

# Three Strikes

## *The Wrong Way to Justice*

**A Report on Massachusetts'  
Proposed Habitual Offender  
Legislation**







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### **A Report on Massachusetts' Proposed Habitual Offender Legislation**

**A Policy Report of the Charles Hamilton Houston Institute for Race and Justice: Harvard Law School**

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This report provides critical information to the public and to Massachusetts state legislators about the likely long-term impact of the proposed changes to Massachusetts' Habitual Offender Law (S 2080 AND H 3818). These changes are currently being debated in the Legislature's Conference Committee.

At a time when many states are moving to repeal or amend their "three strikes" laws in order to take a more balanced approach to public safety, Massachusetts has inexplicably chosen to move in the "wrong direction." The report offers a detailed analysis of the most problematic provisions of the bills that are almost certain to cost taxpayers far more than originally estimated, increase the likelihood of unnecessarily lengthy prison sentences for low-level offenders, further burden an already severely overcrowded prison system—putting employees and prisoners at risk—and divert precious state resources away from education, basic services, infrastructure improvement, and job creation. The legislation will almost certainly further exacerbate the stark racial disparities that characterize the state's prison population.

There is still time for the Commonwealth to take a different approach to public safety. *Justice Reinvestment* is a project of the Council of State Governments' Justice Center. It can offer Massachusetts a consensus-building, data-driven process for reducing the state's prison population without sacrificing public safety. This approach has been effectively employed in seventeen other states, including many of our New England neighbors.



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# Changes to the Massachusetts Habitual Offender Law Proposed in S.2080 and H.3818: A Regressive Criminal and Social Justice Policy

## Summary of Changes

*The Massachusetts Senate and House of Representatives have proposed significant changes to the existing Habitual Offender Law (M.G.L. c.279, §25) in Senate Bill 2080 and House Bill 3818.*

If these proposed changes become law, they will:

- ▶ **Make hundreds of low-level offenders subject to lengthy prison sentences;**
- ▶ **Cost taxpayers as much as an estimated \$125,000,000 more per year;**
- ▶ **Increase the burden on our already-overcrowded prisons;**
- ▶ **Disproportionately impact people of color and poor people;**
- ▶ **Divert resources away from programs that are proven to reduce crime; and**
- ▶ **Put Massachusetts out of step with other states, which are moving away from “three strikes” schemes because they have proven to be unjust, ineffective at reducing crime, and expensive.**

It is not too late. The bills can be stopped by the Conference Committee or amended to target the most serious repeat offenders, while preserving resources for programs that actually improve public safety and strengthen our communities.

# The Scope of the Proposed Habitual Offender Law

## The Proposed Changes, In a Nutshell:

### Current Law

M.G.L. c. 279, §25

Calls for the maximum sentence for anyone convicted of a *third felony* who has already:

- (i) Been convicted twice of any of 688 existing felonies; and
- (ii) Served *three or more years in state prison* for each qualifying prior conviction.
- (iii) Habitual offenders are eligible for parole after serving *half* of the maximum sentence for the third felony.

### Senate Bill 2080

S.2080 (Sections 46, 31, 32)

**Subsection (a):** Incorporates current law, but delays parole eligibility to *two-thirds* of the maximum sentence.

**Subsection (b):** Calls for the maximum sentence for anyone convicted of a *third qualifying felony* who has already:

- (i) Been convicted twice of any of 59 *qualifying felonies*; and
- (ii) Served *one day or more in any facility* for each qualifying prior conviction.
- (iii) Habitual offenders under Subsection (b) are *not eligible for parole*.

### House Bill 3818

H.3818 (Sections 3, 1, 2)

**Subsection (a):** Incorporates current law, but requires sentences of *one day or more in state prison* for each qualifying prior conviction and delays parole eligibility to *two-thirds* of the maximum sentence.

**Subsection (b):** Calls for the maximum sentence for anyone convicted of a *third qualifying felony* who has already:

- (i) Been convicted twice of any of 55 qualifying felonies; and
- (ii) Served *one day or more in state prison* for each qualifying prior conviction.
- (iii) Habitual offenders under Subsection (b) are *not eligible for parole*.

#### ► The Senate bill and the House Bill create two categories of habitual offenders:

- Subsection (a) largely mirrors the requirements of the current law, but delays parole eligibility until the defendant has served 2/3 of the maximum sentence permitted for the third qualifying felony, or “strike.”
- Subsection (b) is a new category deemed to apply to “violent” habitual offenders, based on a specified list of felonies that qualify as “strikes.” Subsection (b) habitual offenders are sentenced to the maximum sentence permitted for their third qualifying felony conviction without the possibility of parole.

#### ► House Proposal (March 14, 2012)

- As of this writing, S.2080 and H.3818 were approved by the Senate and House of Representatives, respectively, in a vote and the two bills are in Conference Committee.
- As part of the process of negotiation, members of the House released a proposal on March 14, 2012. The language regarding the habitual offender provisions of the House Proposal is substantially similar to H.3818, but for two important improvements:
  - The House Proposal reduces the list of qualifying felonies under Subsection (b) to 29 crimes, removing a number of felonies and adding four new ones related to human trafficking that became law in fall 2011.

- The House Proposal requires state prison sentences of at least 3 years for prior felony convictions to count as “strikes” under Subsection (b), as opposed to state prison sentences of 1 day or more, as proposed in H.3818.
- The House Proposal takes several steps in the right direction, but still has many of the flaws of the original bills. At the very least, more felonies need to be eliminated from the list of felonies that qualify as “strikes” under Subsection (b), Subsection (a) must be amended to require sentences of 3 years or more in state prison for prior convictions to qualify as “strikes,” and judicial discretion to remove defendants from the purview of the habitual offender provision must be included.

► **Senate Proposal (April 13, 2012)**

- In response to the House Proposal, the Senate released a proposal to the Conference Committee on April 13, 2012. The habitual offender provisions of the Senate Proposal include the following changes to those of S.2080:
  - The Senate Proposal also reduces the list of qualifying felonies under Subsection (b) to 29 crimes. However, the list is different than that of the House Proposal; it returns five of the felonies removed by the House Proposal to the list, removes five from the House Proposal list, and limits the inclusion of three felonies to certain circumstances.
  - The Senate Proposal requires state prison sentences of at least 3 years for prior felony convictions to count as “strikes” under Subsection (b), as opposed to sentences of 1 day or more in any correctional facility.
  - The Senate Proposal adds Subsection (e), which permits a sentencing judge to allow parole eligibility for defendants convicted under Subsection (b) after serving 2/3 of the maximum sentence or 25 years of a life sentence “in the interest of justice and upon a finding on the record of substantial and compelling reasons.”
- Despite important improvements, the Senate Proposal requires additional revisions. At the very least, more felonies need to be eliminated from the list in Subsection (b) and judicial discretion to remove defendants from the purview of the habitual offender provisions, rather than mere sentencing discretion, must be included.

