

NO TIME TO WAIT:
Recommendations for a Fair
and Effective Criminal
Justice System

REPORT OF BOSTON BAR
ASSOCIATION CRIMINAL
JUSTICE REFORM WORKING
GROUP

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Criminal Justice System

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FOREWORD

When Massachusetts' leaders commissioned a report on justice reinvestment from the Council of State Governments (CSG) Justice Center, they opened the door to the possibility of comprehensive and durable criminal justice reforms – something not seen in the Commonwealth for more than 20 years. The BBA has played a role in debating such reforms, continuing our advocacy for evidence-based improvements that promise to reduce recidivism while allocating scarce resources more efficiently.

In January 2017, in anticipation of CSG's recommendations, I appointed a BBA Working Group on Criminal Justice Reform in Massachusetts. Following the release of the CSG report in February, the BBA's working group convened numerous times, working to assess the report's recommendations and identify areas of the criminal justice system where we believe additional reforms are necessary. Over the past eight months, the group's members have identified six key areas where broader reforms are supported by years of studies and empirical data.

The working group was composed of deeply experienced practitioners with a diverse array of backgrounds. Collectively, they have hundreds of years of experience as both prosecutors and criminal defense attorneys, at both the state and federal level. In addition, they share a thorough understanding of the challenges and opportunities facing the Commonwealth as we confront this historic moment.

With the release of the report before you, I want to publicly thank all the members of the working group—and, in particular, the two co-chairs. The BBA could not have found two more dedicated, insightful, and knowledgeable attorneys to lead this effort than former BBA President Kathy Weinman of Hogan Lovells and current BBA Treasurer Marty Murphy of Foley Hoag. This report is a testament to their commitment to bringing our justice system closer to the ideals of fairness and effectiveness.

During the coming year, as the Legislature continues to consider these issues, the BBA hopes to partner with like-minded advocates and elected officials who recognize the need for comprehensive change. We look forward to participating in that dialogue, and we are committed to advancing significant change in the Commonwealth's criminal justice system.

Carol A. Starkey

President, Boston Bar Association, September 2016 – August 2017

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The Hon. Margaret R. Hinkle (Ret.) served as a Superior Court judge for 18 years, including four years as the Regional Administrative Justice for Criminal Business in Suffolk County. After leaving the Court, she also served as a Special Judicial

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The positions expressed in this report reflect the individual views of the members of the Working Group, and not the positions of the organizations with which they are or have been affiliated.

INTRODUCTION

On July 20, 2015, Governor Charlie Baker, Senate President Stanley Rosenberg, House Speaker Robert DeLeo and Chief Justice Ralph Gants took a bold step: they invited the Council of State Governments (“CSG”), an independent, non-partisan research organization with a demonstrated track record of work in criminal justice innovation, to come to Massachusetts to assess our criminal justice system and make recommendations for improvements.

Our state leaders’ invitation to CSG was a welcome development. Far too often, Massachusetts criminal justice policy has been driven by reactions to particularly outrageous crimes—reactions that result in legislative changes that might appear to fix one problem but often have unintended consequences that ultimately create many more problems than they correct.

CSG produced valuable research that shed light on how Massachusetts’ criminal justice system operates in practice, and exposed cracks and flaws not widely known to the public. CSG published that research in a series of reports in 2016. On February 20, 2017, CSG and its Steering Committee—the Commonwealth’s Governor, Lt. Governor, Senate President, House Speaker, and Chief Justice—issued a final report, called a Justice Reinvestment “Policy Framework”—proposing a number of changes to state law and state practice. These changes were designed to reduce what CSG and its Steering Committee called the most important problem in the Massachusetts criminal justice system: recidivism. On the same date, the Governor introduced legislation implementing a number of recommendations that emerged from CSG’s work, and also pledged to adopt administrative changes to correct a number of problems, identified by CSG, that did not require legislation to address.

These proposals have much to be commended. The legislative initiative would, for example, permit larger numbers of prisoners to participate in programming designed to reduce recidivism. The administrative reforms, if successfully implemented, would permit more prisoners whom the Parole Board has judged deserving of parole to be released, with parole supervision, before the end of their sentences. We applaud CSG’s work and support the legislative and administrative agenda the Governor and the state’s other leaders have proposed. We share these leaders’ views that recidivism in Massachusetts is far too high, and likewise share

the hope that these reforms will result in fewer Massachusetts prisoners returning to state prison or county Houses of Correction.

The Boston Bar Association believes, however, that the proposed legislation does not go far enough. The time has come for a broader, more comprehensive set of reforms. Recidivism is, to be sure, one of the significant issues our criminal justice system faces, but it is only one symptom of a much larger set of problems. While the number of prisoners in Massachusetts has recently declined, and Massachusetts' incarceration rate is lower than most other states, the fact remains that Massachusetts still imprisons *four times* as many individuals today as we did 40 years ago—even though the crime rate is about the same now as it was then. The footprint of the criminal justice system has grown exponentially, without meaningful benefits for public safety.

In our view, meaningful criminal justice reform in Massachusetts—reform that we believe will result in even more significant reductions in recidivism and savings to taxpayers, without jeopardizing public safety—requires Massachusetts to do significantly more than what the CSG legislation proposes. The BBA is particularly concerned that the proposals CSG and its Steering Committee have advanced do not address what we believe is the most important question raised by CSG's research (and other recent research as well): the problem of race.

Massachusetts' criminal justice system impacts citizens of color, and neighborhoods with large black and Hispanic populations, far more severely than it impacts others groups in our state. Higher incarceration rates and harsher sentences have resulted in a prison population that is racially disproportionate to the general population.¹ As of July 1, 2015, whites represented 82% of the Massachusetts resident population, but only 44% of the prison population; blacks, 8% of the resident population, but 27% of the prison population; and Hispanics, 11% of the resident population, but 25% of the prison population.²

¹ See *Massachusetts Profile*, PRISON POLICY INITIATIVE
<https://www.prisonpolicy.org/profiles/MA.html>.

² *Quick Facts*: Massachusetts, UNITED STATES CENSUS BUREAU,
[HTTPS://www.census.gov/quickfacts/table/PST045216/25#headnote-js-a](https://www.census.gov/quickfacts/table/PST045216/25#headnote-js-a); MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2015 18 (Mar. 2016),
<http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpopotrends-2015-final.pdf>.

As this data suggests, the incarceration rates for blacks and Hispanics in Massachusetts far exceeded the rates for whites. Blacks are incarcerated at eight times the rate of whites, and Hispanics are incarcerated at five times the rate of whites.³ And the data shows that this disparity is, in fact, worse here than elsewhere in the country: the Hispanic/white disparity in Massachusetts was the *highest* in the nation, and the black/white disparity ranked thirteenth among the fifty states.⁴ In fiscal year 2014, blacks and Hispanics also received longer sentences and served, on average, more time in Houses of Correction and state prisons than whites.⁵

The cause, or causes, of this disparate impact are not well understood, but the fact of its impact is unmistakable. This is the great shame of our system of criminal justice and, in our view, it must be addressed. Even if we cannot identify its causes with precision, we believe we know enough to take action to address its consequences, and the time has come to do that now.

³ MASSACHUSETTS SENTENCING COMMISSION, SELECTED RACE STATISTICS 1, 2 (Sept. 27, 2016), <http://www.mass.gov/courts/docs/sentencing-commission/selected-race-statistics.pdf> (citing Ann E. Carson, Ph. D., U.S DEPARTMENT OF JUSTICE: BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 1, 15-17 (Sept. 2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf>); MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2014 1, 18 (Apr. 2015), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpopotrends-2014-05042015-final.pdf>; U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES, STATES, AND COUNTIES: APRIL 1, 2010 TO JULY 1, 2013 (June 2014), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

⁴ Ashley Nellis, Ph. D., *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT 1, 5-8 (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁵ “A larger portion of black and Hispanic individuals released from HOCs served sentences over one year than white or other individuals.” *Massachusetts Criminal Justice Review Working Group Meeting 3 Research Addendum*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER 1, 30 (July 12, 2016), (citing CSG Justice Center analysis of FY2014 Parole Board’s SPIRIT HOC data); “Black and Hispanic individuals released from DOCs served an average of 10 months more than white or other individuals.” *See Massachusetts Criminal Justice Review Working Group Meeting 3 Interim Report*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER 1, 11 (July 12, 2016) [hereinafter CSG Report #3] (citing CSG Justice Center analysis of FY2014 DOC data).

