

MASS(achusetts) INCARCERATION OF THE ELDERLY
Morally Questionable, Costly and Unnecessary for Public Safety

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for
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SUMMARY

- MA incarceration rates have tripled since 1990, in large part because of longer sentences, resulting in the rapid aging of the prison population (pp 1-3)
- Corrections experts consider prisoners aged 50 and over as elderly because of premature aging and increased medical and mental health problems (3-4)
- MA has among the highest percentages of elderly (24%) and Life Without Parole (LWOP) (11%) prisoners in the nation (3-4)
- High and increasing costs of incarceration and criminal justice diverts funding from other public areas, including public education, public health, social services and local aid (4-5, 29-31, 39-46)
- As of January 1, 2015, the MA elderly (50 and older) prisoner population had increased 270% between 1999-2009 and 515% between 1999-2015. On 1/1/15 the elderly numbered 2552 and comprised 24% of total prisoners (up from 19% in 2011). Those 60-69 comprised 6% and 2% were 70 and older (7-10)
- 30% of MA prisoners are serving life or 20 year or more sentences, up from 17% in 2000. 11% are serving first degree life, 10% second degree, and 9% 20 or more years (10-15)
- Between 2005 and 2015 the total prison population increased by 8%; those with Person governing offenses increased by 18%; Property 11%; and Other by 104%. Those with a drug governing offense decreased by 29% and Sex by 8% (18-20)
- The DOC continues to house 17-18% in Maximum security, 68-69% in Medium, and 13-15% in Minimum/Pre-release. Since 2000, 10-11% of prisoners are being released directly from maximum (up from 2-3% in the 1990s) and since 2000, an average of 36% are released from minimum/pre-release (down from 46% in the 1990s) (21-22)
- Since 2002, recidivism rates for those released from maximum have been 50-60%, medium 38-45% and 27-37% for those released from minimum/pre-release (22-23)
- Evidence has shown that people age out of crime, committing few new crimes and have low rates of recidivism at age 50 and older.

In MA, between 2009 and 2014, 7-8% of new criminal commitments were by those 50-59, and 1-2% by those 60 and older. The 20-29 age group was responsible for 36-41% (18-20, 33)

For cohorts released between 2002-2011, total recidivism rates (including technical violations) were >40% for those under 40; 26% for 40-49; 25% for 50-54; 17% for 55-59; and 12% for 60 and older. Since technical violations added an average of 7% to the rates, the rates for new crimes are estimated to be 7% lower (24-25)

- The 1000 LWOP prisoners incarcerated on 1/1/15 can be estimated to cost approximately \$80 Million/year. The 225 LWOP prisoners aged 60-69 are expected to cost at least one million dollars each while in custody during the remaining years of their lives (28-29)
- As the numbers of prison beds increase, the benefit-to-cost ratio decreases until prison costs may exceed the cost benefits of harm reduction (32)
- Health care for elderly prisoners will require new facilities and increased treatment costs will continue to increase (29-30)
- Immutable LWOP sentences violate human rights norms as they offer no possibility of reform or rehabilitation, and are unnecessary because elderly LWOP prisoners pose few risks to public safety if released. Evidence shows that lifers have among the lowest risks of reoffending with serious crimes (34-36)
- The ACLU estimates that nationally, on average, more than \$66,000 per year can be saved for each elderly prisoner released on parole. Adjusting the estimate for higher regional costs suggests that between \$94,000 - \$144,000 per year would be saved for each elderly prisoner paroled in MA (37-38)
- The increasing costs for criminal justice and incarceration coupled with rising costs for high-tech and modern medications for elderly prisoners jeopardizes funding for other important public services like education, public health and to sustain communities (34-36, 39-40)
- There is a need to reconsider current policies to achieve better outcomes. Remedies to effect constructive change and reduce incarceration are proposed (41-46)

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"[Y]ou actually create victims by not letting [elderly prisoners] go and [not] 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...'"

Burl Cain, Warden of Louisiana State Penitentiary, Angola^a

I. INTRODUCTION

The Massachusetts incarceration rate has tripled since the early 1980s.^{2,3} Until then, Massachusetts incarcerated smaller numbers of offenders and focused more on prisoner rehabilitation. Considerable efforts were expended on preparing prisoners for release and re-entry with active pre-release planning and opportunities. Additionally, furloughs allowed prisoners to prepare for re-entry. Three-year recidivism rates hovered in the mid-20-percent range rather than at the current 40-percent levels. However, during the 1980s, 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. Swept up in "tough on crime" fervor, 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.^{2,4} At the national level, the Federal Crime Bill provided monetary

^a The author gratefully acknowledges and credits the ACLU for identifying and publishing these seminal words.

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 increased time served by imposing mandatory minimum sentences for a wide range of offenses, while reducing parole eligibility, curtailing sentence reductions for good behavior and providing multiple sentence enhancements for special circumstances and habitual offenders. The overall result significantly lengthened not only new sentences but also increased the effective time served for all prisoners, including those serving sentences imposed years earlier by judges expecting much earlier release. Ironically, by this time Massachusetts crime rates were already falling, a trend which continues into the present millenium.^b Although some have suggested that it was the increase in incarceration which caused the steady decrease in crime, rigorous research has shown that this was not the case and has concluded that the massive use of incarceration can account for only a small portion of the continuing decrease.^c In response to the increased incarceration, blue ribbon Massachusetts commissions on criminal justice have recommended reforms, but because crime and corrections remains so highly politicized, most of these have not been implemented.^{2,5} Neither the Massachusetts Department of Correction (DOC) nor the legislature have responded effectively to these calls for rational reform. In fact, as recently as 2012, the enactment of

^b Crime rates in Massachusetts are down 37% since 1990² and continuing to decrease statewide and in Boston: homicides statewide and in Boston have fallen by more than half from the rates in the 1980s and early 90s (Boston Globe, 6/17/15, B1&B3); violent and total crime (except for vehicular theft) continue to decrease year by year (Boston Globe, 5/22/14, B2; 9/24/14, B1&B6; 12/31/14, A1&A8; 1/19/15, B1); total crime index and criminal case filings are down 10% 2005-2014; arrests are down 12% since 2008 and convictions decreased 31% since 2004 (Council of State Governments, Massachusetts Working Group Report, January 2016).