*\*Because the House and Senate Proposals have not been debated or voted upon by either legislative body and do not have the official status of a bill, this paper will discuss the habitual offender provisions of S.2080 and H.3818.*

### ***The Proposed Legislation Fails to Target the Most Serious Habitual Offenders***

- **The current habitual offender law’s requirement of sentences of 3 years or more in state prison serves to ensure that a prior conviction will only count as a “strike” if the individual was indicted and convicted in Superior Court and the crime was violent or serious enough to merit a significant state prison sentence.**
- **Subsection (a) of the House bill requires only sentences of 1 day or more in state prison for prior convictions of any of the 688 felonies to count as “strikes.”**
  - Sentences of less than 3 years in state prison are not the norm and are generally given to defendants in acknowledgment of mitigating factors relevant to their case, including the circumstances of the crime, the defendant’s level of participation in the criminal acts, the defendant’s personal history, and the defendant’s participation with the authorities.
  - While not the norm, when dealing with all 688 felonies, most of which are nonviolent, this language will lead to a significant increase in the number of defendants subject to maximum state prison sentences as



habitual offenders. The Massachusetts Sentencing Commission's Survey of Sentencing Practices FY 2010 indicates that in FY 2010 alone, 325 males were sentenced to state prison for less than 3 years.<sup>1</sup>

► **Instead of a three-year state prison requirement, Subsection (b) of the Senate bill permits a conviction for any of the 59 qualifying crimes to count as a “strike” if the individual has served “at least 1 day of incarceration.”**

- The requirement of serving only 1 day or more in any facility—a county jail or house of correction or state prison—means that Subsection (b) of the Senate bill catches individuals whose previous acts were not serious enough to merit prison time.
- Aside from a sentence of probation that is completed successfully, there is no lesser sentence than one day of incarceration. Because of homelessness, mental illness, mental disabilities, and substance abuse, among other issues, some individuals are unable to successfully complete probation.
- Poor people will be hit the hardest. The Senate bill ignores a reality faced by many low-income people who cannot afford to post bail: the prosecutor offers to let them go if they plead guilty to the time that they have already served awaiting trial and, in order to go home, they plead guilty, even if they are innocent or likely to win at trial. Thus, because some people cannot make even a \$50 bail, they accept a guilty plea that counts as a “strike.”

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**CASE EXAMPLE**

Ed's elderly mother lives with him. She suffers from dementia and is prone to violent outbursts. One day, she begins to scream as Ed tries to get her into the car to go to an appointment. A neighbor hears her and calls the police. When the police arrive, Ed's mother tells them Ed was pulling her by her arm. She is uninjured. Ed is arrested and charged with “assault and battery upon an elderly or disabled person” (M.G.L. c.265, §13K(a ½)). He spends the night in jail. The next day is his bail hearing. The prosecutor looks at his file, realizes her case is weak, and offers him a plea bargain: he can plead guilty, and she will recommend that he be sentenced to “time served”—the one day in jail awaiting his hearing. Otherwise, the prosecutor will take the case to trial. Ed cannot afford bail and must get home to care for his mother, so he takes the deal.

If the Senate Bill passes, this would count as a “strike” against Ed under Subsection (b). Under current law, the incident would NOT count as a strike.

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► **Because Subsection (b) of the Senate bill counts time served in any facility, the following people could be indicted as habitual offenders and subject to maximum state prison sentences, including life, without the possibility of parole:**

- People who have never been indicted, i.e. faced charges, in Superior Court.
- People who have previously served as little as two days in county jail.
- People who have not been sentenced to state prison before and who may have never been, but for the habitual offender indictment.
- People who have not committed acts of physical violence.

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**CASE EXAMPLE**

Warren has struggled with drug addiction since he was 17 years old. At 19, his parents decided to try a “tough love” approach and kicked him out of the house. Weeks later, homeless and desperate for a fix, Warren opened the unlocked window of a first-floor apartment, climbed inside, filled his backpack with DVDs, and left. He was arrested for breaking and entering in the daytime with the intent to commit a felony (M.G.L. c. 266, §18). He was convicted in the District Court and sentenced to 1 year of probation. Within a few weeks, Warren violated his probation due to a positive drug screen and was sentenced to 6 months in the county house of correction.

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<sup>1</sup> Massachusetts Sentencing Commission, *Survey of Sentencing Practices FY 2010*, at p.21 (April 2011), <http://www.mass.gov/courts/admin/sentcomm/fy2010survey.pdf>.

When he was released, Warren found himself homeless again and fell back into using drugs. One night, he got into an altercation outside of a CVS with another homeless teenager. Warren pushed him away and he fell to the ground; he landed on his back, but sustained no injuries. A police officer witnessed the other teenager fall and arrested Warren. Unbeknownst to Warren, the other teenager was 13 years old. Warren was charged with assault and battery with a dangerous weapon on a child under 14 years (M.G.L. c.265, §15A(c)(iv)). The prosecutor offered him a plea deal: 12 months in the county house of correction. Warren could not afford bail and was in jail awaiting trial. He took the deal.

Warren is released again, still having received no treatment for his drug addiction. He returns to drugs. At age 23, he approaches a man at a bus stop and demands his wallet. He shows the man a pair of scissors he pulls from his jacket pocket. The man kicks Warren's legs out from under him and restrains him until the police arrive. Warren is charged with armed robbery (M.G.L. c.265, §17).

If the Senate bill passes, Warren could be indicted as a habitual offender and sentenced to life in prison without the possibility of parole if he is convicted of the armed robbery.

Under current law, Warren would NOT be charged a habitual offender, and he would not be facing an automatic LIFE SENTENCE.

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### ***The Proposed Legislation Would Reduce or Eliminate Parole Eligibility for Habitual Offenders, Even Those Convicted of Nonviolent Crimes***

► **Under current law, only people convicted of first degree murder can be sentenced to life in prison without parole.**

- If either bill passes, 22 crimes could result in sentences of life without parole for those convicted as habitual offenders under Subsection (b).

► **Both bills delay parole eligibility for individuals convicted as habitual offenders under Subsection (a) at great cost to taxpayers.<sup>2</sup>**

- Under the proposed legislation, an individual sentenced as a Subsection (a) habitual offender will not be eligible for parole until he or she has served 2/3 of the maximum sentence allowed for the third felony, rather than after serving 1/2 as under current law.
- The 688 felonies encompass countless nonviolent crimes, including larceny of property worth over \$250, check forgery, drug distribution, and operating a motor vehicle under the influence of liquor second offense.
- This change in parole eligibility will be expensive for taxpayers: it costs, on average, approximately \$46,000 to keep one person in prison for one additional year.

► **Both bills eliminate parole eligibility for individuals convicted as habitual offenders under Subsection (b), including people who have never previously faced prison time.**

- Under the proposed legislation, a person will be ineligible for parole, work release, and any deduction from their sentences for good conduct if convicted three times of any of the “qualifying” felonies (59 crimes in the Senate Bill; 55 in the House Bill).
- This ratcheting-up of penalties may merit consideration if Subsection (b) were limited to the absolute worst repeat offenders with the most serious cases, but the qualifying felonies are NOT limited to the most serious crimes.

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<sup>2</sup> See pages 13 through 18 for additional information regarding costs.

► **A number of the qualifying felonies included in Subsection (b) of both the Senate bill and the House bill permit conviction based on nonviolent actions. For example:**

- **Carrying dangerous weapons (M.G.L. c.269, §10(b)).** This crime is not limited to firearms, and has nothing to do with using weapons. A person can be convicted for possessing an item like brass knuckles or a switch blade, even if the item is never used. People convicted as habitual offenders will serve 5 years in state prison.
- **Assault and assault and battery (M.G.L. c.265, §13A(b)(ii) and (iii)).** Subsections (b) (ii) and (iii) allow for conviction based on assault and assault and battery. Assault entails no physical contact, no intent to harm, and no requirement that the individual assaulted was even placed in fear by the defendant's conduct. Assault and battery is an unconsented touching of any kind, requiring no injury and no intent to harm on the part of the defendant. Despite the absence of injury or injurious intent, a habitual offender would be required to serve 5 years in state prison.
- **Stalking (M.G.L. c.265, §43(b) or (c)).** Stalking does not require physical or even face-to-face contact. A person can be convicted of stalking for making phone calls and sending text messages. If there is physical contact and bodily harm, different, additional charges apply. A habitual offender would be required to serve 5 or 10 years state prison under (b) or (c), respectively.
- **Armed robbery (M.G.L.c.265, §17).** Conviction for armed robbery can be based on an assault that gives rise to a taking of property. This can be committed with no actual force, no physical contact, and no injury. The "dangerous weapon" need only have been possessed by the defendant, not used, and could be a fake weapon or an innocuous object. If convicted of this offense and sentenced as a habitual offender, the mandatory sentence would be life in prison without parole.
- **Assault and battery with dangerous weapon (M.G.L.c.265, §15A(a) and (c)(ii)-(iv)).** Subsections (a) and (c) (ii)-(iv) do not require any bodily injury or any intent to injure on the part of the defendant. All that is required is an unconsented touching with a "dangerous weapon" that can consist of any number of things, including a shoe on a foot and the ground. Nevertheless, under §15A(a), a person convicted as a habitual offender will get the maximum sentence of 10 years or 15 years under §15A(b).
- **Possession of incendiary device or hoax device (M.G.L.c.269, §102).** Incendiary devices and substances have been construed to include firecrackers or combinations of household cleaners; hoax devices, by definition, are not functionally dangerous. The crime does not entail any infliction of injury or intent to injure. Moreover, Chapter 269, §102A and §102B sufficiently target those who actually seek to cause damage or fear by throwing, launching, discharging and igniting incendiary devices. Including this offense unreasonably places people at risk of receiving mandatory maximum sentences ranging from 5 to 20 years in state prison for mere possession if they are sentenced as habitual offenders.