We can achieve meaningful criminal justice reform that will protect the safety of the public, reduce recidivism, save taxpayers' money and operate more justly. But it will require, in addition to the reforms our leaders have proposed, the following steps:

1. Massachusetts should increase opportunities for pre-trial diversion for more defendants

Research shows that programs that divert offenders away from the criminal justice system are effective in reducing recidivism and help prevent individuals charged with non-violent offenses to avoid the lasting stigma that typically accompanies interaction with the criminal justice system. But Massachusetts has no coordinated system for pre-trial diversion; instead, it has a hodgepodge of programs that benefit some defendants and not others without meaningful objective criteria. Evidence suggests that defendants of color are much less likely to be given the opportunity to participate in diversion programs than white defendants. We urge Massachusetts to expand diversion programs, making every defendant without a felony record accused of a non-violent crime eligible for consideration for diversion.

2. Massachusetts should adopt significant reforms to the Massachusetts cash bail system

Nearly one quarter of Massachusetts prisoners are incarcerated not because they have been convicted of an offense, but because they have a pending case or hearing. Many of these defendants are held on cash bail, too often set without sufficient regard to their ability to pay. The result is a system that incarcerates thousands of defendants each year not because they are dangerous, or because they pose a risk of flight, but because they are poor. And here, too, a defendant's race has an impact. Defendants of color are far more likely to be held on bail, and have bail set at higher amounts, than white defendants. Serious criminal justice reform requires Massachusetts to reduce dramatically its reliance on cash bail. A recent Supreme Judicial Court decision has the potential to curtail our state's reliance on cash bail, but we believe a comprehensive, legislation solution is necessary to solve this serious problem effectively.

3. Massachusetts should repeal mandatory minimum sentences, particularly for drug crimes

CSG's Steering Committee did not recommend changes to Massachusetts' sentencing law that requires judges to impose mandatory minimum sentences for

more than 30 drug crimes. The BBA has long opposed mandatory minimum sentences, and we believe that the time has come—indeed, is long overdue—for the Massachusetts legislature to repeal mandatory sentences, at least for drug crimes. We believe the legislature should repeal mandatory drug crime sentences for these reasons, among others:

- Mandatory sentences help drive racial disparity in the criminal justice systems. While black and Hispanic persons are *generally* over-represented as defendants in the Massachusetts criminal justice system, the disparity between defendants of color and white defendants is particularly pronounced when Massachusetts law calls for mandatory sentences in drug cases. Approximately 75% of the individuals serving mandatory sentences for drug offenses are people of color.
- Because mandatory sentences are driven primarily by drug weight, they do not permit judges to make important, evidence-based distinctions concerning a defendant’s role in a drug distribution scheme: they treat the drug courier or “mule” just as they treat the leader of a drug organization.
- Experience strongly suggests that eliminating mandatory minimum sentences in drug cases—and instead letting judges impose individualized, evidence-based sentences based on established, written sentencing policies—will not adversely impact public safety. Massachusetts reduced the penalties associated with mandatory drug sentences in 2012, and crime in Massachusetts continued to decline.

4. Massachusetts should ensure that ordering payment of multiple fines and fees does not effectively criminalize poverty

Massachusetts has imposed steep fines and fees on criminal defendants, even indigent defendants. These assessments do little to add to the state budget, but pose enormous costs to some of the state’s poorest citizens—costs that increase rather than reduce the likelihood of recidivism. Massachusetts should require judges to waive fines and fees when defendants are unable to pay them. And Massachusetts should guarantee that people are not incarcerated for nonpayment unless courts determine, with adequate safeguards, that their failure to pay was willful and not because of their inability to pay.

5. Massachusetts should expand recidivism reduction programs

CSG and the Steering Committee emphasized the importance of expanding evidence-based recidivism-reduction programs for individuals who are incarcerated and those who are under probation and/or parole supervision after release. They also supported increasing incentives for state prison inmates to participate in and complete these programs by increasing earned-time credits. As recommended by CSG and the Steering Committee, the increase in earned time credits would extend to people serving mandatory sentences for certain drug crimes. The BBA applauds these recommendations. However, the proposed legislation is, in our view, drawn too narrowly. These earned-time credits should be viewed not as a privilege, but as a means of advancing public safety. The BBA recommends, therefore, that all defendants whose sentences contemplate their eventual release from prison be afforded a meaningful opportunity to earn time credits. The BBA also recommends that the Commonwealth widely employ cognitive behavioral therapy, which has been shown in multiple studies to be effective at reducing criminal conduct.

6. Massachusetts should re-assess its criminal record laws

In 2010, Massachusetts enacted legislation designed to reform the state’s Criminal Offender Record Information (“CORI”) law. The legislation’s goal was to reduce the adverse collateral consequences of criminal convictions, particularly in employment. Unfortunately, in practice, CORI reform has not entirely served its intended purpose: people continue to suffer adverse consequences long after they have paid their debt to society. The result, once again, is greater rather than lower rates of criminal conduct and recidivism, as individuals returning to society find it difficult to get jobs and housing. We believe that more can be done to minimize the long-term impacts of criminal convictions without putting public safety at risk. Further amendments to CORI are required, as are new tools to ensure that not every contact with the criminal justice system results in an indelible stain on an individual’s future.

In the following Report, we outline in greater detail the evidence that supports these conclusions and recommendations. To be clear, we do *not* oppose the legislative or administrative changes CSG and the Steering Committee have proposed. In fact, we endorse them. We believe, however, that it is again time to be bold—to use the opportunity now at hand, when criminal justice is in the

spotlight—to make truly significant reforms to the state’s criminal justice system. We can reduce recidivism without jeopardizing public safety. Indeed, reducing the criminal justice system’s footprint—particularly the large shadow it casts over our communities of color—will, in the end, make our state stronger and safer.

I. INCREASE OPPORTUNITIES FOR PRE-TRIAL DIVERSION

Introduction

In a proposed agenda for the new presidential administration, a select group of nationally-renowned law enforcement leaders decried our country's historic reliance on imprisonment as an effective means of increasing public safety.⁶ Decades of experience, the panel concluded, led them to the "sobering reality" that for many nonviolent and first-time offenders, imprisonment was both unnecessary and, because of its attendant collateral consequences, likely to lead to further endangerment of communities.⁷ The CSG report and its related legislative reforms do little to address the plight of a sizable number of Massachusetts residents entering our criminal justice system. Pre-trial diversion, "the practice of channeling [certain offenders] *out* of the criminal process,"⁸ is one of many under-utilized intervention strategies aimed towards reducing recidivism, conserving criminal justice resources and promoting personal accountability and responsibility.⁹ We recommend that Massachusetts significantly expand its use.

Massachusetts Pre-Trial Diversion Programs

Currently, the Commonwealth's pre-trial diversion programs serve three specific populations of offenders: veterans and active duty military personnel,¹⁰ youthful

⁶ See Ronal Serpas and David Brown, *Fighting Crime and Strengthening Criminal Justice: An Agenda for the New Administration*, LAW ENFORCEMENT LEADERS TO REDUCE CRIME AND INCARCERATION 1, 1 (2017), <https://assets.documentcloud.org/documents/3460826/Fighting-Crime-and-Strengthening-Criminal.pdf>.

⁷ See *id.*

⁸ Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes among Men Charged with Felonies and Processed in State Courts*, RACE AND JUSTICE 3(3) 210, 211 (2013) (emphasis in original), <http://journals.sagepub.com/doi/pdf/10.1177/2153368713483320>.

⁹ See Spurgeon Kennedy & Tara Boh Klute, *Measuring for Results: Outcome and Performance Measures for Pretrial Diversion Field*, NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES 1, 2.