^c Most experts agree that at most 10-30% of the decline in crime can be attributed to the dramatic increases in U.S. incarceration over the last three decades. Of note, Canada and Europe experienced similar decreases in crime during this time with no increase in incarceration. There is also evidence that those U.S. states that most reduced incarceration rates in the late 1990s and early 2000s experienced the most marked reductions in crime. For example, New York State, which reduced incarceration rates by 15% between 1997 and 2007 (contrasted with a national increase of 14%), led all states with a 40% reduction in violent crime (compared to a national decline of 24%).^{3,4}

the so-called "Crime" or "3-strikes" bill increased many penalties, including requiring judges to impose mandatory maximum sentences without any possibility for parole or sentence reduction for offenders with two prior felony convictions for 19 different offenses.⁶ Although the same bill does provide limited reductions of mandatory minimum for certain drug offenses, it also required new mandatory life without parole (LWOP) sentences for the 19 new offenses, where previously there was only one crime (first degree murder) with such a requirement.⁶

As a result, the bloated Massachusetts prison population continues to stubbornly resist meaningful downsizing. In addition, the frequent imposition of LWOP and the proliferation of extremely long other sentences, as well as the practical elimination of commutations and sharply decreased paroling rates have contributed to the rapid aging of the state prison population. What makes this especially problematic is that there is a growing consensus that prisoners aged 50 years or older typically need to be considered elderly because they have aged prematurely.^{7,8,9,10} This is also the definition of elderly adopted by the National Institute of Corrections.¹¹ In sum, evidence suggests that prisoners are appropriately considered to have a physiological age some 10-15 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, which is aggravated by separation from family and community.^{7,10} Additionally, often substandard healthcare and nutrition during lengthy incarcerations accelerates 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 healthcare starting long before their confinement. All of these factors are associated with poor health outcomes.^{7,13,14,15} Beyond that, prisoners have a high incidence of mental illness¹² which further predicts poor

health outcomes.^{7,13,14,15} Consequently, most corrections authorities have appropriately classified prisoners aged 50 and over as elderly in order to assess required resources.

This situation has serious economic, moral, and public safety implications for correctional policies because annual costs to incarcerate elderly prisoners typically run at levels 2 to 4 times greater than average costs.^{7,8} This is of particular concern for Massachusetts because not only does the state have very high prison costs (currently approximately \$50,000 per prisoner per year), Massachusetts also has among the highest healthcare costs in the nation. Additionally, the DOC also has one of the highest percentages of elderly prisoners of any state. In 2011, Massachusetts ranked third nationally with 19.4% of prisoners 50 and older, trailing only New Hampshire (19.8%) and W. Virginia (20%)⁷ The most recent data (January 1, 2015) shows elderly Massachusetts prisoners now comprise 24% of the total¹⁶ (see also Tables 3 & 4 and discussion below). This rapid increase in only 4 years suggests that Massachusetts may actually now lead the nation in the percentage of such prisoners. This would not be surprising since Massachusetts also ranks at the top in the percentage of prisoners serving LWOP sentences^{16,17} who currently represent 11% of the prison population.

The confluence of these factors has brought Massachusetts to circumstances which are not only costly but also are morally questionable, and unnecessary. They are costly since the elderly are especially expensive to incarcerate because of high healthcare costs and needed 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 and restored stability and 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 behavior such that the elderly more rarely offend or recidivate. When they do offend, they are mostly one-time offenders, suggesting that many could be released without endangering public safety.^{2,4,7,8,9}

This report 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. Additionally, it strives to offer some opportunities for future mitigation and change to improve our communities while preserving public safety, reducing costs, and respecting the humanitarian ethic which reflects the express will of the Massachusetts people.¹⁹

II. PROFILE OF MASSACHUSETTS STATE PRISON POPULATIONS

A. Definitions

The Massachusetts Department of Correction (DOC) uses multiple definitions when describing its populations.¹⁶ Additionally, the definition of "jurisdictional population" was changed in 2010 by adding non-criminally sentenced prisoners. Table 1 summarizes the makeup of five frequently used population groupings.

TABLE 1
DOC POPULATIONS

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

+ means included; - means excluded

Over the years, prisoner data has been compiled and reported based on a variety of these populations which accounts for the differences 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, 30-39, 40-64, and 65 & over. This has complicated teasing out the population of special interest to this report, those 50 and older. Since 2010, prisoner data is reported in 10-year age brackets through age 59, plus 60 and older. Occasionally, some older groups are also delineated. These practices complicate longitudinal comparisons, especially since different subgroups may be heterogeneous: for example, the civil commitment group tends to be older and the pre-trial group younger.

B. Aging of the DOC Resident Population

Tables 2, 3, and 4 summarize age data for DOC prisoner populations between January 1, 1999 and January 1, 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% of the total population. Consequently, the "50-64 Est" row is derived by subtracting 25% 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% 1999-2005 then increased 15% by 2009. It is apparent, even with the 20% decrease in total population, that by 2005 the number as well as the percentage of the older age groups is increasing while the younger age groups are decreasing. Not surprisingly, the increases were even more dramatic by 2009. The 40-64 age group increased by 30%, those 65 and older increased by 99% and the especially relevant "50+ Est" group increased by 270% and 1251 prisoners.

Table 3 extends the data through January 1, 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%. The older age groups continue to increase: 50-59 increasing by 368 (28%) and 60+ adding 271 (47%) between 2009 and 2015. The bottom row combines these two into the 50 and older group, increasing 33% between 2009 to 2015 and 515% between 1999 and 2015. The latter comparison adds well over 2000 prisoners to this group despite the 8% 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 2552) are 50 years and older. This contrasts with the national percentage of such

TABLE 2
PRISONER AGE DISTRIBUTION 1999-2009^a

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%	3768 38%	3892 38%	4055 39%	+306 +10%	+924 +30%
65+	123 1%	133 1%	149 1%	155 2%	161 2%	156 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 ^b 14%	+851 +250%	+1129 +331%
50+ Est	464 4%	702 7%	885 9%	1012 11%	1180 13%	1145 12%	1360 15%	1484 16%	1529 16%	1590 16%	1715 ^b 17%	+896 +193%	+1251 +270%
Total	11158	10712	10095	9607	9223	9060	8979	9405	9778	10132	10342	-20%	-7%

^a "Old" Jurisdiction population (criminally sentenced, housed inside & outside DOC) on January 1.

^b 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^a

Age	1999 ^b	2009 ^b	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%	-196 -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 ^c 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%

^a "New" Jurisdiction population (total custody population plus those housed outside DOC) on January 1.

^b 1999 & 2009 data adjusted to reflect "new" jurisdiction population definition adopted in 2010

^c Estimate. See Table 2 and text.

prisoners which, as of December 31, 2012, was only 16.7%, two-thirds of the 24% for Massachusetts.²⁰

Table 4 elaborates on the oldest age groups, showing available data between January 1, 2011 and January 1, 2015, for the more limited criminally sentenced custody population. Once again, even with only a 4 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, likely mostly with very long or LWOP sentences. They age inexorably, their numbers pruned predominantly by death.

At the other end of the spectrum are the age distributions of new court commitments, prisoners as they flow into the prison population. These data, summarized below (section II.F.3), makes clear that the majority are under 40 years old and less than 10% of newly committed prisoners (including any returning recidivators) are 50 and over. From this 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 offenders participating in an elderly crime wave.

C. Sentence Length of DOC Prisoners

The preceding is confirmed by the data in Table 5, summarizing the changes in sentence length for DOC prisoners between January 1, 2000 and January 1, 2015. Of note, prisoners with sentences <10 years have substantially decreased (-2125, -30%) while those with sentences of 20 years or more, second degree life, and first degree life have grown by 218%, 14% and 46%, respectively. No breakdown is available for the actual sentence length of those sentenced to 20 or more years. While second degree lifers are eligible for parole after 15 years, there is no guarantee that parole will be granted and many remain long after they are first eligible. First degree lifers serve mandatory LWOP (life without the possibility of parole); their only means of release is commutation or pardon, none of which have been granted for several decades, or, rarely, by

TABLE 4
ELDERLY PRISONER AGE DISTRIBUTION^a

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%

^a Criminally sentenced custody population on January 1.