*The proposed legislation is closer to California's three strikes law than it might seem. . .*

- ▶ California has withdrawn part of its initial three strikes legislation and two forthcoming initiatives are on the table to further reduce its applicability in the face of massive prison overcrowding, skyrocketing costs, and absurd sentencing outcomes.<sup>3</sup>
  - The U.S. Supreme Court, in *Brown v. Plata*, 131 S. Ct. 1910 (2011), affirmed an order of a special three-judge federal court requiring California to reduce its prison population by over 30,000 within two years in order to reach 110,000, 137.5% of the prison system's design capacity. The Court found the reduction in overcrowding necessary to remedy violations of prisoners' constitutional rights against cruel and unusual punishment.
- ▶ Some proponents of the Massachusetts legislation claim "this is not like California" and that we are not heading down the same dead-end road, *but the Massachusetts laws proposed would result in excessive sentences with no consideration of the circumstances—just like we have seen in California.*

**Case Example: Charles<sup>4</sup>**

In 1991, Charles committed two nonviolent residential break-ins. In 1996, he was convicted of breaking into a van and stealing the radio. He was sentenced under the "three strikes" law. Charles was abused as a child and was addicted to drugs.

If Charles committed his crimes in Massachusetts after the Senate bill passed, he would be facing ten years in state prison without the possibility of parole.

- Breaking into the van in order to steal the radio would count as a "strike" under Subsection (b) of the Senate bill (M.G.L.c.266, §18).
- Since Charles had two earlier qualified felony convictions (M.G.L.c.266, §17 or 18), he could be charged as a habitual offender. If convicted, he would automatically receive the maximum 10 year sentence without parole. The judge could not consider his history of abuse and addiction in sentencing.

3 Legislative Analyst's Office, *A Primer: Three Strikes—The Impact after More than a Decade* (October 2005), [http://www.lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm). A successful ballot, Proposition 36, amended the law in 2000 allowing those convicted of drug possession to be offered treatment instead of incarceration. A three strikes reform initiative that would change the law to apply only to serious and violent crimes has been approved as an initiated state statute and will be placed on the November 2012 ballot if the sponsors collect 504,760 signatures. See Ryan Gabrielson, *Three strikes ballot measures public safety politics*, California Watch, November 7, 2011. <http://californiawatch.org/dailyreport/three-strikes-ballot-measure-faces-public-safety-politics-13446>. In addition, the California State Assembly passed AB 327, putting "an initiative on the 2014 ballot to amend Penal Code Sections 667 and 1170.12 so that the 'third strike' would have to be classified as a 'serious' or 'violent' felony." See *Press Release: Davis Prevails in Getting AB 327 Three Strikes Legislation Passed*, January 31, 2012, <http://asmcd.org/members/a48/news-room/press-releases/item/2984-davis-prevails-in-getting-ab-327-three-strikes-legislation-passed>.

4 Stanford Three Strikes Project, [http://www.law.stanford.edu/program/clinics/threestrikesproject/#success\\_stories](http://www.law.stanford.edu/program/clinics/threestrikesproject/#success_stories).

### Case Example: Norman<sup>5</sup>

In 1997, Norman was homeless and addicted to drugs. He was arrested for stealing a floor jack from a tow truck. Norman was prosecuted under the “three strikes” law because he had two prior convictions: in 1982, he tried to burglarize an apartment being fumigated; and, in 1992, he tried to steal several tools from an art studio attached to a house, but dropped them and fled when confronted by the owner. Norman had suffered childhood abuse and struggled with a mental disability.

If Norman had committed his crimes in Massachusetts after the Senate bill passed, he would also have two “strikes” against him.

- The burglary and art studio break-in would count as a “strike” under the Subsection (b) of the Senate Bill (M.G.L.c.266, §17).
- If Norman had then stolen over \$250 worth of property from the back of a truck, his crime would count as a third “strike” (M.G.L.c.266, §18). He could be prosecuted as a “habitual offender” and would receive a maximum sentence of 10 years without parole. The judge would not be permitted to consider his history of abuse and addiction, or his disability, in sentencing.

*Moreover, California law includes certain safeguards that both the Massachusetts Senate bill and House bill fail to incorporate. . .*

- ▶ California law allows judicial discretion. Judges are permitted to vacate one or more of a defendant’s convictions from consideration as a strike “in furtherance of justice” if the judge determines that, in light of the nature and circumstances of the present felonies or prior convictions and the particulars of his background, character, and prospects, the defendant may be deemed outside the spirit of the three strikes scheme, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.
- ▶ California law includes parole eligibility at 25 years for individuals sentenced to life in prison as “three strikers.”

5 *Id.*; Emily Bazelon, *Arguing Three Strikes*, New York Times, May 21, 2010, [http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html?\\_r=1&scp=1&sq=arguing%20strikes&st=cse](http://www.nytimes.com/2010/05/23/magazine/23strikes-t.html?_r=1&scp=1&sq=arguing%20strikes&st=cse).

## Other States are Now *Rejecting* Habitual Offender Legislation

- ▶ **The proposed legislation is out of step with a national trend moving away from “three strikes” and other overly broad punitive legislation, and toward a more balanced approach to public safety.**
  - Between 1993 and 1996, twenty-five jurisdictions passed habitual offender laws similar to the bill proposed by the Massachusetts Senate and House.<sup>6</sup>
  - Since 1996, the trend has clearly been the reverse. Only one state has passed a comprehensive habitual offender law in the past decade—Arizona in 2006.<sup>7</sup>
- ▶ **Of the 25 states to first introduce habitual offender laws, at least 16 have amended the legislation to allow for greater flexibility in sentencing and measures aimed at reforming mandatory sentencing laws continue to be proposed around the country.<sup>8</sup>**

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### THE TREND IN OTHER STATES:

- ▶ At least ten states have increased judicial discretion in “three strikes” sentencing, including Colorado, Connecticut, Florida, Kansas, Louisiana, Maryland, Montana, Nevada, New Jersey, and Wisconsin.<sup>9</sup>
- ▶ As of 2010, seven states have either eliminated life without parole or limited the circumstances in which that sentence applies to habitual offenders, for example:<sup>10</sup>
  - Montana introduced exceptions to mandatory sentences and restrictions on parole eligibility in 2007.<sup>11</sup>
  - In Nevada, habitual offenders are eligible for parole after serving a minimum term.
- ▶ As of 2010, at least *eight states replaced mandatory sentences with sentencing ranges*, for instance:<sup>12</sup>
  - Connecticut changed its three-strike sentencing to minimum and maximum ranges.
  - Louisiana still requires a determinate sentence, but now provides ranges that depend on whether it is a second or third conviction and on the underlying offense.
- ▶ Also based on adopting more balanced and cost-effective sentencing laws and corrections systems, many states have modified mandatory minimum sentences for drug offenses:<sup>13</sup>
  - Colorado, Connecticut, Louisiana, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Rhode Island and South Carolina eliminated mandatory minimum sentences or permitted judicial discretion for certain drug crimes.
  - Indiana and South Dakota narrowed the application of mandatory minimums.
  - Delaware and Maine decreased mandatory minimum sentences for trafficking crimes.
  - New Mexico repealed the provision that made a sentence enhancement mandatory if the defendant was charged with a previous drug conviction as a habitual offender, making the drug enhancement discretionary for judges.
  - Pennsylvania lawmakers, in 2004, created an intensive treatment model making drug-addicted offenders who would otherwise face a minimum prison sentence eligible for an intermediate punishment program.