¹⁰ See G. L. c. 276A, §1 et seq.

offenders,¹¹ and those seeking drug abuse and/or mental health treatment.¹² Under Massachusetts General Laws Chapter 276A, Section 3, probation officers are required to screen defendants to determine their eligibility for diversion to a program. If a defendant qualifies for diversion, and probation determines that the defendant would benefit from the program, the defendant can choose to accept the offer of diversion in exchange for a stay of the criminal proceedings or a continuance without a finding (CWOFF). Upon successful completion of the program, the judge may dismiss the original charges pending against the defendant.¹³ In addition, district attorneys in some counties have additional diversion programs that contemplate dismissal of charges upon successful completion of a specific program. The goal of these statutory and voluntary diversion programs is to permit qualified defendants to complete a program successfully and have no criminal history.

Our Concerns

At the law enforcement level, a few local police departments have instituted their own diversion alternatives to arrest, particularly for arrestees in need of substance abuse treatment.¹⁴ In addition, private entities have partnered with police departments throughout the Commonwealth to offer drug treatment in lieu of arrest to certain offenders.¹⁵ While the benefits of these programs should not be discounted, the existing structure leaves a substantial population of offenders unserved. By excluding theft and other low-grade felonies typically associated with defendants from poor and disadvantaged communities, the Commonwealth ignores

¹¹ *See id.*

¹² *See* G.L. c. 111E, §10, (2006) (providing right to examination for drug dependency to any defendant charged with a drug offense and, where applicable, assignment to a drug treatment facility and staying of court proceedings until completion).

¹³ *See* G.L. c. 276A, §7; Earlier this year, the Supreme Judicial Court addressed the question of whether §7's dismissal provision applied to qualifying veterans and rejected the Commonwealth's contention that the dismissal provision applied only to youthful offenders.; *see* Commonwealth v. Morgan, 476 Mass. 768 (2011).

¹⁴ Dana Forsythe, *Young Arlington Drug Offenders Get Option of Diversion Program*, Arlington Advocate, Dec. 14, 2016 (detailing efforts of police departments in Middlesex County to divert addicts out of the criminal justice system).

¹⁵ Brian MacQuarrie, *Help-Not-Handcuffs Drug Effort Thriving*, BOSTON GLOBE, Feb. 27, 2017, (describing the work of The Police Assisted Addiction and Recovery Initiative which, to date, has partnered with 30 police departments in Massachusetts). http://edition.pagesuite.com/popovers/article_popover.aspx?guid=2716fa58-dfb3-4de6-a552-a9ed527ab778.

a sizable cohort of offenders that would benefit greatly from diversion. A criminal conviction carries with it significant personal consequences for the offenders themselves and increases the likelihood that those individuals will subsequently be incarcerated.

Unfortunately, even if the Commonwealth were to expand the eligibility criteria for pretrial diversion to a greater population of offenders and offenses, disparities would arguably still exist. While the Massachusetts courts do not track the number of persons admitted into its pretrial diversion programs by race, a study of defendants who, upon conviction, were eligible to serve their sentence under the supervision of a community corrections program rather than in prison, revealed that defendants from the state's highest incarceration rate communities, particularly those in Suffolk County, were among those least likely to receive a diverted sentence in lieu of incarceration.¹⁶ Diversion, as a key decision point in the criminal justice system, is susceptible to the same biases that pervade the entire system, arguably to a greater extent given the risks inherent in offering alternatives to incarceration to certain offenders. That risk and the degree of uncertainty surrounding these decisions can, according to one study of pretrial diversion programs in several states, lead decision-makers to (albeit unconsciously) over-rely on stereotypical associations of certain minorities with dispositions of criminality.¹⁷ Moreover, the study found that assessments of a defendant's amenity to rehabilitation can rest on the similar racialization of criminality.¹⁸

Our Recommendations

Prior to issuing its final report, the CSG working group identified pre-trial diversion as one of many opportunities that exist to resolve a case before sentencing.¹⁹

¹⁶ *Justice Reinvestment At-A-Glance*, MASSINC (Oct. 2016), <https://massinc.org/wp-content/uploads/2016/10/JUSTICE-REINVESTMENT-AT-A-GLANCE.pdf>. Although blacks and Hispanics comprise less than half of Suffolk County's total population, they constitute nearly 80% of that county's pretrial arrestee population. See Alexander Jones and Benjamin Forman, *Exploring the Potential for Pretrial Innovation in Massachusetts*, MASSINC, 5 (Sept. 2015), https://massinc.org/wp-content/uploads/2015/09/bail.brief_.3.pdf.

¹⁷ See Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, RACE AND JUSTICE 3(3) 210, 214 (2013), <http://journals.sagepub.com/doi/pdf/10.1177/2153368713483320>.

¹⁸ See *id.* at 215.

¹⁹ See *Massachusetts Criminal Justice Review Working Group Meeting 2*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER 1, 121 (Apr. 12, 2016),

Ultimately, the final report focused largely on “back-end,” i.e., post-conviction and incarceration reforms rather than pretrial diversion’s potential to reduce recidivism, improve public safety, and ease the burden on jails and prisons. However, many of CSG’s policy proposals can be incorporated into measures aimed towards expanding and improving the Commonwealth’s current pre-trial diversion structure:

1. Expand the eligibility criteria for pre-trial diversion to include a wider population of offenders.

At a minimum, all non-violent offenders with no prior felony convictions should be eligible for consideration for pre-trial diversion.²⁰ Recently, the Supreme Judicial Court analyzed the pretrial diversion statute, specifically the scope of the legislature’s expansion of the statute’s eligibility to include military veterans.²¹ After a thoughtful discussion of the purpose and legislative intent of the expansion, the Court observed that avoiding the cycle and consequences of imprisonment through rehabilitation of “those whose criminal habits [have] not become fixed...benefit[s] [the diverted] and society as a whole.”²² The Commonwealth could fully realize this benefit by further amending the existing pretrial diversion statute

<https://csgjusticecenter.org/wp-content/uploads/2016/04/MASecondPresentation.pdf> [hereinafter “CSG Report #2]. The working group was also hampered by the system-wide lack of reporting of recidivism data at the pretrial level. *See Massachusetts Criminal Justice Review Working Group Meeting 1*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER 1, 30 (Jan. 12, 2016), https://csgjusticecenter.org/wp-content/uploads/2016/01/MA_Working_Group_Meeting_1.pdf.

²⁰ *See* Christopher Reinhart, *Criminal Pretrial Diversionary Programs*, CONNECTICUT GENERAL ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH 1, 1-2 (Jan. 14, 2016), <https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0020.pdf> (summarizing eligibility criteria for eight pretrial diversionary programs in Connecticut); *see* Anita Alvarez, *Cook County State’s Attorney’s Office Deferred Prosecution Program*, OFFICE OF THE STATE’S ATTORNEY COOK COUNTY, ILLINOIS, <http://c.ymcdn.com/sites/www.nwsba.org/resource/resmgr/imported/Cook%20County%20States%20Attorneys%20Office%20Deferred%20Prosecution%20Program.pdf>; (Cook County, Illinois State’s Attorney’s Office offers pre-trial diversion to adult felony offenders facing charges that include Theft, Forgery, Burglary, Possession of Burglary Tools, and Possession of a Stolen Motor Vehicle).

²¹ *See* Commonwealth v. Morgan, 476 Mass. at 773-80.

²² *See id.* at 779.

to include a larger class of offenders, a broader list of contemplated crimes/charges, and specific conditions one must fulfill for satisfactory completion.

Under this new framework, if a person charged with a crime meets the statutory criteria, he or she, with the assistance of appointed counsel, would have the opportunity to petition the court to postpone the arraignment for a period of thirty days during which time the individual and his or her attorney could gather information to convince the judge of the defendant's eligibility for such a diversion program. Once the court approves the defendant's entry into a diversion program, the criminal case would remain in its pre-arraignment posture until the defendant completes the program. The SJC endorsed such an approach, albeit implicitly, when it recognized the district court's authority to dismiss, even over the District Attorney's objection, a case involving a military veteran who successfully completed a pretrial diversion program.²³ By establishing broad, equitable, and objective diversion criteria, and applying them consistently, the Commonwealth can reduce the burden on the criminal justice system while providing access to a wider array of similarly situated defendants regardless of geography.²⁴

2. Remove restrictions on the use of Community Corrections Centers for pre-trial services including diversion.

Expanding the eligibility criteria for pre-trial diversion will undoubtedly result in an increased number of offenders in need of services. Fortunately, resources do exist, specifically in the largely underutilized Community Corrections Centers ("CCCs").²⁵ Operating under the Office of Probation, CCCs were established as part

²³ See, e.g., *Morgan*, 476 Mass. at 774-76 (describing the lengthy deliberative process district court judges undertake in determining whether a particular defendant is eligible for pretrial diversion and the requisite periodic reporting of the defendant's progress in the prescribed program). The SJC stated that "[w]here the legislature has granted the authority to dismiss a case or to continue it without a finding ... a judge may exercise that authority without offending [the separation of powers clause of the Massachusetts Constitution]." *Id.* at 780.

