

"LIFE" IS A DEATH SENTENCE: Aging and
Dying in Massachusetts Prisons

by

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INTRODUCTION

Massachusetts state prisoners are among the oldest in the United States¹. An important reason for this is that 12.4% of Massachusetts state prisoners are serving Life Without the possibility of Parole (LWOP) sentences², a rate which is the second highest percentage in the nation, trailing only Louisiana³. In Massachusetts, LWOP sentences are mandatory for first degree murder and, under felony murder statutes, frequently have included those not actually participating in the killing or even having any intent to kill⁴. Further, few, if any, mitigating factors such as developmental impairments or extreme intoxication have successfully shielded defendants from this sentence as long as they were felt to have the capacity to form an intent to kill or cause serious bodily injury⁵. Until 2014, even those between the ages of 14 to 17 committing first degree murder were subject to mandatory LWOP sentences⁶.

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The persistent imposition of LWOP sentences has caused a steady increase in the number of prisoners with this sentence, from 695 in 1999 to 1066 as of July 1, 2017⁷. Although Massachusetts has eliminated the death penalty, this has been replaced with the current liberal use of LWOP sentences

which are, simply stated, death-by-incarceration sentences. With that change, however, these prisoners have also lost the critical protections offered to death-sentenced defendants such as "death-certified" trial attorneys or bifurcated jury trials that determine guilt and sentence separately while considering mitigating factors. Additionally, those sentenced to LWOP do not receive the benefits of extensive post-conviction legal assistance and the multiple procedural and evaluative safeguards afforded to those sentenced to death. These factors contribute to the findings that a mere 10-20% of non-death penalty cases are reversed on appeal while 68% of death sentences are reversed⁸. And, because of the progressively aging population, the time has come that Massachusetts has a steady flow of LWOP prisoners now dying in prison.

In the past, there may have been some hope for commutation for those prisoners who demonstrate a rehabilitated character and whose advanced age, by itself, drastically reduces their risks of reoffending. It has been independently shown that such older and rehabilitated prisoners, even those convicted of murder, pose no more than minimal risks to public safety⁹. 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 be falsely convicted¹⁰. It is clear that this option has withered to the point of nonexistence, effectively denying all LWOP prisoners, no matter how rehabilitated and elderly, any opportunity for a second chance at redemption. This violates what many would

consider a basic tenet of American fairmindedness. A full discussion of the pros and cons of LWOP sentences is beyond the purpose of this treatise, but is admirably provided in a comprehensive parallel work¹¹. There it is argued that there is an urgent need for the possibility (but not the assurance) of being granted discretionary parole after 25 years for those convicted of first degree murder. As stated by those authors, "[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."¹²

DATA

Table 1 lists the age distribution of the overall population and the first degree LWOP prisoners in the custody of the Massachusetts Department of Correction (DOC) as of January 1, 2017. It is apparent that the first degree, LWOP prisoners are notably older. Almost one-half (46%) are 50 or older, as compared to only 26% of the overall population. Similarly, 24% are 60 and older, almost three times the rate of the general population. The two groups reflect the same disparity in their mean and median ages, with values of 50 and 49 years, respectively, for the first degree prisoners as contrasted with 41 and 39 years, respec-

TABLE 1
AGE DISTRIBUTION OF POPULATIONS^a

Age (yrs)	General Population		First Degree Population	
	#	% ^b	#	% ^c
<20	11	0.1%	0	0.0%
20-29	1707	20.7%	73	7.1%
30-39	2432	29.5%	185	18.1%
40-49	1919	23.3%	295	28.9%
50-59	1396	16.9%	223	21.8%
60-69	570	6.9%	179	17.5%
70-79	173	2.1%	56	5.5%
80-89	24	0.3%	8	0.8%
90-99	2	0.02%	2	0.2%
Total	8234	100.0%	1021	100.0%
<20-49	6069	73.7%	553	54.2%
50-99	2165	26.3%	468	45.8%
60-99	769	9.3%	245	24.0%

^a Criminally sentenced custody population, January 1, 2017¹³.

^b Percent based on custody general population.