TABLE 5
PRISONER SENTENCE LENGTH^a

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

^a Criminally sentenced jurisdiction population. 2010 data not available at publication.

^b 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.

overturning their verdict. Summing these three groups (the last row) shows that by 2015 these prisoners number 2847 individuals, constituting 29% of the criminally sentenced jurisdiction population. They have increased by 1013 and 55% between 2000 and 2015 although the total population decreased by 1042 and 10% during the same interval. This proliferation of very long sentences is a major factor contributing to the rapid aging of the Massachusetts prison population.

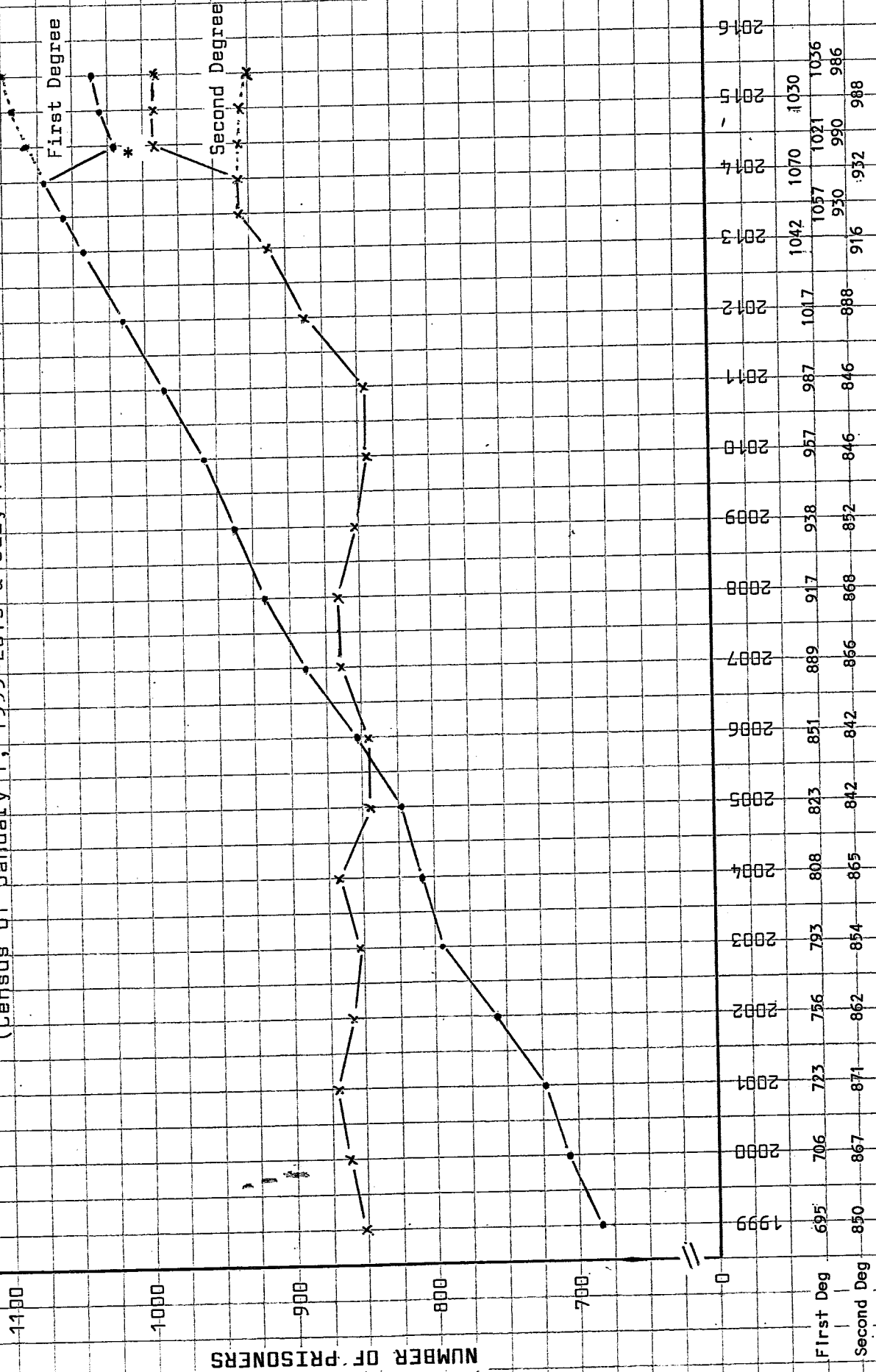
D. Lifers in the DOC

Figure 1 graphically and numerically shows the details of prisoners serving life sentences in the DOC between 1999 and 2015. Not surprisingly, numbers of first degree lifers, with virtually no opportunity for release, have continued a steady climb. By contrast, the population of second degree lifers held virtually constant, the numbers being added yearly mostly balanced out by paroling rates. However, between 2011 and 2014, the numbers of second degree lifers began a steady increase, paralleling first degree lifers, as a result of a politically motivated change in the Parole Board following the murder of a police officer by a parolee. This resulted in an abrupt downturn in second degree paroles. As also shown, the sudden increase in second degree lifers (and decrease in first degree) in mid-2014 reflects the reclassification of juvenile first degree lifers as a consequence of U.S. Supreme Court and Supreme Judicial Court decisions that revised their sentences (although not their verdicts). Although it appears that the numbers of second degree lifers may have leveled off again, future trends will need to await results of additional recent changes at the Parole Board.

Table 6 tabulates the steadily increasing annual census of first degree lifers, including the numbers of new first degree commitments each year. As is apparent, in every year except 2011, first degree lifers are fewer at year's end than expected, leaving a number unaccounted for. While an unknown number of first degree lifers may have reversed their convictions, the bulk of those unaccounted for are likely to

FIGURE 1
LIFE SENTENCED PRISONERS

(Census of January 1, 1999-2015 & July 1 2013-2015)



*During 2014 the DOC reclassified 62 juvenile first degree lifers after Datchenko v DA, 466 Mass 655 (2013) made them eligible for parole, although their verdicts were not changed

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 ^a	0	0	0	0	0	-62
Actual census December 31	957	987	1017	1042	1070	1030
Reversed or Died in Prison ^b	20	8	[4] ^c	16	12	13

^a 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).

^b 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.

^c 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.

have died in prison since there have been no commutations or pardons.