²⁴ See Meghan Guevara and Kristy Pierce-Danford, *Creating an Effective Pretrial Program: A Toolkit for Practitioners*, CRIME AND JUSTICE INSTITUTE 1, 9 (June 2013), http://www.crj.org/page/-/cjfiles/CSJ_pretrial_toolkit_Jun13.pdf.

²⁵ See *Justice Reinvestment At-A-Glance*, MASSINC, (Oct. 2016) (reporting the lack of referrals of eligible defendants to Community Corrections and resulting funding cuts and closing of centers); see Benjamin Forman, *The Geography of Incarceration*, BOSTON INDICATORS PROJECT 1, 15 (Oct. 2016) (observing that cities with high rates of incarceration,

of the Commonwealth's efforts to address prison overcrowding by adding a tier of intermediate sanctions to the existing sentencing structure.²⁶ Upon conviction, a judge can refer certain offenders to one of the approximately twenty CCCs in Massachusetts for a specified term in lieu of incarceration. CCCs offer services ranging from substance abuse treatment to education to job readiness training and placement, along with a sanctions-based system that includes random drug/alcohol screening, electronic monitoring, and other accountability systems. Presently, CCCs are only available to defendants, post-conviction, and to parolees prior to reentry.²⁷

In its final report, CSG proposed that the Commonwealth remove existing restrictions on CCCs for those in pretrial status.²⁸ Governor Baker recently filed an amendment to the Community Corrections statute, M.G.L. c. 211F §1, that would remove those restrictions, thereby permitting persons on pre-trial status to access services and support from CCCs. Rehabilitative services offered through CCCs could also be extended to offenders admitted into a newly expanded pre-trial diversion program. Further, the screening instruments used to identify those offenders posing the highest risk of recidivism, and therefore most likely to benefit from intermediate sanctions, could be tailored to fit the needs of pre-trial diversion candidates.

3. Amend the CORI laws to permit the removal of offender's successful completion of pretrial diversion from publicly accessible CORI reports.

The vast majority of individuals accepted into pre-trial diversion programs successfully complete the program's requirements.²⁹ Successful completion enables the defendant to have the underlying charges dismissed, thereby fulfilling one of the

like Boston, house community centers with the capacity to serve more clients than currently referred).

²⁶ See *Overview of the Office of Community Corrections*, MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/court-info/probation/overview-community-corrections-gen.html>.

²⁷ See G. L. c. 211F, §4(c).

²⁸ See *Justice Reinvestment in Massachusetts Policy Framework*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER 1, 16 (Feb. 2017) [hereinafter CSG Policy Framework].

²⁹ In a survey of pretrial diversion programs in 26 states, respondents reported that an average of 85 percent of defendants accepted into programs completed diversion successfully. See *Pretrial Diversion in the 21st Century: A National Survey of Pretrial Diversion Programs and Practices*, NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES 1, 22 (2009).

pretrial diversion's chief goals: avoiding the stigma of criminal conviction.³⁰ Full realization of that goal is thwarted if a record of the individual's court appearance continues to appear in the CORI database. To ensure consistency, the record of the underlying charge and disposition from a defendant's criminal history immediately should be sealed upon successful completion of a pretrial diversion program unless the district attorney's office objects and, following a hearing, persuades the court that sealing does not serve substantial justice.³¹

³⁰ See Meghan Guevara and Kristy Pierce-Danford, *Creating an Effective Pretrial Program: A Toolkit for Practitioners*, CRIME AND JUSTICE INSTITUTE 1, 8 (June 2013).

³¹ For additional discussion of proposed CORI reforms, see *infra* at p. 62 et seq.

II. REDUCE PRE-TRIAL INCARCERATION BY REFORMING SYSTEM OF CASH BAIL

Introduction

CSG's work in Massachusetts produced important data about the Massachusetts criminal justice system's reliance on a system of cash bail resulting in the incarceration of thousands of defendants each year. But neither CSG's recommendations nor the Governor's proposed legislation to implement those recommendations proposes any changes to Massachusetts' bail system.

In our view, this represents a missed opportunity. Evidence strongly suggests that reforming Massachusetts' bail system would reduce the populations of Massachusetts Houses of Correction, save taxpayers' money, curtail the disruptions to the lives of defendants who are neither dangerous nor risks of flight, reduce rather than increase recidivism, and correct a significant injustice: the fact that many defendants are being held in Massachusetts jails before their trials not because they are dangerous, or are likely to flee, but because they are poor—and more likely to be persons of color.

On August 25, 2017, the Massachusetts Supreme Judicial Court issued a significant new opinion about cash bail—one that could lead to significant progress in addressing the problems cash bail creates. In *Brangan v. Commonwealth*³², the SJC recognized that requiring defendants, particularly poor defendants, to post significant cash bail often causes significant economic dislocation for those defendants and their families, and often affects defendants of color more harshly than white defendants.³³ *Brangan* established several new procedural requirements that, if faithfully implemented, have the potential to make it significantly less likely that defendants will be held on cash bail simply because they are too poor to pay even relatively low bail.

But the SJC's opinion—which focused on the constitutional protections to which defendants are entitled given the Commonwealth current bail statutes—does not reach as far as reform efforts recently completed in a number of other states. While

³² 477 Mass. 691 (2017).

³³ *Id.* at 709, n.22.

the specific features of these reforms may vary from state to state, they typically share two important features. First, the new bail systems either eliminate or dramatically reduce reliance on cash bail. Second, the reforms typically call for bail decisions to be based on evidence-based, validated risk assessment tools which, when used properly, make bail decisions more rational and less subject to implicit bias against defendants of color. We believe that the evidence about the harm caused by Massachusetts' reliance on cash bail continues to require a comprehensive, legislative approach, one that would bring Massachusetts bail practices more closely aligned to states that have adopted more comprehensive bail reforms.

CSG's Findings and Other Data about Defendants Held on Bail Pre-Trial

Data CSG gathered reveals that, as of January 1, 2015, more than half of Massachusetts' incarcerated prisoners (54%) were held in Houses of Correction rather than the Department of Correction.³⁴ Of the prisoners held in Houses of Correction, half—or 27% of the total population of prisoners incarcerated in Massachusetts—are being held pending trial or other hearing, rather than serving a sentence following conviction.³⁵ And despite falling crime rates,³⁶ this number has remained stubbornly consistent over time: while the total daily population of prisoners serving sentences in Houses of Correction statewide declined substantially between 2006 and 2015 (down 35%), the number of prisoners held daily pending trial or hearing has been reduced only four percent, from 5,125 to 4,927.³⁷ To be sure, prisoners held prior to trial represent only a small percentage (fewer than one in ten) of defendants who encounter the Massachusetts criminal justice system each year.³⁸ But because they represent more than one-in-four of the individuals *incarcerated* on any given day, the costs they impose on the system, and the consequences their detention creates, should not be ignored.

³⁴ See *CSG Report #2*, *supra* note 19, at 15.

³⁵ *Id.*

³⁶ As CSG found, Massachusetts total crime index fell 10% between 2005 and 2014; criminal case filings likewise fell by 10%, and convictions fell by 31%. See *id.* at 14.

³⁷ *Id.* at 16. There is substantial variation, county-to-county; some counties have seen sharp increases, others have seen substantial decreases.