^c Percent based on first degree prisoner population.

tively, for the overall population¹⁴. Also shown is that there is a significant number of non-first degree, elderly prisoners included in the general population. As in the case of LWOP prisoners, many of these older individuals are prisoners with very long sentences who have aged in prison¹⁵. For example, there are currently 70 prisoners serving 25 year sentences and another 172 with term-of-year sentences that are even longer¹⁶. There is also a supplemental number of second degree lifers who, while they were eligible for parole after 15 years, have been repeatedly denied paroles and so remain incarcerated, possibly for life¹⁷.

TABLE 2
ANNUAL CENSUS OF FIRST DEGREE LWOP PRISONERS^a

Year	2009	2010	2011	2012	2013	2014	2015	2016	Total
LWOP Census on January 1	938	957	987	1017	1042	1070	1030	1035	
# of New LWOP Commitments	39	38	26	41	40	35	24	35	278
LWOP prisoner Deaths	11	4	7	6	8	10	8	12	66
Court Releases	2	7	1	4	4	0	8	4	30
End of Year Census	957	987	1017	1042	1070	1030 ^b	1035	1055	

^a Criminally sentenced jurisdiction population.¹⁹

^b 65 juvenile first degree LWOP prisoners were reclassified 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.

Table 2 provides a more detailed summary of the annual census of first-degree, LWOP prisoners, 2009-2016. During these years, 278 LWOP prisoners were newly committed although the total number of such prisoners increased by only 117 (1055 minus 938). As also referenced in the table, 65 first-degree lifers, originally sentenced to LWOP, were juveniles at the time they committed first degree murder. They became eligible for parole in 2014 as the result of U.S. Supreme Court and Massachusetts Supreme Judicial Court (SJC) rulings¹⁸, resulting in their one-time, retroactive, reclassification, removing them from the LWOP population. Also listed are 30 who were released by the courts because of reversals of their convictions¹⁹, many of them after having been incarcerated for 20, 30 or even more years. A final

group are the 66 that have already died in prison. For clarity's sake, it is worth noting that although the overall numbers over the 8 years add up correctly (117+65+30+66=278), the year by year tallies often do not, possibly because of delays in the reporting of the exact years in which the events occurred²⁰.

DISCUSSION

Two conclusions are inescapable from the preceding facts that, over 8 years, 66 LWOP prisoners died in prison and another 30, falsely convicted, were finally released, often after decades of incarceration.

First, there is the inevitable consequence is that LWOP prisoners must die in prison, regardless whether they have been sufficiently rehabilitated and have matured to become better persons. This reality is now compellingly before us. With the current, politically motivated virtual abolition of meaningful executive clemency, these prisoners are steadily dying in prison without having had any opportunity for a second chance to demonstrate that they, as many have, are indeed changed from their reckless, often thoughtless and foolish, younger iterations. After a lifetime of imprisonment, they are left to succumb to this unique and slow death-by-incarceration sentence, often elderly, toothless, wheelchair- or bed-ridden, and harmless beyond any reasonable doubt.

The inanity and futility of this practice has been poignantly summarized by a most unlikely protagonist, Burl Cain, the often brutal and repressive former warden of Louisiana State

Prison in Angola who stated, when commenting on elderly prisoners: "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."²¹ But, this relief is explicitly denied by LWOP sentences. Instead, these prisoners languish, hopelessly and helplessly in prison, all the while adding to the increasing costs of incarceration through their burgeoning special needs and health care requirements. This growing elderly prisoner population is disproportionately contributing to increasing the costs of so-called "corrections", which are now well above the total amounts the state allocates to much-needed higher education²².

Second, and perhaps even more concerning and inhumane, is that we can be confident that not all of these LWOP prisoners are actually guilty. The 30 prisoners released by the courts over the last eight years were all released because of serious flaws in their convictions. Many are indisputably shown to be innocent. Even those whose cases were overturned on only procedural grounds are not being reprosecuted. This, in effect, casts serious doubt on the reliability of their original convictions, because prosecutors are not shy about denouncing such reversals and pledging retrials. Consequently, these are tacit admissions that there is insufficient evidence to convict. Moreover, this number is not inconsequential, representing over 10% of the 278 new commitments occurring during these eight years.

