Is It Time to Get Smart on Crime?" p. 6 (MassINC, Boston, MA March 2013).
22. Forman B & Widmer M. "Getting Tough on Spending: An Examination of Correctional Expenditure in Massachusetts" (MassINC, Boston, MA, May 2017); Engel L & Atkisson J. "Priorities and Public Safety: Reentry and the Rising Costs of Our Correctional System" (Boston Foundation, Boston, MA 2009). Between FY2011 and FY2016 state expenditures for Corrections increased 34% per inmate but only 11% for education per student and 6% for local aid per resident, while MassHealth spending per enrollee decreased by 6% (MassINC); Similar results were shown by the Boston Foundation in 2009.
23. Greineder. "Massachusetts Incarceration of the Elderly" (see note 9); Gottschalk M. "Caught: The Prison State and the Lockdown of American Politics" Princeton Univ Press, 2015).
24. Since the elimination of the death penalty in Massachusetts, first degree convictions are nominally afforded "capital plenary review" of all issues relating to the conviction under G.L.c. 278 §33E. However, almost none of the reversals of first degree LWOP sentences actually result from this so-called "favorable and comprehensive" review process. Typically, only issues argued by the defendant are considered and only rarely prevail.
25. Since the passage of the AEDPA in 1996 and the resultant amendments to 28 U.S.C. §2254, the numbers of total and successful federal Habeas Corpus petitions have plummeted precipitously.
26. Research & Planning Division, MA DOC. Public Records Request, January 2020 (Milford, MA).
27. Research & Planning Division, MA DOC. Public Records Requests 2015, 2017, 2019, 2020; MA DOC, Public Records Requests, 2017, 2019.



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To partner with families and other stakeholders to create solutions for sentencing reform, promote meaningful parole opportunities for all lifers, and assist lifers and long-termers to live positive lives both inside and outside of prison

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Advocate

Coordinate with any organization striving for similar goals in order to provide an effective use of penal and rehabilitative resources

Inform

Operate under sound ethical and democratic principles and share our knowledge with our members and those on the outside on criminal justice and prison reform issues, such as reducing recidivism, improving public safety, and building peaceful and productive relationships with family members, fellow prisoners, supporters, and the community

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