³⁸ See *Massachusetts Trial Court Fines and Fees Working Group*, REPORT TO TRIAL COURT CHIEF JUSTICE PAULA M. CAREY 1, (Nov. 17, 2016), <http://www.mass.gov/courts/docs/trial-court/report-of-the-fines-and-fees-working-group.pdf>.

Why are these defendants being held prior to trial? The data—which, to be clear, is far from complete—suggest a troubling answer. Many defendants are held prior to trial because they cannot afford to post cash bail the court has set, even when that bail is low. In Fiscal 2015, for example, at least 33,862 defendants had their release conditioned on the payment of cash bail; about one-third of these defendants (11,589) were held because they did not pay the cash amount.³⁹ In at least 1,600 cases, defendants remained in jail because they did not pay bail set at an amount of \$500 or less.⁴⁰

Defendants detained pre-trial appear to be among the poorest individuals in the United States. One recent study concluded that “people in jail had a median annual income of \$15,109 prior to their incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages.”⁴¹

The problem appears to have a particularly striking impact on women and on defendants of color. A Department of Correction survey of women detained pre-trial at MCI-Framingham found that more than a third of the women for whom bail had been set could not afford to pay the amount required.⁴² And a Wellesley College study concluded that 36% of the women held at Framingham could not pay bail under \$500; in other parts of the states, between 77% and 88% of women could not afford bail under \$2,000.⁴³ A significantly higher percentage of black and Hispanic defendants are held before trial than white defendants. As the SJC held in *Brangan*, “[p]re-trial detention disproportionately affects ethnic and racial minority groups.”⁴⁴

³⁹ MASSACHUSETTS COURT SYSTEM, INITIAL ANALYSIS OF MASSCOURTS DISTRICT AND BOSTON MUNICIPAL COURTS PRE-TRIAL RELEASE EVENTS 1, 8 (Apr. 5, 2016).

⁴⁰ *Id.*

⁴¹ Bernadette Rabuy and Daniel Kopf, *Detaining the Poor*, PRISON POLICY INITIATIVE 1, 6 (May 10, 2016).

⁴² Rhianna Kohl and Nichols Cannata, *Bail Survey: Pre-Trial Females at MCI-Framingham*, MASSACHUSETTS DEPARTMENT OF CORRECTION 1, 2 (May 2015).

⁴³ Erika Kates, *Moving Beyond Incarceration for Women in Massachusetts: The Necessity of Bail/Pre-Trial Reform*, WELLESLEY CENTER FOR WOMEN 1, 3 (2015).

⁴⁴ *Brangan v. Commonwealth*, 477 Mass. at 709, n.22.

Massachusetts' Bail Laws and Practices

Massachusetts was once a leader in enacting forward-looking bail reform. Before 1967, Massachusetts relied on the system then prevalent throughout the country: to obtain release before trial a defendant had to pay a bail bondsman a non-refundable amount, generally five to ten percent of the amount set by the Court.⁴⁵ Over the next ten years, Massachusetts moved sharply away from that system. The Legislature in 1971 enacted G.L. c. 473 §1, creating a “presumption” (with the exception of first-degree murder cases) that defendants charged with crimes in the District Court would be released on their own recognizance. The new statute provided that the Court “*shall* admit such person to bail on his own personal recognizance, unless the [the Court] determines . . . that such release will not reasonably assure the appearance of the prisoner . . . before the Court.”⁴⁶ The Court could still impose cash bail if he or she concluded, based on consideration of seventeen different factors, that cash bail is required to cause a defendant to come back to Court when ordered.⁴⁷ As the Supreme Judicial Court has held, “the

⁴⁵ Commonwealth v. Ray, 435 Mass. 249, 253 (2001).

⁴⁶ *Id.* at 254.

⁴⁷ *Id.* These are the 17 factors:

1. the nature and circumstances of the offense charged,
2. the potential penalty the person faces,
3. the person’s family ties,
4. financial resources,
5. employment record
6. history of mental illness,
7. his reputation,
8. the length of residence in the community,
9. his record of convictions, if any,
10. any illegal drug distribution or present drug dependency,
11. any flight to avoid prosecution,
12. or fraudulent use of an alias or false identification,
13. any failure to appear at any court proceeding to answer to an offense,
14. whether the person is on bail pending adjudication of a prior charge,
15. whether the acts alleged involve abuse as defined in section one of chapter two hundred and nine A, or violation of a temporary or permanent order issued pursuant

essential purpose of bail is to secure the presence of a defendant at trial to ensure that, if the defendant is guilty, justice will be served.”⁴⁸

The Court also effectively eliminated bail bondsmen in Massachusetts by permitting defendants to deposit cash bail directly with the Court, with the right to get back the full amount of their bail at the end of the case if they appeared when required.⁴⁹

In 1994, the Massachusetts legislature added new language to the bail laws, permitting Courts in certain categories of cases to order that a defendant be held without bail when the prosecution established that he is dangerous.⁵⁰ The statute provided significant procedural safeguards to defendants; judges may issue orders of detention only after holding an evidentiary hearing where prosecution is required to establish, by clear and convincing evidence, that the safety of the community or a particular individual can be protected only by detaining the defendant prior to trial.⁵¹ It also provided that the judge “may not impose a *financial condition* that results in the pretrial detention of the person” based on dangerousness (emphasis added).

While we are not aware of data detailing precisely how often prosecutors seek to hold defendants without bail because they are dangerous, our experience, corroborated by CSG’s findings, suggest that prosecutors and Courts rely on the dangerousness statute infrequently. CSG’s examination of data from six counties suggests that only about four percent of the pre-trial population of Houses of Correction is held pre-trial because a court has found those prisoners to be

to sections eighteen or thirty-four B of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, sections three, four or five of chapter two hundred and nine A, or sections fifteen or twenty of chapter two hundred and nine C,

16. whether the person has any history of orders issued against him pursuant to the aforesaid sections,

17. whether he is on probation, parole, or other release pending completion of sentence for any conviction, and whether he is on release pending sentence or appeal for any conviction.

⁴⁸ Querebin v. Commonwealth, 404 Mass. 108, 113 (2003).

⁴⁹ Ray, 435 Mass, at 254-255.

⁵⁰ G. L. c. 276, §58A(2).

⁵¹ *Id.*; see also Commonwealth v. Diggs, 475 Mass. 79 (2016).

dangerous.⁵² Many Massachusetts criminal lawyers believe, however, that prosecutors in fact sometimes seek (and Courts sometimes impose) significant cash bail when they believe that a defendant may be dangerous but wish to avoid the inconvenience and time required for a full-blown detention hearing. This view is corroborated by MassINC’s research⁵³ and suggests that what the SJC observed in 1996—that some Courts may have imposed “very high bail . . . sub rosa” as a way of detaining defendants viewed as dangerous⁵⁴—still persists.⁵⁵ This practice runs directly counter to a fundamental provision of the state’s 1994 bail statute: “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”⁵⁶

Thus, it appears that the current bail system in Massachusetts:

- Results in the imprisonment, before trial, of a significant number of Massachusetts prisoners, at significant cost to the Commonwealth;
- Incarcerates prior to trial many defendants who have not been judged to be dangerous; and
- Results in the imprisonment of many defendants who cannot post bail simply because they are too poor to do so.⁵⁷

⁵² CSG Report #3, *supra* note 5, 11 (July 12, 2016).

⁵³ Alexander Jones and Benjamin Forman, *Exploring the Potential for Pretrial Innovation in Massachusetts*, MASSINC 1, 3 (Sept. 2015).

⁵⁴ *Mendonza v. Commonwealth*, 423 Mass. 771, 775 (1996).

⁵⁵ In *Brangan*, for example, the SJC specifically noted that, despite the fact that the Commonwealth had not sought a dangerousness hearing, the prosecution repeatedly argued that the defendant’s bail should not be reduced because he posed a danger to the public and created a public safety risk. 477 Mass. at 706-07.

⁵⁶ G. L. c. 276, §58A(2).

⁵⁷ Massachusetts data does not permit us to know with certainty how many defendants are being held prior to trial solely, or principally, because they cannot afford the bail set for them. A 2013 study in New Jersey concluded that, in that state, 38.5% of New Jersey inmates were held in custody solely because they were unable to pay the bail set, and that some 800 inmates faced bail of \$500 or less. Marie Van Nostrand, Ph. D., *New Jersey Jail Population Analysis*, LUMINOSITY IN PARTNERSHIP WITH THE DRUG POLICY ALLIANCE 1, 13 (Mar. 2013), https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.