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6 Alison Lawrence, *Issue in Focus, Three Strikes Laws: Past and Present*, National Conference of State Legislatures, E-Bulletin (October 2010), <http://www.ncsl.org/issues-research/justice/three-strikes-laws-past-and-present.aspx> (reporting that 24 jurisdictions enacted laws between 1993 and 1995); Prison Policy Initiative, *“Three Strikes” Laws: Five Years Later (Executive Summary)*, <http://www.prisonpolicy.org/scans/sp/3strikes.pdf>, confirms this figure and notes that Alaska enacted its habitual offender law in 1996.

7 A.R.S. § 13-706.

8 See Lawrence, *supra* note 7; see, e.g., Gabrielson, *supra* note 3; Johnny Edwards, *Inmate drop could free Fulton lockup: Jail's success may signal how state's plan can aid taxpayers, court efforts*, The Atlanta Journal-Constitution, April 7, 2012.

9 See *id.*

10 See *id.*

11 Mont. Code Ann. 46-18-222.

12 See Lawrence, *supra* note 7.

13 See Alison Lawrence and Donna Lyons, *Principles of Effective State Sentencing and Corrections Policy: A Report of the NCSL Sentencing and Corrections Work Group*, National Conference of State Legislatures (August 2011); Jon Wool and Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, Vera Institute of Justice (March 2004); Judith Greene and Timothy Roche, *Cutting Correctly in Maryland*, Justice Policy Institute (February 2003).

- **States have been moving away from three strikes laws because, realizing that this type of legislation is too expensive and not effective in measurably reducing crime.**

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"Years of budget shortfalls have led to major cuts in almost all state-funded programs. California is under a U.S. Supreme Court order to reduce prison crowding. And polls consistently show voters believe the state is spending way too much money on incarceration and not enough on education and other programs." (*California, San Francisco Chronicle*)<sup>14</sup>

"Habitual offenders are inherently one of the most expensive populations in Alabama's prison system due to the population aging over lengthy or lifelong sentences. They cost the prison system \$112 million dollars a year -- or 36 percent of the fiscal 2006 budget. That takes a toll on the underfunded, understaffed, dated prison system that's at double designed capacity with more than 27,000 inmates" (*Alabama, Montgomery Advertiser*)<sup>15</sup>

"In North Carolina, 10 percent of all inmates are classified as habitual offenders. Now, the General Assembly, which approved structured sentencing reform in 1994, must come up with \$150 million for two close-security prisons, not to mention their \$17 million annual operating expenses. And that could be just the beginning." (*North Carolina, Greensboro News & Record*)<sup>16</sup>

"Crowding in Nevada's prisons has become so serious that the federal government might take over the prison system unless the problem is resolved soon. [...] Lawmakers who have been studying the state's system of parole and probation say throwing up bricks and bars is too expensive. They believe the state has options that are cheaper and more practical, including backing away from some of the "get tough on crime" laws enacted during the mid-1990s." (*Nevada, Las Vegas Sun*)<sup>17</sup>

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## **The Proposed Law Will Have a Significant, Negative Impact**

### ***The Financial Costs***

- **According to estimates, Subsection (b) of the proposed habitual offender law alone could cost as much as \$125 million per year once the law is fully in effect.**
- It cost \$46,000 to keep one person in prison for one year in FY 2010. However, the annual cost of housing prisoners rises over time.<sup>18</sup>
  - Every year, about 2,000 new prisoners are incarcerated for one of the crimes listed in Subsection (b) of the Senate bill.
  - Based on an analysis of FY 2010 data from the Massachusetts Sentencing Commission, approximately 150 to 250 of these prisoners are sentenced for what would qualify as a third "strike" under Subsection (b) every year and could be sentenced the maximum sentence without parole—some to life without parole.<sup>19</sup>

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14 Marisa Lagos, *Major 3-strikes changes sought*, San Francisco Chronicle, November 28, 2011, at A1.

15 Samira Jafari, *Alabama's habitual offender laws filling state prisons*, Montgomery Advertiser, January 3, 2011.

16 Editorial: *Sentencing Changers Merit a Closer Look*, Greensboro News & Record, January 19, 2002, at A6.

17 Joe Schoenmann, *Too many prisoners: threat of takeover might give Gibbons more budget muscle*, Las Vegas Sun, April 7, 2007, at A1.

18 Per the Massachusetts Department of Correction, the average cost per year to house a prisoner in FY2010 was \$45,917.05. Massachusetts Department of Correction, *Frequently Asked Questions about the DOC*, <http://www.mass.gov/eopss/agencies/doc/faqs-about-the-doc.html>. In 2001, the cost of housing a state prisoner in Massachusetts was \$37,718 per year. U.S. Department of Justice, *Bureau of Justice Statistics Special Report: State Prison Expenditures, 2001*, 3 (June 2004), <http://cacs.unlv.edu/pdf/spe01.pdf>. Five years earlier, in 1996, the annual cost was \$26,002. U.S. Department of Justice, *Bureau of Justice Statistics Special Report: State Prison Expenditures, 1996*, 2 (June 2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe96.pdf>.

19 This analysis was conducted by Prisoners' Legal Services based on the data from the following: Massachusetts Sentencing Commission's *Survey of Sentencing Practices FY 2010*, Figure 1: Sentencing Guidelines Grid at p.3, Table 24: Grid Cell Assignment by Court Department at p.37; Criminal History Group at p.70; Selecting a Governing Offense, p.71 (explaining that the statistics "may underestimate the number of defendants in the highest criminal history group"); and Table 41: Governing Offense by Grid Cell Assignment and Incarceration Status, All Courts, pp.86-87 (April 2011), <http://www.mass.gov/courts/admin/sentcomm/fy2010survey.pdf>. The range of 150-250 was estimated by assuming that all people convicted of a third strike would be in criminal history group D or E, and that all crimes of Levels 7-9 and 50% of Level 6 crimes would count as strikes. The range also includes a rough estimate of the number of people who have served at least one day in county facilities for their previous two "strikes," under Subsection (b) of S.2080.