Some may argue that these 30 represent a mere and trivial trickle from the pool of 1055 LWOP prisoners accumulated over many decades. Nevertheless, this steady "trickle" is, and likely

has been, ongoing. Data show that the numbers of LWOP prisoners in Massachusetts have been increasing linearly at a rate of 25 per year since 1999²³. Although composite data on the rates of new LWOP convictions, deaths, and court releases over this time period are incomplete, the linear increase strongly suggests that the relative proportions have not significantly changed. As a result, the awareness that over 10% of those sentenced to LWOP eventually are able to prove that they have been erroneously convicted should arouse grave concern. Even worse, this fraction is likely only a small subset of the total number suffering false convictions.

There are many more first degree lifers who adamantly assert their innocence but who have been unsuccessful at

WHY ARE THESE MEN STILL IN PRISON?*

At 94, he is the oldest prisoner in MA prisons. A veteran, he fought for us in WWII under General Patton. Attached to one of only two African-American tank battalions, he saw active combat and suffered shrapnel wounds, resulting in a Purple Heart and service disability. A far different person today after serving 38 years for a murder, he has long abandoned thoughts of violence. Now wheel-chair bound, he is confined in the Assisted Daily Living (ADL) unit of Norfolk prison because of extreme age-related debilitation. Keeping this veteran, an elderly, weakened husk of a man, in prison makes no sense. He is harmless and his release would present no risk to public safety. His special needs and healthcare requirements make housing him in a secure prison with its security staffing an unnecessary extravagance.

George, 70 years old, has severe type 1 Diabetes with all its complications: cardiac, chronic kidney disease, retinal detachments, hearing loss, and severe circulatory impairment with arterial bypass surgeries and bilateral foot amputations. At 21, implicated as driver and co-venturer in an armed robbery, he was convicted under felony-murder rules for a killing in which he had no active role. Imprisoned for 49 years and long without disciplinary issues, he was eligible, during the 1970s and 80s, for the furlough program. He was released to the street on over 200 furloughs without incident. He filed 8 commutation petitions, receiving one positive vote but release was denied by Governor Romney. He remains incarcerated at MCI-Norfolk, living without privacy in the dormitory of the ADL, tethered to his wheel-chair by his foot amputations. Now a chastened, thoughtful and mature man, his release certainly would pose no risks to public safety. Meanwhile, his ongoing medical and special needs complicated by required security staff to accompany him for all clinic and hospital visits drastically inflates the expense of his already very costly incarceration.

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* These are only two of 69 LWOP prisoners aged 70 or older imprisoned at costs of 6-10 million dollars per year.

overturning their cases. As mentioned earlier, LWOP prisoners have only very limited access to effective post-conviction assistance and relief despite the finality of their sentence. Legal counsel is constitutionally mandated for direct appeals limited to the existing trial record, but is only optional for critical Motion for New Trial appeals. These are required to expand often incomplete records revealing previously unavailable evidence, such as false statements by confidential informants, mistaken identification, ineffective assistance by trial counsel, or other important shortcomings before and during trial.

Additionally there seems to be a clear reluctance of the Massachusetts SJC to reverse first degree murder convictions as measured by the rare application of the comprehensive "capital review" under G.L.c. 278, §33E as the basis for the reversal.²⁴ The situation has been further exacerbated by the passage of the AEDPA (Antiterrorism and Effective Death Penalty Act) in 1996 which severely restricts access to meaningful Habeas Corpus review in federal courts.²⁵

As for the fortunate few who have been able to successfully overturn their unjust first degree murder convictions, most have suffered at least 10 and more commonly 20 or 30 years of imprisonment before finally achieving these hard-won reversals. These false incarcerations and punitive delays have destroyed lives and exacted a desperate toll on families. Recognizing that the system is not flawless should add strong argument that justice requires that all those sentenced to LWOP should be given a second chance. Making such prisoners eligible for a

discretionary parole after 25 years, provided they can show a high likelihood that they are rehabilitated, exhibit responsible behavior, and have only minimal risks of violating the law upon release, would be a rational response to the recognition that some are innocent and many others have matured to become better persons than the ones who committed their crimes. The time to reform our laws to allow this is now.