The Brangan Decision

In *Brangan*, the SJC addressed a defendant’s challenge to his pre-trial detention on cash bail for more than three years on armed robbery charges. Brangan challenged his detention as unconstitutional because the Superior Court judge who initially set his bail—initially \$50,000, later reduced to \$20,000—had failed to find that the defendant could in fact afford the bail set, or make any other findings about his financial circumstances. Brangan argued that “unaffordable bail is unconstitutional per se.”⁵⁸ The SJC rejected that argument, holding that an “amount of bail [is] not excessive merely because [a defendant] could not post it” (internal citation omitted).⁵⁹ The SJC held:

Bail that is beyond a defendant’s reach is not prohibited. Where, based on the judge’s consideration of all the relevant circumstances, neither alternative nonfinancial conditions nor an amount the defendant can afford will adequately assure his appearance for trial, it is permissible to set bail at a higher amount, but no higher than necessary to ensure the defendant’s appearance.⁶⁰

The SJC did, however, establish a number of procedural safeguards, recognizing that “where a judge sets bail in an amount so far beyond a defendant’s ability to pay that it is likely to result in long-term pre-trial detention, it is the functional equivalent of an order for pretrial detention . . .” The SJC held:

First, a judge may “not consider a defendant’s alleged dangerousness in setting the amount of the bail . . . Using unattainable bail to detain a defendant because he is dangerous is improper.”⁶¹

Second, “where, based on a defendant’s credible representations and any other evidence before the judge, it appears that the defendant lacks the financial resources to post the amount of the bail set by the judge, such that it will likely result in the defendant’s long-term pre-trial detention, the judge must provide findings of fact and a statement

⁵⁸ 477 Mass. at 700.

⁵⁹ *Id.*

⁶⁰ *Id.* at 701.

⁶¹ *Id.* at 706.

of reasons for the bail decision, either in writing or orally on the record. The statement must confirm the judge’s consideration of the defendant’s financial resources, explain how the bail amount was calculated, and state why, notwithstanding the fact that the bail amount will likely result in the defendant’s detention, the defendant’s risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings.”⁶²

Third, “when a bail order comes before a judge for reconsideration or review and a defendant has been detained due to his inability to post bail, the judge must consider the length of the pretrial detention and the equities of the case.”⁶³

Our Concerns

The SJC’s *Brangan* decision—and in, particular, its forceful restatement that cash bail should not be used, *sub rosa*, a substitute for evidence of dangerousness, is in our view, an important step in the right direction. But it does not address the full range of problems created by Massachusetts’ reliance on a system of cash bail. A number of concerns remain:

- *The Massachusetts Bail System Is Not Evidence-Based*

A September 2015, MassINC study noted a number of defects in the state’s bail system:

State law lays out 17 factors a judicial officer must take into account when setting financial conditions for bail, but no study has proven that these factors relate directly to a defendant’s probability of appearing for trial in Massachusetts. While some have an obvious connection (e.g. failure to appear in court for a past offense), the predictive power of others is much less certain (e.g., a history of mental illness), particularly given that some represent fairly subjective measures that show no correlation with risk to appear in peer-reviewed research,

⁶² *Id.* at 707.

⁶³ *Id.* at 710.

such as the nature of the offense, while factors that have been tied directly to risk of flight, such as age and education, are notably absent.

Because there is no mechanism for determining how much weight each indicator of risk should be given, even if each of the 17 indicators were independently backed by empirical evidence, the Massachusetts bail decision-making process would still remain largely subjective. Research shows that criminal justice decisions made in a subjective matter are, on the whole, less accurate than validated actuarial instruments that indicate risk based on statistical probabilities.⁶⁴

- *Racial and Ethnic Disparities*

The same MassINC study raised real concerns about the impact of the Massachusetts cash bail system on defendants of color. In every Massachusetts county, black and (where the data was available) Hispanic defendants were vastly overrepresented in the jail's pre-trial population.⁶⁵ The amount of bail for defendants of color was also significantly higher than for white defendants in those counties where data was available.⁶⁶

- *Increased Recidivism*

Research suggests that when low and moderate risk defendants are detained pending trial, they are more likely to commit additional crimes when they are released. One study concluded that being held even four to seven days resulted in defendants being 50% more likely to be re-arrested on release.⁶⁷ Another recent study confirmed that those detained pretrial are more likely to commit future

⁶⁴ Alexander Jones and Benjamin Forman, *Exploring the Potential for Pretrial Innovation in Massachusetts*, MASSINC, 1, 3 (Sept. 2015), https://massinc.org/wp-content/uploads/2015/09/bail.brief_.3.pdf.

⁶⁵ *Id.* at 4.

⁶⁶ *Id.*

⁶⁷ Christopher V. Lowenkamp, Ph. D, Marie Van Nostrand, Ph. D & Alexander Holsinger, Ph. D, *The Hidden Costs of Pretrial Detention*, LAURA AND JOHN ARNOLD FOUNDATION 1, 17-18 (Nov. 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf; see Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, COLUMBIA.EDU 1 (Aug. 18, 2016), <http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf>.

crimes, which suggests that detention may itself breed criminal thinking.⁶⁸ In this study, the authors controlled fully for the initial bail amount, offense, demographic information, and criminal history characteristics of the defendants, thus eliminating the possibility that detained defendants had preexisting profiles that made them more likely to recidivate.⁶⁹

- *Impact on Outcome of Cases*

Several recent studies, which control for a number of relevant factors (including the offense and the defendant's record), demonstrate that defendants who are incarcerated prior to trial are more likely to be convicted, more likely to receive sentences of incarceration, and more likely to receive longer sentences than defendants who are released prior to trial.⁷⁰ One study concluded that “detained defendants are 25% more likely than similarly situated releasees to plead guilty, are 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average.”⁷¹

- *Disruption in Employment, Personal, and Family Life*

Detention often has significant collateral consequences to defendants: individuals held because they cannot make bail may lose jobs, housing, or even custody or visitation rights to children.⁷² Again, the problem can be particularly acute for women: according to the Wellesley Center for Women, approximately 5,300 children

⁶⁸ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 1, 30-35 (2017).

⁶⁹ *Id.*

⁷⁰ Mary T. Phillips, *A Decade of Bail Research in New York City*, NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC., 1, 115-17 (Aug. 2012); see Christopher V. Lowenkamp Ph. D., Marie Van Nostrand, Ph. D., & Alexander Holsinger, Ph. D., *Investigating the Impact of Pretrial Detention on Sentencing*, LAURA AND JOHN ARNOLD FOUNDATION 1, 13, 17 (Nov. 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

⁷¹ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 1, 21 (2017).

⁷² *Id.* at 1.

were impacted by the mothers' pre-trial detentions in the Framingham women's prison in 2012.⁷³

- *Cost to Taxpayers*

The budget process for sheriffs' operation of jails⁷⁴ makes it difficult to estimate how much Massachusetts would save if the number of prisoners held pre-trial was reduced. A 2015 study by the Vera Institute (also discussed in the MassINC report described above) provides useful data bearing on the costs the current cash bail system causes to Massachusetts taxpayers.⁷⁵ The Vera Institute study included data supplied by Hampden County.

The marginal daily cost of housing a prisoner in Hampden County averages \$143.72.⁷⁶ Reducing the number of prisoners held on cash bail would not, of course, generate dollar-for-dollar savings to taxpayers because many Houses of Correction costs are fixed. But, as the Vera Institute concluded, Hampden County's experience (unusual for Massachusetts) in reducing the number of defendants held pre-trial by thirty percent between 2008 and 2014 permitted the Sheriff's department to close six housing units (averaging 55 beds/unit) and led to \$13.1 million in annual savings for the department.⁷⁷

⁷³ Erika Kates, Ph. D., *Moving Beyond Prison: Creating Alternative Pathways for Women*, WELLESLEY CENTERS FOR WOMEN, <https://www.wcwonline.org/pdf/ekates/PretrialDetentionAccessToBailForWomen.pdf>.