- If all of the people eligible for indictment as Subsection (b) habitual offenders are convicted and sentenced to an average of 10 extra years in prison as a result of the changes to the law, they will cost taxpayers approximately \$75 to \$125,000,000 per year once the law has taken effect.<sup>20</sup>
- **The Massachusetts Sentencing Commission recently issued a report estimating the number of people who would be eligible for conviction under the Senate bill and House bills based on FY 2009 sentencing data.<sup>21</sup> It also compares the average current sentences for those people with the average sentences that would be imposed under each bill. This information can be used to estimate potential annual costs of up to \$132 million.**
  - The Massachusetts Sentencing Commission estimated that 307 defendants met the criteria for habitual offenders under the Senate bill in FY 2009, all of whom would receive the maximum state prison sentence permitted for their third offense if they were sentenced as habitual offenders. Out of those 307 defendants, 9 are not sentenced to incarceration at all under current law.<sup>22</sup>
  - The Massachusetts Sentencing Commission estimated that the average sentence for habitual offenders under the Senate bill would be 169.8 months. This increase in sentence would be 113 months, over 9 years, for each defendant sentenced as a habitual offender.<sup>23</sup>
  - Based on those estimates, the Senate bill has the potential to expand the prison population by approximately 2,890 people once the law has fully taken effect; 1,826 people would be sentenced under Subsection (a) and 1,064 under Subsection (b). The number of people in prison as habitual offenders who are not incarcerated at all under current law could grow to 127 when fully implemented.
  - At a cost of nearly \$46,000 per year, the potential added annual cost of the proposed habitual offender provisions in the Senate bill would be approximately \$132,700,274.50 when fully in effect.<sup>24</sup> Out of that total, approximately \$5,831,465.35 would be required to incarcerate the defendants who are not incarcerated at all under current law.<sup>25</sup> The remaining \$126,910,899.78 would be the result of the substantial increase in the length of time served by people convicted as habitual offenders.
  - The Massachusetts Sentencing Commission estimated that 281 defendants met the criteria for habitual offenders under the House bill, and all would receive the maximum sentence of incarceration if they were convicted. Out of those 281 defendants, 14 are not sentenced to incarceration at all under current law.<sup>26</sup>
  - The Massachusetts Sentencing Commission estimated that the average sentence for habitual offenders under the House bill would be 140.4 months. The average increase in sentence would be 85.3 months, over 7 years, each.<sup>27</sup>
  - Applying those estimates, the House bill has the potential to expand the prison population by approximately 1,997 people: 1,798 under Subsection (a) and 199 under Subsection (b). The number of people in prison who are not incarcerated under current law could grow to 163 people when the law is in full effect.

20 This estimate takes into account the increasing cost of incarceration, using \$50,000 per year as the cost of incarcerating one inmate, given that the proposed habitual offender provisions will not take full effect for a number of years. See note 18, *supra*.

21 Massachusetts Sentencing Commission, *A Comparison of the Current Habitual Offender Statute, Chapter 279, s. 25, and Two Proposed Habitual Offender Laws, Senate Bill 2080 and House Bill 3818*, presented to Senator Therese Murray on March 21, 2012.

22 *Id.* at 2, Figure 3, Figure 4.

23 *Id.* at 2, Figure 5.

24 Each of the 2,890 additional people in prison will cost \$45,917.05 per year to incarcerate ( $2,890 \times 45,917.05 = 132,700,274.50$ ).

25 Each of the 127 additional people in prison will cost \$45,917.05 per year to incarcerate ( $127 \times 45,917.05 = 5,831,465.35$ ).

26 *Id.* at 2, Figure 3, Figure 4.

27 *Id.* at 2, Figure 5.



- When fully in effect, the potential added annual cost of the proposed habitual offender provisions in the House bill would be approximately \$91,696,348.90.<sup>28</sup> Out of that total, approximately \$7,484,479.15 would be required to incarcerate the defendants who are not incarcerated at all under current law.<sup>29</sup> The remaining \$84,232,149.73 would be the result of the great increase in the length of time served by people convicted as habitual offenders.

► **There are limitations to the accuracy of the Massachusetts Sentencing Commission's estimates:**

- As noted below Figures 3, 4, and 5, the estimates are based only on Superior Court felony convictions from FY 2009, thereby failing to account for the number of defendants convicted in District Court that would have fallen under the proposed habitual offender provisions.
- As stated in Figure 5, the Massachusetts Sentencing Commission calculated how much time defendants who met habitual offender criteria would serve before parole eligibility if they were sentenced as habitual offenders. This method underestimates the average additional time that habitual offenders will serve under the Senate and House bills. Given current parole rates that the effect of the label "habitual offender," it is unlikely that all or even most habitual offenders sentenced under Subsection (a) will be paroled.
- In addition, the estimates of the average time defendants who met habitual offender criteria would serve if sentenced as habitual offenders do not distinguish between Subsection (a) and Subsection (b). Because Subsection (b) habitual offenders are not eligible for parole, the length of time they serve would be greater than those sentenced under Subsection (a) and the estimates likely underestimate the impact of Subsection (b).

► **These cost estimates do not include the capital costs of building new prisons.**

► **These cost estimates do not include the medical costs required to care for an increasingly aging prison population.**

► **These cost estimates do not account for extra prison time that people eligible for indictment as habitual offenders will serve as a result of plea bargaining.**

- Approximately 90% of criminal convictions are now procured by guilty pleas.<sup>30</sup>
- In most cases, prosecutors and defendants strike plea bargains: the prosecutor offers a reduced sentence, or some other benefit, in exchange for the plea.
- As mentioned above, poor people are especially likely to take plea bargains. They are often forced to remain in jail before trial, since they cannot afford bail—and a plea bargain may be their only means of being released.
- Prosecutors can compel defendants who are eligible for indictment as habitual defendants to plead guilty by threatening to pursue habitual offender indictments if the defendants choose to go to trial.<sup>31</sup>
  - Since prosecutors can extract guilty pleas by offering not to indict under the habitual offender law or to dismiss an existing habitual offender indictment, the legislation can result in longer sentences for many people, even if it is not formally applied.
  - This power of prosecutors over defendants is enhanced further by the addition of Subsection (b). For those defendants who meet the habitual offender criteria under Subsection (b), the prosecutor can also potentially compel them to plead guilty for a step-down to a Subsection (a) indictment allowing parole eligibility.

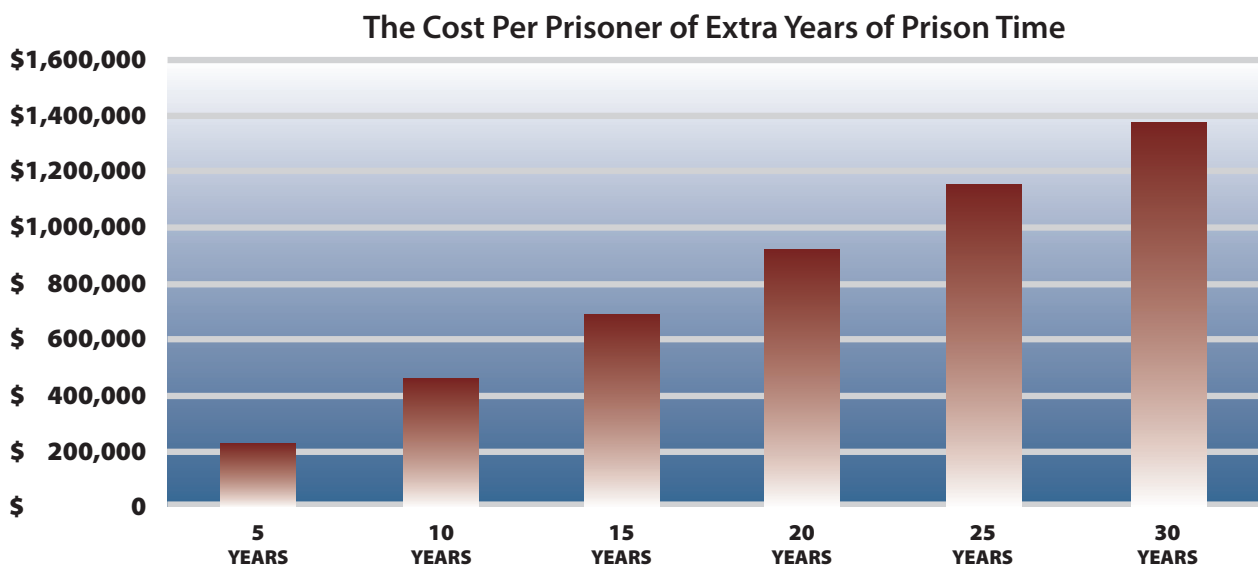
28 Each of the 1,997 additional people in prison will cost \$45,917.05 per year to incarcerate ( $1,997 \times 45,917.05 = 91,696,348.85$ ).

