

COMMUTATION

An epidemic is slowly taking root throughout the United States prison system. As of 2010, State and federal prisons house more than 26,000 inmates 65+ years old and nearly five times that number 55 and up.¹ The boom is a direct result of the "get tough on crime" legislation from the 80's and 90's. These policies have generally caused the nation's inmate prison population to jump from 330,000 in 1980 to over a million by 1995; a tripling of the population representing an increase of 235%! In that same time, Massachusetts has seen its own prison population triple. Prisoners over the age of 50 represent 20% of the Massachusetts prison population.² It is the fastest growing population representing a 9% growth rate since 2009. "Given the steep drop in paroles since the Parole Board was restructured, a continued 5.49% increase per year for those aged 60+ seems not to be unreasonable."³ As of June 2012 the Massachusetts D.O.C. confirms that the state will need three new specialized facilities to house an estimated 1,270 prisoners with medical issues.⁴

Over the past several decades, the role of prison as a component in the larger criminal justice system charged with protecting the public has fluctuated dramatically. In the 1960's and 70's, state corrections policy throughout the U.S. was focused on rehabilitation. Up until the 1980's Massachusetts was highly regarded for developing innovated programs to reduce recidivism, as well as its work evaluating these programs with the strongest research methods available at the time.

When the infamous Willie Horton became a defining issue in Governor Michael Dukakis's 1988 presidential bid the environment changed dramatically. Legislature passed mandatory minimum drug laws, and school zone statutes. In 1990, Dukakis signed another mandatory minimum bill. With criminal justice policy increasingly politicized, Bill Weld promised to "reintroduce our inmates to the joys of busting rocks" and in 1994 President Bill Clinton signed the landmark Federal Crime Bill, giving states monetary incentives to adopt reforms that led to longer periods of incarceration and reduce incentives for prisoners to participate in rehabilitative programming.

In Massachusetts, despite reform recommendations from several recent commissions, corrections policy remains highly politicized, as evidenced by the Three Strikes Bill in 2012.⁵ With Massachusetts boasting impressive track records in clean energy, health care, and education, they have clearly passed the baton in terms of criminal

¹ <http://www.hrw.org/news/2012/01/26/us-number-aging-prisoners-soaring>

² D.O.C. Annual Report 2011, supra at 40

³ Report on Massachusetts Department of Correction by Gordon Haas, supra at 3

⁴ <http://www.govtrack.us/states/ma/bills/187/h2173>

⁵ Crime, Costs, and Consequences: Is it time to get smart on crime?, Massachusetts Criminal Justice Coalition, 2013 supra at 10

justice reform. With Corrections policy under increasing scrutiny, some are starting to question whether offenders who have served 40 or more years must remain behind bars until their death in every circumstance.⁶ In one five year study of 188 paroled prisoners serving life without parole, only 0.53% (1-188) repeated a homicide.⁷ Empirical studies repeatedly show that recidivism decreases not just among capital murderers, but also as one ages. In 2005, a study by the Pennsylvania Board of probation and parole, noted that of the 99 commuted sentences of life without parole, those who were released over the age of 50, only one (1) returned for a crime (new crime: forgery and tampering with public records). A recidivism of 1.01%.⁸

The fact that the fiscal budget has increased by \$62 million over ten years with a steady increase of geriatric prisoners clearly shows that the system in place is not working. In a three year study of lifers released nation wide, 79.4% were arrest free, compared to 32.5% of all other offenders.⁹ In a more recent study conducted in 2008 in New York, not one of 440 convicted murderers or attempted murderers released from 2004 to 2007 returned for a new crime.¹⁰ In Michigan, 175 commutations were granted over a 24 year period to inmates serving life without parole. Not one returned for the commission of murder.¹¹

Data from New York State, for example, tracked 469 inmates over a 13 year period. All were sentenced for violent crimes and were later released as senior citizens. Of the 469, only 8 went back to prison, and one returned for a violent offense.¹²

Keeping thousands of men locked up may make sense to diehards seeking maximum retribution or politicians seeking political gain, but it has little effect on public safety. "Most laws that have been passed about prisoners and parolees," says Author Nancy Mullane, "make parole hearings more, not less, doctrinaire and less attentive to the details of an inmate's progress. Most new laws carry the name of a victim of some well known crime, reflecting that the public's perception of its safety- and therefore its preferences for tough penal codes- continues to be shaped by high profile tragedies, but also anger and revenge."