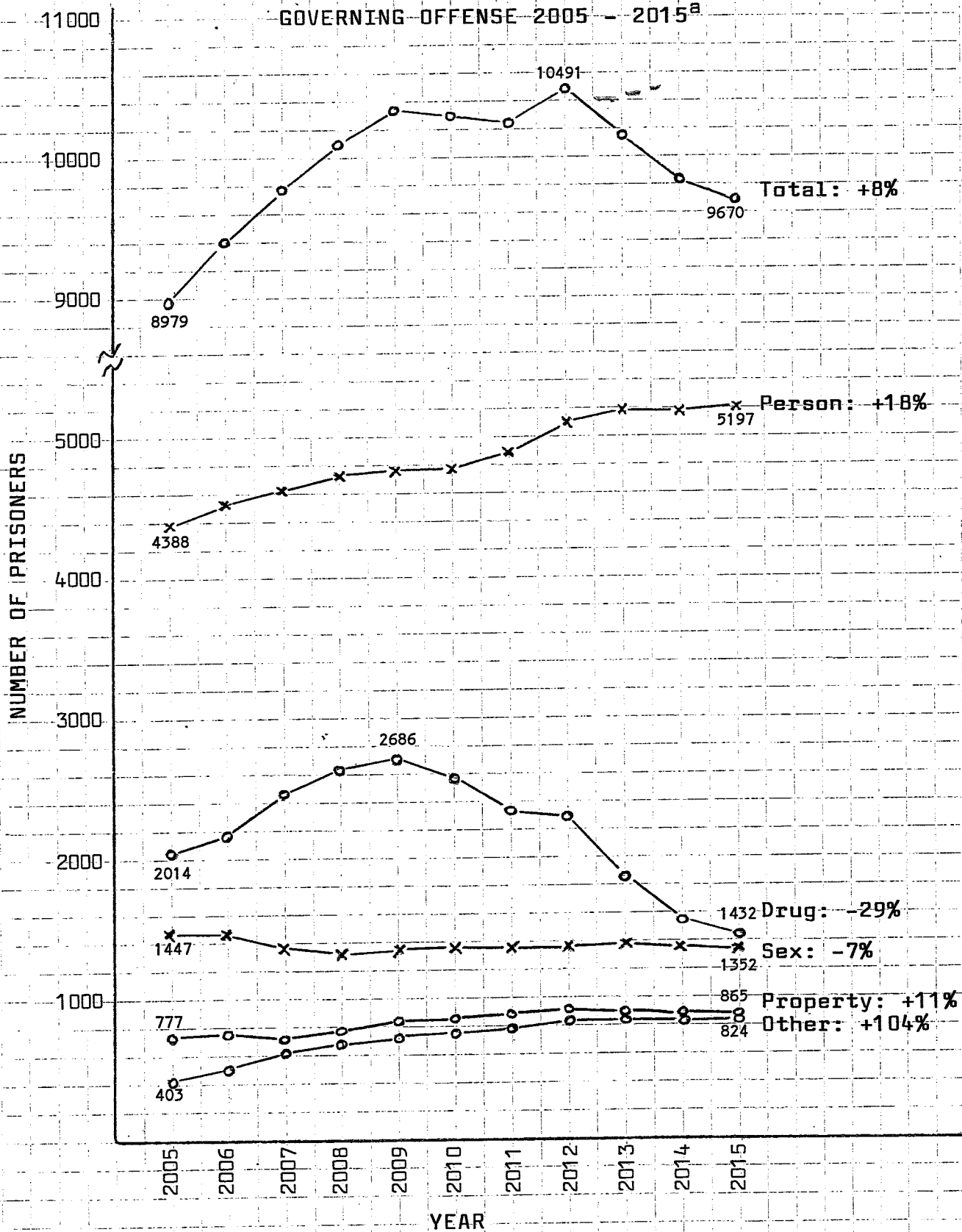
As of January 1, 2015, of the 1000 first degree lifers held in custody by the DOC (30 are housed elsewhere) 425 were 50 and over. Of these, 12 were 80 and over and an additional 44 were in their 70s. The average life expectancy for U.S. males is 76²⁴ and, as discussed earlier, prisoners are known to age by 10 or more years sooner than average.^{7,9,10} There is little doubt that under current Massachusetts laws, these elderly prisoners have had their LWOP sentences functionally transformed into "death by incarceration" sentences. And, they are moving toward that end.

E. 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.¹⁶ Figure 2 depicts graphically for the period January 1, 2005 through January 1, 2015, the changing numbers of the DOC criminally sentenced jurisdiction population 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 drug offenders. This category increased 33% 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% between 2009 and 2015. This notable reduction was the combined result of a flurry of court releases associated with data falsification by an analyst at the State Crime Lab (possibly some 350 releases) plus the implementation of a retroactive reduction in mandatory minimum sentences for drug offenses that was part of the "Crime Bill" passed in August 2012. Additionally, between 2009 and 2014, there was a gradual decrease in the annual number of new commitments for drug offenses (Table 7). Also shown in Figure 2, the numbers of those convicted of Person and Other offenses had steady increases 2005 to 2015 while Property and Sex offenders demonstrated only modest changes.

FIGURE 2

GOVERNING OFFENSE 2005 - 2015^a



^a Criminally-sentenced jurisdiction population on January 1.

F. New Court Commitments

1. By Governing Offense

Table 7 compares the numbers of new court commitments accumulated during the years 2009 and 2014 as well as the resultant resident population for each of the major governing offenses on January 1, 2010 and 2015. Also shown are the percent of new commitments divided by the resident population for each offense as well as the percent of new commitments as a fraction of the total population. What is surprisingly apparent is the large percentage of new commitments for Property and Other offenders (53-71%) as reflected in the January 1 data. This demonstrates a huge turnover in these categories and suggests that most offenders in those categories must be serving short sentences. Although male prisoners in Massachusetts generally serve most short sentences (up to 2½ years) in county facilities, almost all convicted females are housed by the DOC in state prisons. In fact, data show that there are many women serving less than one year in the DOC, and there are sizeable numbers of both genders serving less than three years. During 2009 and 2014, 38% and 41%, respectively, of new commitments received sentences of less than 3 years while 65% and 67%, respectively, served sentences of less than 5 years. By contrast, only 10-11% of new commitments were for sentences of 20 years or more, including all those with life sentences. As shown in Table 7, each year Person offenders add only 9-10% to the total prison population, but because these offenders are serving long sentences, they have accumulated to represent more than half of the total population. Similarly, Sex offenders, who make up only 8% of new commitments and who each year add only 2% to the total population, have accumulated to 13-14% of the total because of their longer sentences. Drug offenders fall in the middle and it is apparent, with the shortening of drug sentences recently and the one-time release of some 350 drug offenders because of the Crime Lab scandal, that their numbers have decreased from 2571 (25% of total) to 1432 (15% of total). Those admitted during 2014 already constituted 41% of

TABLE 7
NEW COURT COMMITMENTS 2009 & 2014^a

2009	# New 2009 Commitments	Resident # on 1/1/2010	New/Resident (%)	New/Total (%)
Person	932(31%)	4772(47%)	20%	9%
Sex	222(7%)	1348(13%)	16%	2%
Drug	852(28%)	2571(25%)	33%	8%
Property	505(17%)	845(8%)	60%	5%
Other	<u>513(17%)</u>	<u>723(7%)</u>	71%	5%
Total	3024(100%)	10259(100%)		
2014	# New 2014 Commitments	Resident # on 1/1/2015	New/Resident (%)	New/Total (%)
Person	1001(37%)	5197(54%)	19%	10%
Sex	214(8%)	1352(14%)	16%	2%
Drug	581(21%)	1432(15%)	41%	6%
Property	499(18%)	865(9%)	58%	5%
Other	<u>435(16%)</u>	<u>824(9%)</u>	53%	5%
Total	2739(100%)	9670(100%)		

^a Criminally sentenced jurisdiction population

the resident number of drug offenders by 1/1/2015. This suggests that many of the resident drug offenders carry only medium length sentences.