29 Each of the 163 additional people in prison will cost \$45,917.05 per year to incarcerate ( $163 \times 45,917.05 = 7,484,479.15$ ).

30 William J. Stuntz, *The Collapse of American Criminal Justice* 7 (2011).

31 This practice is permitted by the Supreme Court. See e.g. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

- The Massachusetts Sentencing Commission does not track data regarding criminal charges that do not result in convictions. However, given the prevalence of plea bargaining, it is reasonable to conclude that a large proportion of defendants who meet habitual offender criteria are under current, and will under the proposed law be, indicted or threatened with indictment by the prosecutor in order to secure a guilty plea.<sup>32</sup>
  - Longer sentences through plea bargains are a major, hidden cost of habitual offender laws. The changes proposed in the Senate bill and House bill will apply to many more cases, resulting in a significant increase in cost to incarcerate defendants compelled to plea to longer sentences.
- **These cost estimates do not account for the substantial increase in costs of pre-trial jail time, case processing, and trials because many defendants facing mandatory maximum terms of incarceration as habitual offenders will opt to go to trial rather than plead guilty.**



*This table represents the additional cost per prisoner associated with adding to the total number of years being served in prison—either by convicting more people, or by giving them longer sentences.*

Even if only ten people are sentenced as habitual offenders per year, and if their sentences are increased by an average of ten years (for a total of 100 years of added prison time), it will cost taxpayers nearly \$4.6 million—just for the additional time served by ten people.

These costs will multiply over time, as habitual offenders are convicted and sentenced every year. If, annually, only ten people are sentenced as habitual offenders and receive an average of ten extra years in prison, then the proposed changes will cost nearly \$1 billion dollars over 20 years.

► **The real costs will probably be far higher:**

- As explained above, data from the Massachusetts Sentencing Commission suggest that well over 250 people could be sentenced under the proposed law every year; this chart assumes only ten people per year.
- The average cost of keeping a prisoner for 1 year is significantly higher for prisoners over age 50. Due to the requirement of maximum sentences and delay or no parole eligibility, many people sentenced as habitual offenders are likely to be in prison past the age of 50.<sup>33</sup>

<sup>32</sup> For further analysis, see Senator Will Brownsberger, *Prison Populations Increases under the proposed Habitual Offender bill*, April 3, 2012, <http://willbrownsberger.com/index.php/archives/10200>.

<sup>33</sup> The cost of aging offenders is discussed in more detail below on page 20.

- Once again, these estimates do not include the capital costs associated with building new prisons necessary to house additional prisoners.
- In addition, these estimates do not include the “hidden costs” of plea agreements. Even if prosecutors only convict a fraction of the over 250 eligible defendants each year as habitual offenders, they may extract higher sentences from others with the threat of habitual offender indictments.

► **Proponents of the new law have *not* offered a reasonable cost estimate.**

- It is difficult to establish with certainty how high the costs will rise due to a number of variables. We would need to know exactly:
  - How often prosecutors would use the new law—prosecutors are likely to use it more often than the current law because the proposed habitual offender provisions apply to more people, mandate harsher punishments, and garner increased media attention.
  - How many additional prison years will be added to individual sentences—this number will depend on what kinds of crimes are charged under the new law and the sentences that defendants would have received but for the application of the new law.
  - How often prosecutors will use the new law as a threat to extract higher sentences through plea bargaining, and what sentences they will get.
  - How many people will turn down plea agreements out of fear of getting a “strike” and instead opt to go to trial, increasing costs of pre-trial jail time, case processing, and trials.

► **Proponents of the changes to the habitual offender law assert it will not be expensive because it will only be used by prosecutors in 5 to 10 cases a year. This claim is based on the assumption that the proposed provisions will not be used more often than current law, which results in roughly 8 convictions annually.**

- The assumption that prosecutors will convict defendants under the proposed habitual offender provisions at the same rate as under current law is not well-founded.
  - The proposed habitual offender provisions apply to many more defendants than the current law.
  - Prosecutors are free to use the law as they see fit. The government has no way to control the charging decisions of elected District Attorneys or individual prosecutors, except by drafting the law more carefully.
  - Increased media and political attention will make it difficult for District Attorneys to decline to seek habitual offender indictments.
  - The changes to the habitual offender provision proposed in the Senate bill and House bill mandate longer sentences than current law and provide prosecutors with greater incentive invoke the statute.
    - ✦ The low rate of habitual offender convictions under current law can be attributed to several factors, including: (1) the current law makes habitual offenders parole eligible after serving 1/2 of the maximum sentence, so prosecutors can often secure from judges a harsh sentence with later parole eligibility if they do not invoke the habitual offender statute; and (2) prosecutors commonly use the threat of a habitual offender sentence as a tool to induce the defendant to plea bargain.
    - ✦ Even if prosecutors invoked for every eligible defendant, it will be available as an enhanced tool for prosecutors to compel pleas from defendants in many more cases, resulting in higher prison terms for people who are not technically convicted as habitual offenders.

- It is irresponsible to introduce legislation that could cost taxpayers millions of dollars per year without thinking carefully about its real financial implications and what tradeoffs will have to be made in terms of cuts to other programs and services.

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*The ability to leverage guilty pleas is greatly enhanced when prosecutors can present defendants with a lesser sentence in light of a potential maximum penalty the defendant would otherwise face if they were convicted after trial. Maximum mandatory sentences are a tremendous bargaining chip the prosecutor has at her or his disposal that significantly increase the likelihood of a guilty plea to a lesser charge, thus guaranteeing a conviction. There have been many times I have indicted individuals under the current habitual offender statute with the intention of leveraging a guilty plea in an attempt to compensate for reluctant witnesses, difficult fact patterns or unlikeable victims. As prosecutors we are taught to peruse all the charges that we can prove based on the evidence available to us, then we negotiate from a position of strength. These proposed habitual offender laws give prosecutors a greater arsenal to pursue this approach with longer sentences, given the increased duration of parole eligibility, and more eligible defendants who may have never served prison time.*

— Rahsaan D. Hall  
 Deputy Director, Lawyers' Committee for Civil Rights and  
 Economic Justice, former Assistant District Attorney for Suffolk  
 County District Attorney's Office, Boston, MA, 2000–2008

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## **The Disparate Racial Impact**

### ► **Habitual offender laws have the greatest impact on low-income people and people of color.**

- People of color are more likely to become involved in the criminal justice system. There are varied explanations for these disparities. Most analyses point to a constellation of complex and interrelated structural and institutional factors that include poverty, high rates of joblessness, low levels of education, the clustering of African-Americans and Latinos in concentrated urban areas that are more heavily policed than predominantly white suburban and rural areas, explicit and unconscious bias on the part of police, judges, jurors and other decision-makers.<sup>34</sup>
- Increased involvement in the criminal justice system leads to increased risk of criminal convictions, making people of color and poor people more likely to have multiple convictions.
- Poor people are more likely to plead guilty to offenses. Often, they face a choice of pleading guilty immediately or waiting in jail because they cannot afford to post bail.<sup>35</sup>
- *As a result, people of color and low-income people are therefore more likely to qualify as habitual offenders.* Imposing longer sentences and delaying parole eligibility will have a disparate impact on these groups.

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34 The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (2008), [http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf); see also Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (July, 2007), [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf); Charles Ogletree, Robert Smith, and Johanna Wald, *Implicit Bias and the Criminal Justice System*, Chapter in *Implicit Bias Across the Law* (Forthcoming Spring 2012).