ENDNOTES

1. ACLU, "At America's Expense: The Mass Incarceration of the Elderly" (New York, NY; ACLU: June 2012, p3). Already in 2011, 19.4% of MA state prisoners were over 50 years old, trailing only NH at 19.8% and WVa at 20.0%. However, by January 1, 2017 the MA state population over 50 had increased by 36% to 26.5% of all prisoners. (See Cannata N. Personal Communication, Public Records Request #RAP00032 (Milford, MA; Research & Planning Division, MA Dept of Correction: Oct 26, 2017)
2. Cannata. Ibid.
3. Nellis A. "Still Life: America's Increasing Use of Life and Long-Term Sentences" (Washington DC; The Sentencing Project, 2017,) p10-11.
4. Under the felony-murder rule "a person who knowingly participates in one crime as a 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). However, after 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 or cause grievous bodily harm. None of the currently 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 current 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 Muller, 477 Mass 415 (2016).
6. Diatchenko v District Attorney for the Suffolk District, 466 Mass 655 (2014); and Commonwealth v Brown, 466 Mass 676 (2014).
7. Greineder D. "Mass(achusetts) Incarceration of the Elderly: Morally Questionable, Costly and Unnecessary for Public Safety" (Norfolk, MA; Lifers' Group Inc.: April 2016) p13-14; and MA Department of Correction "Fact Cards" (Milford, MA; MA Dept of Correction: July 1, 2017).
8. Nellis A. "Tinkering With Life: A Look at the Inappropriateness of Life

- Without Parole as an Alternative to the Death Penalty" (Miami, FL; U. of Miami Law Review 67: 439-458 (2013).
9. Greineder, "Mass(achusetts) Incarceration" p7; Haas G. and Fillion L. "Life Without Parole: A Reconsideration, 2nd Ed" (Boston and Norfolk, MA; Criminal Justice Policy Coalition and Norfolk Lifers Group: 2016) p13-14.
 10. Haas & Fillion, p8.
 11. Ibid.
 12. Id. p16.
 13. Cannata, Personal Communication.
 14. Cannata, Ibid.; and MA Dept. of Correction. "Prison Population Trends 2016" (Milford, MA; MA Dept. of Correction: March 2017) p20.
 15. Greineder, "Mass(achusetts) Incarceration" p10 and p20; and ACLU, "At America's Expense", pp1-15.
 16. Papagiorgakis G. Personal Communication (Concord, MA; MA Dept. of Correction, Research & Planning Division: August 23, 2017).
 17. Haas G. "Parole Decisions for Lifers 2016" (Norfolk, MA; Lifers' Group Inc.: 2017) p20-21; and Greineder D and Haas G. "Aging, Criminal Propensity and Lifer Paroles: A Massachusetts Paradox" (Norfolk, MA; Lifers' Group Inc.: September 2016).
 18. Miller v Alabama, 132 S.Ct. 2455 (2012) and Diatchenko v District Attorney for the Suffolk District, 466 Mass 655 (2014).
 19. Silvia K. Personal Communication: Public Records Request (Milford, MA; MA Dept. of Correction: November 15, 2017); and MA Dept. of Correction, "Prison Population Trends" (Concord, MA; MA Dept. of Correction, Research & Planning Division: Reports 2009 through 2016).
 20. Silvia, Ibid. and "Prison Population Trends" (2009-2016).
 21. Greineder, "Mass(achusetts) Incarceration" p1; and Haas & Fillion, p1.
 22. Engel L and Atkisson J. "Priorities and Public Safety: Reentry and the Rising Costs of Our Correctional System" (Boston, MA; The Boston Foundation: 2009); Haas & Fillion, p9-11; and Greineder, "Mass(achusetts) Incarceration" pp4-5, 29-31, 39-40.
 23. Greineder, Id. at 14, figure 1.
 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 (and his attorney) are considered and, 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 both have plummeted precipitously.

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