2. New Commitments by Sentence Length

The substantial turnover of those incarcerated for so-called non-violent crimes (drug, property, other) suggests that most must carry short sentences. Although the DOC does not report such data, this may well be correct. Certainly there are large numbers of new commitments that carry very short sentences. Reviewing data between 2009-2014 shows that of those prisoners accumulated each year 14-16% will serve <1 year, 21-25% 1 to <3 years, and 24-26% 3 to <5 years. In fact, it is striking to note that, as typical of every other day at MCI-Framingham, the medium security prison for women, on 1/1/2015, 16% of the women incarcerated were serving less than 1 year and another 37% were pre-trial detainees. It may be appropriate to wonder if public safety is actually enhanced by incarcerating such numbers of low-level and all pre-trial detainees or even the 24-26% serving less than 3 years. Are these short sentences not indications that these offenders are deemed to have only a small likelihood of seriously endangering public safety? Possibly other sanctions, with no prison time, would be more appropriate, especially if linked to probation and robust community-based rehabilitation. Such sanctions and interventions should be linked with work requirements, allowing for continued income and preventing family disruptions. Outcomes are very likely to be superior with little to no risk to public safety.

3. New Commitments by Age (Table 7A)

Review of new court commitments over the last six years (2009-2015) reveals that the vast majority (90-92%) are incurred by those under 50 years of age. Only 7-8% and 1-2%, respectively, are incurred by those 50-59 and 60 and older. The largest contributor is the 20-29 year old age group, accounting for 36-41% of new commitments, followed by the 30-39 year olds with 29-31%. These data validate, for Massachusetts, the

TABLE 7A
NEW COMMITMENTS BY AGE^a

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%	1164 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%	867 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%
Total	3024	3072	2941	2709	2712	2730	2866

^a Criminally sentenced jurisdiction population

observations made nationally and in other states, that those 50 and older typically "age out" of crime and relatively rarely commit new offenses. This is a factor that Massachusetts lawmakers need to consider as they look to future criminal justice policy.

G. Housing and Releases by Security Level

1. Security Levels of DOC Prisoners

The Massachusetts DOC has consistently housed a large percentage of its prisoner population in higher security levels. Possibly one reason is that, since 1990, the DOC has added 1200 maximum security and 1000 medium security beds, but only 39 minimum/pre-release beds.² Most states house no more than 7-10% of prisoners in maximum security, but Massachusetts has typically exceeded that percentage. Since at least 2000, the DOC has consistently housed 17-18% of prisoners in maximum security, 68-69% in medium security and only 13-15% in minimum or pre-release.

This policy has several consequences. Higher security is significantly more costly than lower security because of the need for increased security staffing which accounts for almost 70% 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. Finally, the highly restrictive and regimented environment of maximum security provides little opportunity for social maturation or to foster behavior 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 allow prisoners to gradually acclimate to free world behaviors, environment and stresses, plus giving them opportunities to earn money, find housing, and make work-related contacts. Without these opportunities, the likelihood of recidivism is much greater.²²

2. Releases by Security Level

Not surprisingly, therefore, recidivism rates are substantially greater when prisoners are released from higher levels of security. Nevertheless, especially in recent years, the DOC continues to keep the majority of prisoners in higher security, including most soon to be released, and even releases the vast majority directly from either maximum or medium security. In many instances, there are simply no minimum or pre-release beds available for those eligible for release even if they are classified to low security. Additionally, multiple arbitrary classification rules and over-rides prevent others from being classified to low security even when release is imminent.

This problem has been substantially magnified ever since the DOC expanded its maximum and medium security bed capacity during the 1990s and early 2000s. Table 8 displays the pattern of release during the 1990s and again more recently. It is perhaps not surprising that releases directly from maximum security tripled in concert with the opening of a new 1000+ bed maximum security prison in 1998. Despite this, releases from medium security have not been reduced, rather the percentages were cannibalized from low security. Apparently, the DOC has not felt a need to expand minimum or pre-release beds; in fact, some minimum facilities have been downsized or closed. More surprising is the fact that releases from maximum security were less prevalent during the 1980s and 90s, eras when violence in prisons and crime rates were much higher than now. One might have expected the opposite.

H. Recidivism of DOC Prisoners

1. Effect of Security Level on Recidivism

Since the new millenium, the DOC has begun tracking 3 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 the lower portion of Table 8. It is apparent that those released from minimum or pre-release recidivate at significantly lower rates than those

TABLE 8
RELEASE & RECIDIVISM BY SECURITY LEVEL

	1991	1993	1995	1997	1999	2002	2004	2007	2008	2009	2010	2011	2012	2013	2014
Level															
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^a

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%

^a 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.