35 See Criminal Justice Policy Coalition, *Bail Fund*, <http://www.cjpc.org/bailfund.htm>.

- This predictable effect on racial minorities has been well-documented in other states.<sup>36</sup>

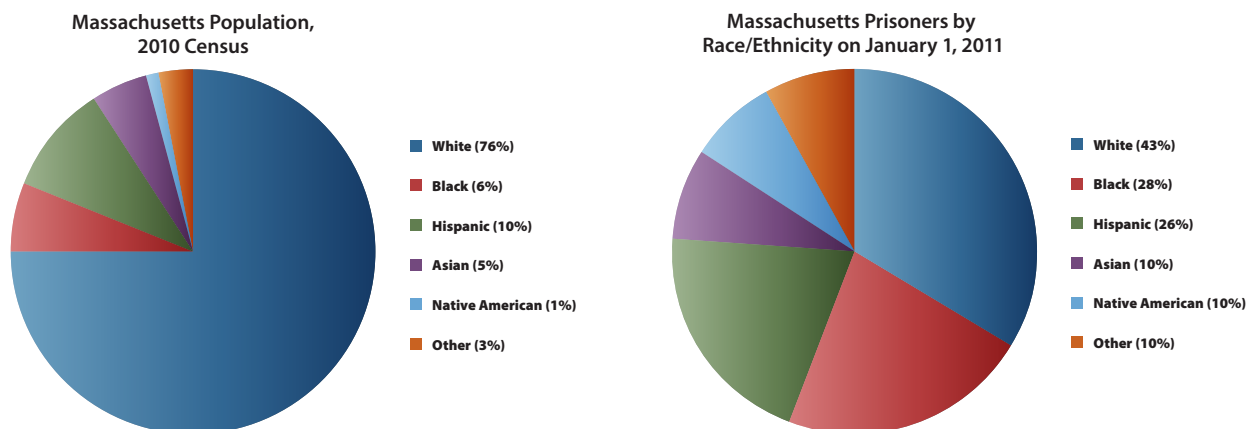
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**THE TREND IN OTHER STATES:**

- In California, only 6% of the state's total population is African-American. However, African-Americans make up 31% of the state prison population and 44% of "three strike" offenders.
  - In Washington, African-Americans account for roughly 4% of the state's population, but they make up 23% of the prison population and approximately 40% of those convicted under the state's three strikes legislation.
  - In Florida, African-American made up approximately 65% of habitual offender admissions, approximately 49% of the entire prison population, and 16% of the state population in 2010.
  - In Georgia, African-Americans are 30.5% of the population, but 61.6% of the prison population and 68% of people convicted under the state's "two strike" habitual offender law.
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- There is no reason to believe Massachusetts would fare better.

- The Commonwealth already imprisons a disproportionate number of racial minorities.
- African-Americans and Hispanic people are especially over-represented.
- *By imposing more prison time on offenders with criminal records, the proposed habitual offender provisions are likely to make these figures even worse.*



*These comparative charts are based on a report of the Massachusetts Department of Corrections<sup>37</sup>*

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<sup>36</sup> Prison Policy Initiative, "Three Strikes" Laws: Five Years Later (Executive Summary), <http://www.prisonpolicy.org/scans/sp/3strikes.pdf>.

<sup>37</sup> Massachusetts Department of Correction, *Comparing Massachusetts Census and DOC Jurisdiction Populations by Race/Ethnicity for 2010* (October 2011), <http://www.mass.gov/eopss/docs/doc/research-reports/briefs-stats-bulletins/2010-racethnic-pop-brief-crystalpark.pdf>.

## The Burden on Prisons

► **The Massachusetts state prison system is currently operating at 145% capacity.**<sup>38</sup>

Without any changes in the law, the prison system will have a shortfall of 12,100 bed spaces by 2020.<sup>39</sup>

► **A growing prisoner population means a growing financial strain on the taxpayers.**

- The Massachusetts Department of Correction's FY 2012 budget is over \$530 million.
- As discussed above, it currently costs approximately \$46,000 to keep a single person in prison for a year.
- The cost is greater for prisoners kept in jail past age 50, when the cost of medical care is higher and the risks associated with re-entry into society are lower.<sup>40</sup>
  - Housing elderly prisoners costs up to three times as much as housing younger prisoners. The National Institute of Corrections counts any inmate over age 50 as "elderly," because "the average prisoner is often physiologically older than their years and with significant health problems exacerbating their age."<sup>41</sup>
  - Elderly prisoners pose a decreased social risk when they reenter society.<sup>42</sup>
  - Habitual offenders, especially those serving life without parole, are likely to be among the population of expensive, elderly inmates.<sup>43</sup>

► **As the prison population grows, we will incur billions of dollars in new costs—capital costs to build new prisons, and ongoing operational costs to run them.**

- Even if we manage to reduce the projected shortfall by 1,850 beds, Massachusetts will need to invest an estimated \$1.3 to \$2.3 billion in today's dollars for new capital costs by 2020. Estimated annual operating costs will rise too, reaching up to \$120 million.

► **In January 2012, the Division of Capital Asset Management released a report on prison overcrowding, following two years of work together with the Department of Correction and Sheriffs' Departments, among others.**

- The report affirmed that we cannot afford to simply build more prisons. We need new, smarter policies: "Building our way out of our challenges is not an option."<sup>44</sup>
- The report identified mandatory minimum sentences and statutes affecting parole eligibility as among "the most prominent drivers of bed space demand."<sup>45</sup>

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38 See Massachusetts Department of Correction, *Weekly Count Sheet: 4/2/2012*, <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2012/04-02-12.pdf>; see also Massachusetts Department of Correction, *Quarterly Report on the Status of Prison Overcrowding, Third Quarter 2011*, <http://www.mass.gov/eopss/docs/doc/research-reports/overcrowding/2011/2011-3rd-overcrowding.pdf>.

39 Massachusetts Division of Capital Asset Management, *Corrections Master Plan*, January 2012, <http://www.mass.gov/eopss/docs/eops/publications/the-massachusetts-corrections-master-plan.pdf>.

40 Michael Vitiello, *Why the Initiative Process is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215*, 43 McGeorge L. Rev. 63, 80 (2012).

41 Aging Inmates Committee, *Aging Inmates: Correctional Issues and Initiatives*, 44 Maryland Bar Journal 22, 24 (2011).

42 Michael Vitiello, *supra* note 35.

43 Patricia S. Corwin, *Senioritis: Why Elderly Federal Inmates are Literally Dying to Get Out of Prison*, 17 J. Contemp. Health L. & Pol'y 687 (2001).

44 Massachusetts Division of Capital Asset Management, *Corrections Master Plan*, *supra* note 24 (emphasis in original).

45 *Id.*

## A Better Approach to Improving Community Safety

### Habitual Offender Laws Are Not Proven to Increase Public Safety

- ▶ Longer prison sentences do not reduce recidivism and may even increase recidivism.
  - “The Bureau of Justice Statistics has reported on a nationally representative sample of prisoners assessing the impact of time served in prison on recidivism rates. Researchers found that recidivism rates did not vary substantially whether prisoners were released anywhere in the range of six months to five years.”<sup>46</sup>
  - Some studies show that longer sentences increase recidivism rates. “[W]hen prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism.”<sup>47</sup>
- ▶ Habitual offender laws are not associated with a meaningful increase in public safety.
  - Nationally, the crime rate was steady between 1968 and 2008 even though the imprisonment rate during that period climbed from 94 out of every 100,000 residents to 504 per 100,000.<sup>48</sup>
  - In a comprehensive study, the Vera Institute of Justice reports: “The most sophisticated analyses generally agree that increased incarceration rates have some effect on reducing crime, but the scope of that impact is limited: a 10 percent increase in incarceration is associated with a 2 to 4 percent drop in crime. Moreover, analysts are nearly unanimous in their conclusion that continued growth in incarceration will prevent considerably fewer, if any, crimes than past increases did and will cost taxpayers substantially more to achieve.”<sup>49</sup>
  - The few positive results gained from habitual offender legislation are outweighed by its racial ramifications and detrimental effects on low-income communities. The increase in incarceration rates will likely have a demonstrable effect on low-income communities and people of color, due to the well-documented pattern of racial disparities in incarceration rates.