Pardons and commutations were vital features of the U.S. criminal justice system throughout the 19th and much of the 20th centuries. Clemency was a key mechanism to manage the prison

⁶ John Tierney, "For Lesser Crimes, Rethinking Life behind Bars" *New York Times* December 11, 2012; Tom Ashbrook, "The Cost of Prison" *On Point* February 20, 2013

⁷ Article, *Journal of Law and Criminology*, vol 90, no 4, Summer 2000. Jonathan R. Sorenson and Rocky L. Pilgrim, "An Actual Risk Assessment of Violence Posed by Capital Murder Defendants."

⁸ Report on the Advisory Committee on Geriatric and Seriously Ill Inmates, June 2005, Penn State Legislator. <http://jsg.legis.state.pa.us/inmate%20report.html>.

⁹ Marc Mauer, *The meaning of life and long prison sentences in context*. Sentencing Project, May 2004

¹⁰ Michael Hill, *Out on good behavior*, *Adirondack Daily Enterprise*, March 27, 2008 at http://realcostofprison.org/blog/archives/2008/03/ny/none_of_hund.html as of September 20, 2008

¹¹ Jonathan Simon, *Rise of the carceral state punishment: the us record*, supra 495

¹² <http://www.hrw.org/node/104747/section/9>

population, correct miscarriages of justice, and make far reaching public statement about the criminal justice system.

It begs to question, if inmates serving life without parole have a considerably higher success rate while on parole than that of other parolees convicted of lesser offenses, why is nobody utilizing the commutation process?

As U.S. Senator James Webb said at a 2008 conference on prison reentry sponsored by the Hamilton Project, "the real question is about fear, and I believe it invades the political process." Governors willing to assume the risk remain the exception today. Governor Janet Granholm of Michigan commuted more sentences than her three predecessors combined before she left office in 2011. Arkansas Governor Mike Huckabee granted 30% more clemencies than the previous three governors combined.¹³

Supreme Court Justice Anthony M. Kennedy said in a 2012 address, "It's true that death sentences are unique in their severity and irrevocability, yet life without parole sentences share common characteristics with death sentences that are shared by no other sentence... [it] deprives the convict of the most basic liberties without giving hope."

However, if public officials are going to revitalize the commutation (and parole) process, they need to improve rehabilitation programs and risk assessment tools. Four decades ago, the President's Commission on Law Enforcement and the Administration of Justice recommended that boards be comprised of psychologists, social workers, correction officials, and other professionals with specialized training and expertise to evaluate an offenders' suitability for release. That recommendation remains largely unrealized today - for instance, in Massachusetts there is only one psychiatrist on a board dominated by criminal justice professionals and headed by a former district attorney.

Over the past forty years, retribution has become a central feature of U.S. penal policy, supplanting rehabilitation and even public safety as the chief aim.¹⁴ Hugo Adam Bedau, a prominent death penalty abolitionist who did not endorse life without parole, reminds us, "[I]t is not the task of penal reform - or of the movement against the death penalty - to present to the public whatever it will accept. The task, rather, is to argue for a punitive policy that is humane, feasible, and effective, whatever the crime and whoever the offender, and regardless of the current climate of the public opinion."¹⁵

¹³ Ibid at 13

¹⁴ https://www.prisonlegalnews.org/24102_displayArticle.aspx

¹⁵ Ibid