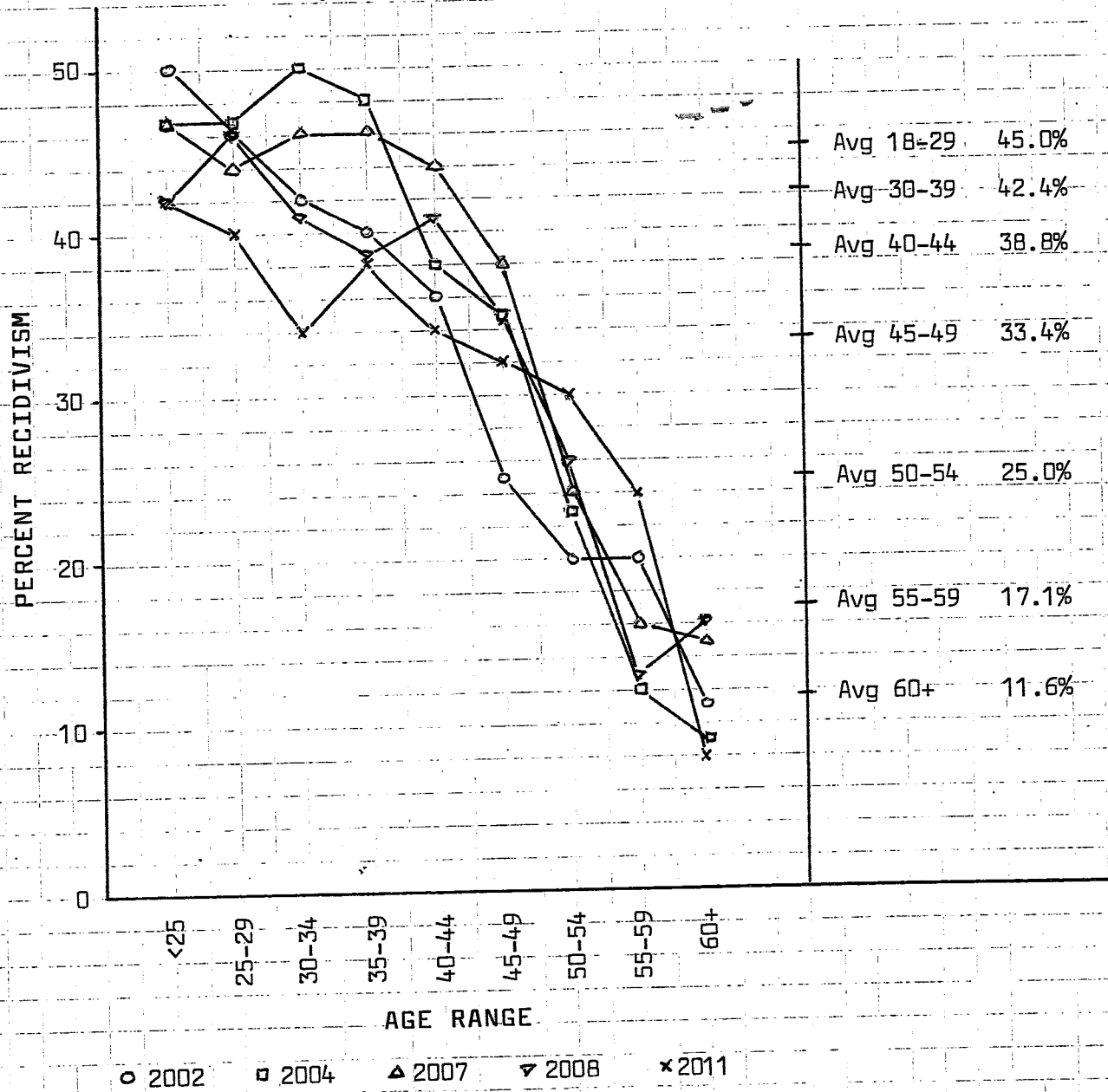
from medium or maximum security. The 10-11% of prisoners released from maximum security, recidivating at almost 60%, account for almost as much recidivism and reincarceration as the more than 30% released from low security. By releasing the largest group from medium, the DOC loses the benefits that might have been achieved were these prisoners transitioned through low security. It seems clear that current DOC release policies are counterproductive, costly and may be harmful to public safety.

2. 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."⁷ 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 prisoners from 15 states (almost two-thirds of all prisoners released in the U.S. in 1994), Lanigan and Levin²¹ reported that only 17% of those released at age 45 and older committed new offenses within three years (as contrasted with rates of 30-40% for those under 25). Similar data has been reported by most states⁷ and makes clear that recidivism decreases substantially as prisoners age. Although not available in Massachusetts, data from other states further suggests that most of the elderly in prison are one-time, first offenders.⁷ For example, a 2009 Ohio study showed that 71% of prisoners aged 50 and over were first-time offenders. And, data from the Bureau of Justice Statistics similarly confirmed that the elderly prisoner population is comprised predominantly of those convicted and sentenced when they were much younger. Such results continue to provide evidence that the elderly "age out" of crime, even if they have offended at a younger age.

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

FIGURE 3
 RECIDIVISM RATE BY AGE 2002-2011^a



^a Recidivism rates are total rates, including technical violations. To estimate rates for new offenses, subtract 7% from total rates (see text).

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 which do not represent 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% lower. This suggests that subtracting 7% 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.

3. Effect of Programming and Rehabilitation on Recidivism

Prisoners, in general, have limited levels of education and vocational training upon commitment. Acquiring such skills is important for them to find work after release, especially since jobs and housing are the two most important factors in predicting successful re-entry and decreased recidivism.²² 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.² Additionally, changes in federal law have virtually eliminated college-level education for prisoners. Currently, the DOC allocates less than 2% 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, 2.09% in FY2011; \$10.7 million, 1.96% in FY 2013).¹⁶

Not surprisingly, this limited effort about what should be a core function for the DOC (prisoner rehabilitation) has resulted in inadequate prisoner programming. The number, variety, and access to programs is 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).² Both have had over one thousand

prisoners waiting for entry. There is little doubt that these failings contribute to the stubbornly high rate of recidivism in Massachusetts. The state did much better in earlier years, achieving recidivism rates at half of today's rates when there was greater emphasis on education and rehabilitation.

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 crime²³ and that a reduction of a mere 5% in the rate of recidivism would provide up to \$150 million in annual savings in Massachusetts.² Past experience and other research shows that such a reduction, or even more, should be achievable.

III. CONSEQUENCES OF THE AGING POPULATION

A. Costs of Elderly and LWOP Prisoners

As of January 1, 2015, there were 2552 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.^{7,8,9,10}) Most of these elderly likely represent the bulk of the 29% of prisoners serving life or 20 years or more. While some may be eligible for eventual release, there are 1000 serving LWOP who will be incarcerated until their deaths. Of these, on January 1, 2015, 575 were under the age of 50, 200 between 50-59 and 225 60 or older. 303 were between 40-49. This group can be expected to generate costs in excess of \$80 million per year.^d Furthermore, as this group ages and more become even older, costs will rise. Although the very oldest prisoners will likely die off, 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^e, such that each one will likely incur additional costs averaging \$1 million or more before dying. Additionally, as larger numbers move into their 70s, it is likely that the cost to incarcerate this current crop of LWOP prisoners will soon exceed \$100 million per year.

B. Necessity for Special Care for Sick and Elderly

It is clear, especially with the aging prisoner population, that current DOC special care facilities will need to be expanded and new facilities established. At present, the DOC operates only two units (MCI-Shirley and SBCC) 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 units at Shirley and SBCC

^d 575 @ \$50K = \$28M; 200 @ 100K = \$20M; 225 @ \$150K = \$34M; Total = \$82M. Not all will expend the average, but some will far exceed it.

^e The average life expectancy for U.S. males is 76²⁴ (women is 81), but the CDC reports that once men attain 65, their life expectancy increases by 18 additional years.²⁵ Even after discounting their survival for the known premature aging of prisoners, these elderly lifers, once they have reached their 60s, are likely to live for 10 or more years.²⁶

were fully utilized with an average census of 21 patients each month and are considered skilled nursing facilities (SNFs).²⁷ During a typical 3 month period in 2014, 15% of patients were aged 46-55 and 85% aged 56 and older. During FY 2010 to FY 2014 there were 195 deaths in the DOC, 85% 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%) in those aged 56 and older. These data confirm the importance of age as a predictor of chronic illness and medical needs.²⁷

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 per year. Overflow and tertiary inpatient care as well as advanced tertiary consultations, procedures and imaging are provided by Boston Medical Center (BMC). The exact nature of financial arrangements between the DOC, MPCH (the medical contractor) and the State are unpublished and 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 (see also section IV.E below). The Shattuck unit is shared with counties and is typically filled to capacity; 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, COPD, 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 over-burdened, the legislature has requested the DOC to research the feasibility and costs of additional SNF-level resources and two responses have been offered.

1. Proposal for LSH Chronic Care Unit²⁸

Lemuel Shattuck Hospital, the current provider and host of the DOC's correctional acute care inpatient unit (8N) has developed a proposal for a Correctional Chronic Care Unit (SNF) at the hospital. Using metrics based on the hospital's free world geriatrics unit (5N), 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".²⁸ 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.