### Smarter Spending—Programs Proven to Increase Public Safety

- ▶ We know which programs and strategies reduce recidivism: “[I]mproving probation and parole supervision practices; delivering effective substance abuse and mental health treatment; providing education, job training, and connections to employment; and ensuring appropriate housing.”<sup>50</sup>
  - In its January 2012 Report on prison costs, the Massachusetts Division of Capital Asset Management stated: “The programs and services provided through pre-release and reentry are essential to a successful re-integration into the community, are the foundation for changing the current rate of re-offending and are a cornerstone to improving public safety.”<sup>51</sup>

46 Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project, 7 (November 2010).

47 *Id.*; see also Paul Gendreau, Claire Goggin, and Francis T. Cullen, *The Effects of Prison Sentences on Recidivism*, Ottawa, Ontario, Canada: Public Works and Government Services Canada (1999); Thomas Orsagh and Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, *Journal of Quantitative Criminology*, 4(2), 155-171 (1988).

48 Lynn S. Branham, “The Mess We’re In”: *Five Steps Towards Transforming Prison Cultures*, 44 *Ind. L. Rev.* 703 (2011).

49 Don Sterman, *Reconsidering Incarceration: New Directions for Reducing Crime* (January, 2007), [http://www.vera.org/download?file=407/veraincarc\\_vFW2.pdf](http://www.vera.org/download?file=407/veraincarc_vFW2.pdf). An analysis led by criminologists in 1997 showed that in nine of California’s ten largest cities, there was no indication that the law had reduced either serious crime or petty theft rates below the level of preexisting trends. See Lisa Stolzenberg and Steward J. D’Alessio, “Three Strikes and You’re Out”: *The Impact of California’s New Mandatory Sentencing Law on Serious Crime Rates*, *Crime & Delinquency*, Vol.43, No.4 (October 1997). Another 1997 survey showed that the law has had little impact on violent crime, finding that states with “three strikes” laws showed less of a decline in violent crime than states without the law. See Harriet Chiang, *Report on 3-Strikes Sentencing Says It Hasn’t Discouraged Crime*, *San Francisco Chronicle*, March 7, 1997.

50 The National Summit on Justice Reinvestment and Public Safety, *Addressing Recidivism, Crime, and Corrections Spending*, 21 (January 2011), [http://issuu.com/csgjustice/docs/jr\\_summit\\_report\\_final/1?mode=a\\_p](http://issuu.com/csgjustice/docs/jr_summit_report_final/1?mode=a_p).

51 Massachusetts Division of Capital Asset Management, *Corrections Master Plan*, *supra* note 24.



- The Washington State Institute for Public Policy was established by the legislature to assess evidence on “what works” to improve public policy outcomes. It spent a decade studying the evidence. In its July, 2011 Update, it profiled 18 crime policy programs. Almost all of the programs worked so well, they saved money.<sup>52</sup> For example:
  - Drug Offender Sentencing Alternative—estimated savings: \$26,502.
  - Correctional Education in Prison—estimated savings: \$18,821.
  - Vocational Education in Prison—estimated savings: \$17,547.
  - Drug Treatment in Prison—estimated savings: \$10,456.
  - Community Employment Training/Job Assistance—estimated savings: \$4,509.
- In 2009, the Massachusetts Department of Correction reported that “[e]ducational and vocation programs have been shown to reduce recidivism by 9%, and 7%, respectively.”<sup>53</sup>
  - However, the Department currently spends only 2.4% of its budget on programming.<sup>54</sup> Thus, opportunities to participate are extremely limited.
  - Those who are not eligible for parole or to receive sentence deductions for good conduct are rarely accepted into programs because participation cannot lead to an earlier release.
  - Therefore, as a practical matter, the language of the proposed legislation means that, in general, people convicted as Subsection (b) habitual offenders will have little or no opportunity to participate in programs that reduce recidivism.

## Recommendations

### FIRST: Reject or Fix the Proposed Legislation

- 1) **With a habitual offender law already in effect, there is no need for the proposed legislation.**
- 2) **Make only prior convictions for which the defendant was sentenced to 3 years or more in state prison count as “strikes” under Subsection (a) and Subsection (b) of the proposed habitual offender provisions to ensure that the law will apply only to serious prior offenses warranting substantial prison time, and will be less likely to ensnare low-level or nonviolent offenders.**
- 3) **The list of crimes that qualify as “strikes” in Subsection (b) should be greatly narrowed to include only the most serious offenses so that people are not subjected to mandatory maximum sentences without the possibility of parole for low-level or nonviolent offenses.**
- 4) **Like other states, permit judicial discretion as a check on the unfettered authority of prosecutors to indict habitual offenders. Specifically, include a provision that allows judges to remove present felonies or prior convictions from consideration as “strikes” in the interests of justice based on the circumstances surrounding the crime and the particulars of the individual defendant.**

52 Washington State Institute for Public Policy, *Return on Investment: Evidence-Based Options to Improve Statewide Outcomes* (July 2011), <http://www.wsipp.wa.gov/rptfiles/11-07-1201.pdf>. The Institute assesses costs, benefits, and risks in order to produce a “Consumer Reports-like ranking of public policy options.” Its report showed that sixteen of the eighteen programs saved money; the two unsuccessful programs were “Intensive Supervision, Surveillance Only” and “DV [Domestic Violence] Perpetrator Program.”

53 Massachusetts Department of Correction, *January 1, 2009 Inmate Statistics*, 22, <http://www.mass.gov/eopss/docs/doc/research-reports/jan-1-population/112009.pdf>.

54 See Massachusetts Department of Correction, *2009 Annual Report*, 78, <http://www.mass.gov/eopss/docs/doc/annual-report-2009-final.pdf>.



- 5) **Make habitual offenders sentenced to life imprisonment pursuant to Subsection (b) eligible for parole after serving 25 years of said life sentence.**

## **SECOND: Make Evidence-Based, Data-Driven Decisions about Public Safety**

- 1) **Allocate the money that would be spent on housing prisoners for longer sentences and building new prisons to support programs that are proven to reduce recidivism and improve community safety. Sound criminal justice policy decisions are based on evidence-based practices and socio-economic research.**
- 2) **Undergo a data-driven process for safely reducing the prison population and reinvesting funds into public safety measures with the assistance of the Pew Center on the States or Justice Reinvestment, a project of the Council of State Governments' Justice Center. This will provide a team of our elected and appointed officials the opportunity to work with criminal justice experts who will consult with a broad range of stakeholders, including: judges; prosecutors; public defenders; corrections and law enforcement officials; community leaders; victims' advocates; people who have been incarcerated; and health, housing, human service, education, and work force professionals. The other states that have taken advantage of these programs have been able to enact cost-effective, targeted criminal justice policies based on research, data, and current best practices.**

## **Conclusion**

Massachusetts legislators must consult with experts and make evidence-based decisions when determining criminal justice policy if the true objective is to improve public safety and address shortcomings of the Commonwealth's current system. Sound policy must be sustainable, cost-effective, and just; it should not be based on an emotional or political response to particular events. The experiences of other states show that lengthy, mandatory state prison sentences incur enormous costs, fail to reduce crime significantly, and exacerbate the already severe disparate impact of the criminal justice system on low-income communities and people of color.

Any new habitual offender legislation must be limited significantly to ensure that it applies to only the few, "worst of the worst" repeat offenders. In addition, sentences of life without parole must be reserved for those convicted of first degree murder, keeping in mind that parole eligibility is no guarantee of parole release. By properly limiting the applicability of the habitual offender provisions, Massachusetts will be able to reinvest in its people through education, treatment, training, and community development programs. Unlike mandatory prison sentences, these programs have a proven effect on reducing recidivism and, better still, strengthening our communities to prevent the creation of future offenders.

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