⁷⁴ Shira Schoenberg, *Massachusetts County Sheriffs See Major Funding Disparities, New Report Finds*, MASSLIVE (June 6, 2016), http://www.masslive.com/politics/index.ssf/2016/06/new_report_finds_major_funding.html.

⁷⁵ See Christian Henrichson, Joshua Rinaldi & Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INSTITUTE OF JUSTICE 1, 15, 21 (May 2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf; see Alexander Jones & Benjamin Forman, *Exploring the Potential for Pretrial Innovation in Massachusetts*, MASSINC 1, 3 (Sept. 2015), https://massinc.org/wp-content/uploads/2015/09/bail.brief_.3.pdf.

⁷⁶ Christian Henrichson, Joshua Rinaldi & Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INSTITUTE OF JUSTICE 1, 23 (May 2015).

⁷⁷ *Id.* at 23.

Bail Reforms in Other Jurisdictions

In a comprehensive opinion released on April 28, 2017, United States District Court Judge Lee H. Rosenthal of the Southern District of Texas described recent work done in a number of jurisdictions to reduce reliance on money bail:⁷⁸

- *New Mexico*. In 2014, the New Mexico Supreme Court ruled that neither “the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.” In 2016, New Mexico voters codified the holding of that case in a constitutional amendment that passed with 87.2 percent of the vote.”
- *New Jersey*. New Jersey recently amended its constitution and statutes to enact statewide bail reforms. The changes went into effect on January 1, 2017. The New Jersey Constitution now provides that “[p]retrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.” Under the new system,

[M]oney bail cannot be used to achieve or to have the effect of a pretrial detention order. Out of the 3,382 cases filed in the first month under the new law, judges imposed transparent orders of pretrial detention in 283 cases and denied pretrial detention when requested to do so in 223 cases. Secured money bail was set in only 3 cases.

- *New Orleans*. On January 12, 2017, the Council of the City of New Orleans, where the municipal courts have jurisdiction only over misdemeanor cases, passed a measure reforming its bail ordinance. The new ordinance requires that except for four enumerated offenses—battery, possession of weapons, impersonating a peace officer, and domestic violence—all misdemeanor arrestees are to be released on personal recognizance. For those charged with

⁷⁸ O’Donnell v. Harris County, Texas, 16-cv-0414, 40-50 (S.D. Texas 2017)(citations omitted).

one of the enumerated offenses, the municipal courts must “impose the least restrictive non-financial release conditions For any person who qualifies for indigent defense, or does not have the present ability to pay, the Court may not set” any financial condition of release or a nonfinancial condition of release “that requires fees or costs to be paid by the defendant.”

- *Maryland*. On February 17, 2017, the Maryland Court of Appeals adopted detailed changes to its court rules, the main source of criminal procedural law in Maryland. Under the new rules, all defendants—both felony and misdemeanor—must be released on personal recognizance or unsecured bond unless a judicial officer makes written findings on the record “that no permissible non-financial condition attached to a release will reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community.” Even in those circumstances, the new rules require that “[a] judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition.” Pretrial detention must not be the intended use or the incidental effect of secured money bail.

In addition, reform-minded states and localities have frequently taken two other important steps. First, they have created pre-trial services units tasked with devising ways to reduce the number of defendants who fail to make their court appearances.⁷⁹ Simple tools like telephone reminders (common for doctors’ and dentists’ offices) have been used with great success, and “[s]tudied over the last three decades have demonstrated that simply reminding defendants of their upcoming court date improved appearance rates.”⁸⁰

Second, an increasing number of jurisdictions have chosen to rely on validated risk assessment instruments, like the Actuarial Pretrial Risk Assessment Instrument created by the Laura and John Arnold Foundation⁸¹ and substantial academic

⁷⁹ See *Moving Beyond Money: A Primer on Bail Reform*, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM 4, 14-15 (Oct. 2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

⁸⁰ *Id.* at 16.

⁸¹ *Id.* at 18. The Instrument is currently being used in 31 jurisdictions. See *Public Safety Assessment*, LAURA AND JOHN ARNOLD FOUNDATION,

research suggests that use of these instruments, properly validated, are more likely to predict accurately—and with less concern for implicit bias—than more subjective standards like the 17 factors the Massachusetts bail statute spells out.⁸²

Our Recommendations

We believe that the Massachusetts bail system requires significant reform, and a serious reform project would reduce pre-trial incarceration, save taxpayers' money, and help defendants avoid many unnecessary hardships—including job loss, and disruption to family—that serve no significant public safety purpose and, indeed, are likely to increase recidivism. While many approaches have promise, we believe Massachusetts should enact legislation creating the following changes, all in place in other jurisdictions:

1. Cash bail should not be ordered unless a defendant can in fact afford to pay the bail set.

Cash bail should be used only as an incentive to cause defendants to return to court, not to hold poor defendants in custody. We agree with the recent conclusion of the Harvard Law School Criminal Justice Policy Program: “If jurisdictions intend to impose money bail as a condition of release, it is critical to ensure that courts inquire into the defendant’s ability to pay any monetary sum imposed While there are undoubtedly complex questions about how to structure pre-trial decision making, a clear first principle should be that wealth should not be a determining factor in whether a particular defendant is released or detained.”⁸³ The Massachusetts Legislature endorsed this principle when it enacted the Massachusetts version of the dangerousness statute, and instructed courts that they “may not impose a financial condition that results in the pretrial detention of

<http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/>.

⁸² See Cynthia Mamalian, *State of the Science of Pretrial Risk Assessment*, PRETRIAL JUSTICE INSTITUTE 1, (Mar. 2011), https://www.bja.gov/publications/pji_pretrialriskassessment.pdf; see also Shawn Bushway & Jonah Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimate of a Parametric Model*, INSTITUTE FOR RESEARCH ON POVERTY SUMMER RESEARCH WORKSHOP (Oct. 28, 2011), http://eml.berkeley.edu/~webfac/kline/e251_s11/gelbach.pdf.

⁸³ See *Moving Beyond Money: A Primer on Bail Reform*, HARVARD LAW SCHOOL CRIMINAL JUSTICE POLICY PROGRAM 4, 10 (Oct. 2016).

the person.”⁸⁴ While the SJC’s holding in *Brangan* means that defendants have no constitutional right to affordable bail, there is no principled reason why (so long as court can order the detention of defendants who pose true flight risks) the legislature should not extend this important safeguard to all defendants.

2. The use of cash bail should be restricted to serious offenses.

The Massachusetts dangerousness statute permits prosecutors to seek pre-trial detention only when a defendant is accused of particularly serious offenses. To the extent that Massachusetts continues to permit judges to use cash bail as a means to incentivize a defendant to appear in court, it too should be restricted to serious offenses. While the list of offenses need not replicate exactly the crimes described in the dangerousness statute, cash bail should not be permitted for many misdemeanors, particularly those where a sentence of incarceration is unlikely to be imposed.

3. Massachusetts should follow the emerging national model of pre-trial services reform.

As we have observed, a number of jurisdictions have recently expanded the use of pre-trial services offices. These offices have two primary functions. First, they gather information about defendants who appear in court and apply validated risk assessment tools designed to help judges make objective decisions about whether a defendant is likely to appear in court if released.⁸⁵ Second, pre-trial service departments take steps, through the use of reminder systems and other mechanisms, that make it more likely that a defendant will in fact appear in court when required. We believe that Massachusetts should join the growing number of jurisdictions that embrace this approach. While we recognize that this will require an investment in resources, it seems clear that expanding pre-trial services will cost less than continuing to incarcerate defendants who are simply too poor to afford cash bail.

4. Defendants detained based on risk of flight should be accorded substantial procedural safeguards.

⁸⁴ G. L. c. 276, §58A (2).

⁸⁵ Care should be taken that the assessment tools are not themselves racially biased.