2. MPCH Proposal for 90-bed Facility²⁷

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: a 30-bed subacute 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. 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. Nevertheless, this proposal is a good starting point and emphasizes that, unless current criminal justice policies are revised, substantial resources will be required to care for the rapidly aging DOC

population. At best, this new facility will supplement, not replace, existing resources.

C. 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.¹⁸ 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 all were 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.¹⁸ 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.

IV. DISCUSSION

A. Too Many Prisoners

While the Massachusetts rate of incarceration ranked 47th out of 50 states in the 2009 report, "One in 31",³ 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 Commonwealth's current rate of incarceration ranges between 330 and 350/100,000 while more than half the world's countries have rates under 150.²⁹ While the Commonwealth fares well compared to the U.S. national rate of about 700/100,000,^{29,30} the Massachusetts rate still far exceeds the rates of all other developed countries and vastly exceeds similar levels prevalent in the U.S. 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 325-400/100,000 where increased incarceration becomes counter-productive, failing to reduce crime and may actually increase it.³ Family and community disruption and increased resources expended on lower level crime progressively decrease the effectiveness of wide-spread enforcement. It is clear that the benefit-to-cost ratio of prison beds shrinks dramatically as rates of incarceration increase; for many, 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¢ for every dollar spent on incarceration.^{3,31} While few states have made such a detailed analysis, there is little doubt that benefits are dramatically reduced as levels of incarceration become excessive.^{3,7,32}

B. Too Many Elderly Prisoners

As shown earlier, 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 and 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% of the DOC population, a level almost 50% above the national average (16.7%).²⁰ This is not only a high percentage, but also amounts to a sizable number of prisoners (2552 as of January 1, 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 (Figure 17 in reference 7). This study, like many others, shows that arrests are strongly skewed towards younger offenders. Taken together with Massachusetts data already reviewed that less than 10% of new criminal commitments involve those 50 and older, it is clear that relatively few new crimes are committed by those over 50. 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%, the rates of new offenses committed by recidivating ex-prisoners 55 and over likely fluctuate between 5 to 10%. 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.^{4,7,8,9}

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.^{9,10} Very few are considered and almost no one is actually released before dying in prison.¹⁰ 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.

C. Too Many LWOP Prisoners

The overall percentage of U.S. and state prisoners serving life sentences is 10.6%,²⁰ and they currently number approximately 150,000, a 4.4-fold increase over 1984.¹⁷ About one-third of these are serving LWOP. Massachusetts has the dubious achievement of having sentenced 21% of state prisoners to life, and more than half, amounting to 11% 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 Luisiana. There are also additional prisoners serving virtual-LWOP sentences of 40, 50 or even more years that are hidden in the expanding >20 year 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 Case of Vinter and Others v. United Kingdom, European Court of Human Rights, 9 July 2013).³³ 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.¹⁷ The excessive use of LWOP sentences in the United States has been extensively reviewed.^{17,42} 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).¹⁷ 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 because 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% of death penalty cases are reversed because of the stringent review of cases mandated by federal law, no more than 10-20% of non-capital, non-death penalty cases, including LWOP, are reversed.¹⁷ 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 U.S. criminal justice system,³⁴ 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.³⁵ 188 murderers and 51 capital rapists were released on parole (4 died) and were assessed after 5 years in the community. 19 (8%) had technical violations, 3 committed misdemeanors and 29 (11%) participated in felonies (mostly property and drug offenses). One murderer killed again and two rapist reoffended for a 1.2% 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% of murderers return for another murder. Of 11,532 murderers released between 1971-1975 only 26 killed again (0.2%). 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.³⁶ By contrast, California's overall three-year reincarceration rate for new crimes is 49%. 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 even murderers 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. And, 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.

D. Too Many Costly Prisoners

Incarceration is always costly but 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 has 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.^{9,10,14} Due to the complex medical issues, problems and needs of elderly prisoners and the constitutionally mandated requirement to provide appropriate health care for them, costs 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% of the population, were responsible for 38% of medical costs; and North Carolina where 72% of healthcare costs were attributable to 50 and over prisoners.³⁷

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.^{7,30,41} A seminal report by the ACLU has direct applicability to Massachusetts.⁷ When coupled with costs delineated by others,^{2,3,4,16,18} it is apparent that Massachusetts and the DOC fall into the high cost category referenced by the ACLU analysts. However, even at the mid-range of national costs, the ACLU report's estimate for savings from the release on parole by 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/year/prisoner (Table 9).

TABLE 9
ESTIMATED ANNUAL FISCAL SAVINGS
PER ELDERLY PRISONER PAROLED

	ACLU Estimate ⁷	Adjusted MA ^a
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	- 85	- 123
Net Annual Savings	+ \$66,294	+ \$ 94,578-144,578

^a 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.

Keeping in mind that, as of January 1, 2015, there were 2552 prisoners 50 and older, it seems credible that considerable savings could be achieved by selecting for parole a reasonable number determined to be at low risk of re-offending.

E. 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.^{38,39} 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% because of collateral costs borne by centralized budgets.³⁸ 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% to that state's DOC budget.

F. Escalation of Costs by Medical Technology and New Medication

Future expenditures for the elderly and the specialized care facilities that will be needed if a sizeable portion of that population is not released have been reviewed in section III.A & B. In addition, necessary hospice care and increasing numbers of prisoners needing complex, high technology care will further inflate healthcare expenses to unprecedented levels. The advent of proliferating, very high cost biologic 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 disproportionately affect the elderly. Furthermore, these medications are converting previously lethal illnesses (e.g. heart attacks, cancers, HIV) into chronic illnesses requiring ongoing, 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 biologic medications plus the substantial expansion of modern "precision" medicine. For example, the necessity to provide extraordinarily expensive \$40,000 ICDs (implantable defibrillators) to cardiac patients³⁹ or \$100,000 per treatment hepatitis C medicine to the 17% of infected prisoners⁴⁰ 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.

G. Competition for 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. The Boston Foundation review of 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 are a clear example of such concerns.¹⁸ As reported, between 1998 and 2008, criminal justice expenditures for the DOC, Sheriff's departments, Parole and Probation increased by 12.4%, 20.5%, 2.6%, and 163%, respectively, while higher education, public health, and local aid decreased by 7.6%, 3.3%, and 0.9%, respectively. Only K-12 education was spared, increasing by 13.9%. 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 last resort. Medicaid, welfare, social services, public health and housing, education and public-sector jobs are the very programs that help to prevent crime.^{f 30} 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 the majority, those convicted of

^f The current Massachusetts poverty rate is the highest in 50 years. 12% live below the poverty level and 25% below double the poverty level (Johnson K. Boston Globe, 11/11/14, B8). The very counties that contribute the greatest number of incarcerated criminal offenders are the ones with the highest rates of childhood poverty: Hampden, 31%; Suffolk, 26%; Berkshire 21%; Bristol, 18%; Essex and Franklin, 17%; Worcester, 15% (Boston Globe, 3/26/14, B8). Additionally, poverty impacts school quality and dropout rates which remain high in urban areas: Boston, 5.9%; Springfield, 6.5%; Lawrence, 5.8%; New Bedford, 5.8% (Vaznis J. Boston Globe, 1/28/14, B1). In Suffolk County only 63% of 9th graders graduated high school in four years (Boston Globe, 3/26/14, B8). Alleviating these dismal statistics would be a major factor in reducing crime and the inflow of offenders into the prison system.

violent and sex offenses.³⁰ These current efforts are crippled by ignoring the social realities that crime and the underlying poverty, unemployment and inequality can be ameliorated by changing 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.³⁰ It is also important to remember how we got here. Surging crime first incubated in the crucible of poverty, inadequate public education, and inaccessible, meaningful employment. Public policy responded not by addressing the underlying causes but by incarcerating the problems, who are also the victims of this social inequality. 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 the crime."³⁰

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 can begin to revitalize depleted neighborhoods, especially if education, jobs and public services are concomitantly provided. Also, these ex-prisoners, even the elderly, will add to the emotional and financial security of their families and neighborhoods and also contribute to

economic growth, whether by joining the work-force and/or through the consumption of goods and services.^{7,30}

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-WW-II Germany to the social and economic powerhouse that sustains all of Europe today.³⁰ 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. It is a noble challenge, and Massachusetts deserves no less.

V. Interventions and Recommendations

This report and many others, some cited here and others not, argue that the United States and Massachusetts are incarcerating many more than needed and often for far longer than necessary for public safety. Consequences include a markedly aging prison population, with economic, societal and moral ramifications. We have already seen the transformation of our prisons into the most prevalent and neglectful reservoir of those afflicted with mental health problems and now 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 as well as demonstrate a practical recognition that, compared to other prisoners, older prisoners pose the fewest risks to public safety while costing taxpayers the most.

The recommendations that follow set out practical steps that 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. Additional measures are proposed to help prevent a future repetition of the vicious cycle of policies that brought us to the present critical and unwanted juncture.

The recommendations have been grouped into three categories: to reduce the future likelihood of unnecessary and excessive incarcerations; to improve and accelerate the rehabilitation of those already incarcerated; and to support and increase the ability of ex-prisoners to successfully re-integrate into society after release. Additionally, the branches of government, legislative, executive and judicial, that would be most responsible for addressing each issue are identified.

Responsible Parties

Measures to Reduce Unnecessary and Excessive Sentences

- Leg
 - **Abolish LWOP and >20 year sentences**
 - Parole eligibility after 15-25 years^a
 - Excessive sentences do not increase deterrent effect
 - Parole eligibility does not mean automatic release
- Leg
 - **Increase juvenile age limit for life sentences to under 21**
 - Consistent with brain science demonstrating limited impulsivity controls
 - Young have greater capacity to change and outgrow violent behavior
- Jud/Exe/Leg
 - **Empower Sentencing Commission to develop strong guidelines**
 - Based on sound penologic principles regarding efficacy and deterrence
 - Apply lessons learned from U.S. experiences before 1980 and international law
- Leg/Jud
 - **Eliminate 3-strikes/habitual offender enhancements**
 - Politically motivated sentences not grounded in science
 - Do not increase deterrent effect
 - Disproportionately lead to excessive sentences and aging in prison
- Leg/Jud
 - **Eliminate mandatory minimums**
 - Judges to use new, rational sentence guidelines
 - Judges to provide written justification for departures from guidelines
- Leg/Jud/Exe
 - **Give judges authority to limit maximum prosecutorial charges**
 - Prevents current frequent prosecutorial over-reach
 - Especially needed during plea negotiations
 - Decision to be based on "probable reach" of evidence
- Leg/Jud
 - **Reclassify low-level felonies as misdemeanors^b**
 - Without prison time sentences
 - Use alternate, community-based sanctions
- Jud/Leg
 - **Reduce pre-trial detention with release as the default^b**
 - Unless there are meaningful threats to public safety
 - Use electronic monitoring/modern border security measures to ensure trial appearance

^a 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)

^b 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)

Responsible
Parties

Measures to Improve and
Accelerate Rehabilitation

- Leg
- **Parole eligibility for all prisoners 50 and over**
 - After serving 15 or more years
 - Apply retroactively to all sentences, including LWOP
 - Parole eligibility does not mean automatic release
- Exe
- **Strengthen prison rehabilitation & incentives to participate**
 - Increase number, availability and relevance of validated programs to individual needs
 - Offer opportunities, facilitate and provide substantial incentives for education, including vocational
 - Provide blocks of good-time as incentives for successfully completing programs rather than compelling participation
 - Provide access to all programs early and throughout incarceration, not limited only to period prior to release
- Leg/Exe
- **Establish system of "presumptive" parole**
 - Parole to be granted unless, by a preponderance of evidence:
 - prisoner poses substantial risk to public safety
 - there are no conditions that can be imposed after release that adequately reduce that risk
 - Parole Board should not retry the original crime but focus on prisoner's rehabilitation and maturation
 - Make objective assessments using risk assessment instrument
- Exe/Leg
- **Expand availability of Good-Time credits**
 - For participation in programs, education and work
 - Eliminate "Truth in Sentencing" restrictions
 - Grant day-for-day good-time for blocks of 90-day clean disciplinary records
 - Apply good-time credits to reduce sentence up to half
- Exe
- **Provide robust computer/internet fluency for all**
 - Fluency is critical for re-entry, especially for the elderly and long-incarcerated
 - Introduce corrections compatible tablets with download capability and access to allow individual in-cell study
 - Provide appropriately censored and site-limited internet access, especially to education sites
 - Provide access to Harvard/MIT EdX classes
 - Provide access to books, educational materials including voc-ed, secondary education, licensing materials and civics information
- Leg/Exe
- **Open prisons to public oversight**
 - Establish independent ombudspanel to hear visitor and prisoner complaints and grievances
 - Provide subpoena power to investigate abuses
 - Facilitate media access to prisons and prisoners

Responsible
Parties

Measures to Support and
Improve Successful Re-integration

Leg/Exe

- **Provide robust post-release services**
 - Actively assist job search and acquisition
 - Supplement vocational training started in prison as necessary
 - Provide support while training and/or actively seeking job (up to two years)
 - Provide housing support, including limited subsidy if taken in by family

Leg/Exe

- **Narrowly tailor employment, licensing and housing restrictions**
 - Prohibit access only for specific, relevant and clear public safety concerns
 - Rein in sex offender registration and housing restrictions except clearly articulated safety concerns

Exe

- **Use non-prison alternatives for parole violations**
 - Implement swift, graduated non-prison sanctions for violations that do not involve new crime
 - Structure sanctions to avoid interfering with parolee's employment
 - Provide meaningful incentives for adherence to rules (e.g. reducing restrictions and/or duration of parole)

Exe

- **Empower parole department and officers to support parolee**
 - Provide tools/resources to encourage support and assistance for parolee, not simply monitoring behavior
 - Provide financial incentives to divisions and/or parole officer for reducing assigned population revocation rates

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