We recognize that some defendants charged with serious offenses may, if released, flee to avoid prosecution. In serious drug cases, for example, defendants may be indigent and unable to afford cash bail, but face very serious criminal consequences. Courts have a legitimate right to take steps to ensure that they appear in court as required. To that end, the Massachusetts legislature should create an alternative to imposing high cash bail on these defendants by creating a mechanism for courts to detain defendants in serious cases where the prosecution can establish, after an adversary hearing, that they are likely to fail to appear for trial. Defendants whom the prosecution seeks to detain based on risk of flight should be accorded procedural protections like those now accorded defendants facing detention based on dangerousness. Like the recently enacted New Jersey statute, or the federal bail reform act, Massachusetts should permit courts to detain defendants based on risk of flight only when the prosecution can establish, by clear and convincing evidence, that no condition or combination of conditions is likely to cause a defendant to appear in court when required.

We recognize that *Brangan's* new procedural dictates, which the SJC held were constitutionally required, could ameliorate some of our concerns. But procedural safeguards more closely resembling those set out in the dangerousness statute would, ultimately, in our judgment, be more likely to lead to the result consistent with the objective CSG's findings and the other research we have cited above suggest is very important: that defendants not judged to be dangerous should be detained before trial only as a last resort, when the prosecution can demonstrate that pre-trial detention is the only means of assuring that a defendant will appear in court.

III. REPEAL MANDATORY MINIMUM SENTENCES FOR DRUG OFFENSES

Introduction

CSG’s policy recommendations did not address directly one of the most significant issues in the debate about criminal justice reform, in Massachusetts and across the country: whether to reduce or eliminate mandatory minimum sentences, particularly in drug cases. The Steering Committee did recommend legislation that would, if enacted, ameliorate some of the most counterproductive impacts of mandatory minimum sentences by loosening restrictions that prevent prisoners serving mandatory minimum sentences from participating in programming when they are incarcerated. We applaud these recommendations; indeed, we think they should be expanded, as we discuss below.

The BBA has long opposed mandatory minimum sentences.⁸⁶ In 1991, the Task Force on Justice, a joint project of the BBA and the Crime and Justice Foundation, issued a report, *The Crisis in Corrections and Sentencing in Massachusetts*, recommending that the Commonwealth repeal mandatory sentencing laws, except for first degree murder. In our view, the time has come for the Legislature at least to repeal drug mandatory sentences and replace them with a sentencing system that is more rational, evidence-driven, transparent to the public, and less likely to impact defendants of color more harshly than other defendants.

The BBA’s long-standing opposition to mandatory minimum sentences is based on a number of bedrock principles, including these three:

- *First*, for drug cases, mandatory minimum sentences law make “drug weight”—that is, the number of grams of illegal drugs attributable to a defendant—a primary driver of sentencing. These laws fail to draw distinctions of culpability: they do not distinguish between the drug courier or

⁸⁶ *The Crisis in Corrections and Sentencing in Massachusetts*, February 1991 TASK FORCE ON JUSTICE, A JOINT PROJECT OF BOSTON BAR ASS’N AND CRIME AND JUSTICE FDN. 28. The report also recommended adoption of sentencing guidelines, which remains the position of the BBA. *See also Drugs in the Community: A Scourge Beyond the System*, March 15, 1990 FINAL REPORT BOSTON BAR ASSOCIATION TASK FORCE ON DRUGS AND THE COURTS 10-11, <http://www.bostonbar.org/prs/reports/drugsincommunity0390.pdf> (“Mandatory minimum sentences have clogged the criminal justice system, fail to distinguish between first offenders and repeat offenders, and give no credit for cooperation with law enforcement”).

“mule” caught with illegal drugs and the leaders of drug distribution organizations that employ the courier and reap the profits. They offer one-size-fits-all justice even in cases where judges would likely make important, evidence-based decisions based on defendant’s role in the drug organization and relative culpability.

- *Second*, with mandatory minimum sentences, prosecutors can choose whether to charge defendants with crimes that carry mandatory sentences, or “break-down” those charges so as to eliminate mandatory minimum sentences. The result is that prosecutors, under a system of mandatory minimum sentences, effectively have the power to decide both what charges a defendant will face and what sentence he or she will receive on conviction.
- *Third*, when judges sentence defendants, they do so in open court, after they have had the opportunity to hear arguments from both prosecutors and defense counsel.

Recent experience offers three additional reasons why the legislature should eliminate mandatory minimum drug sentences. The data now demonstrates that mandatory minimum sentences, particularly in drug cases, help drive one of the most significant problems faced by the Commonwealth’s criminal justice system: the problem of racial disparity. Racial disparity is even higher among inmates serving mandatory minimum drug sentences than among defendants charged with other crimes. The reasons for this disparity remain poorly understood, but the fact of racial disparity is quite clear.⁸⁷ Reducing reliance on mandatory minimum drug sentences is likely to reduce racial disparity in our prisons. In addition, Massachusetts reduced the length of a number of mandatory minimum sentences in 2012 without any adverse impact on public safety. Finally, serious efforts to reduce recidivism in Massachusetts will require expanded programming inside prisons to help break patterns of criminal thinking (a topic we discuss later in this report). Eliminating mandatory drug sentences could help generate savings necessary for these investments.

⁸⁷The BBA endorses CSG’s recommendation to “[i]mprove data collection and reporting related to race and ethnicity.” *CSG Policy Framework, supra* note 28, at 21-22.

Mandatory Minimum Sentences in Massachusetts

Since 1980, the number of people incarcerated in Massachusetts has nearly quadrupled.⁸⁸ Table 1 below shows the incarcerated populations in 1980 and 2016.

Table 1:

Year	DOC Pop.	HOC & Jail Pop.	Total
1980	2,754 (January 1, 1980)	2,654 (Avg. Daily Pop.)	5,408
2016	10,014 (January 1, 2016)	10,496 (January 4, 2016)	20,510

As the National Research Council of the National Academies observed in its seminal report, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* at 78 (2014) (“National Research Council Report”), sentencing laws enacted from the mid-1980s through the mid-1990s were “targeted at making sentences harsher and more certain and preventing crime through deterrence and incapacitation.” Sentencing policy in this phase shifted to “certainty, severity, crime prevention, and symbolic denunciation of criminals.”⁸⁹ According to the National

⁸⁸ MASSACHUSETTS DEPARTMENT OF CORRECTION, A STATISTICAL DESCRIPTION OF RESIDENTS OF THE MASSACHUSETTS INSTITUTIONS ON JANUARY 1, 1980 1,4 (May 1980), <http://www.mass.gov/eopss/docs/doc/research-reports/jan-1-population/011980.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2011 10 (June 2012), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/poptrends2011final.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2015 10 (Mar. 2016), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2015-final.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, COMMITMENTS TO MASSACHUSETTS HOUSES OF CORRECTION DURING 1980 3 (Mar. 1980), <http://www.mass.gov/eopss/docs/doc/research-reports/county-commit/1980cty.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, WEEKLY AND DAILY COUNT SHEETS 7 (Jan. 2, 2012), <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2012/2012-wc01-02.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, WEEKLY AND DAILY COUNT SHEET 7 (Jan. 4, 2016), <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2016/week-count-01042016.pdf>.

⁸⁹ Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, NATIONAL RESEARCH COUNCIL 1, 78 (2014), http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.

Research Council Report, by 1994, every state had adopted mandatory minimum sentences, many for drug offenses.⁹⁰

Massachusetts was no exception. Massachusetts law provides for mandatory minimum sentences—that is, sentencing requiring the judge to impose a term of incarceration of at least a certain number of days, months, or years—in approximately 100 criminal statutes.⁹¹ Apart from murder,⁹² few violent crimes carry mandatory sentences; in cases of rape, manslaughter, and armed robbery, for example, the Legislature has chosen to permit judges to fashion the appropriate sentence based on the facts about the crime and the defendant’s history and background. Instead, mandatory minimum statutes generally address three categories of crimes—impaired driving,⁹³ firearms offenses,⁹⁴ and drug distribution offenses.

The focus of most current reform efforts, and our focus here, is on drug distribution crimes; those statutes call for much longer sentences than impaired driving crimes (which become longer as a defendant commits second and subsequent offenses), and are charged far more frequently than firearms offenses.

Massachusetts law currently contains 36 separate mandatory minimum drug charges—more than one-third of all the mandatory sentences on the books. Mandatory sentences begin at relatively low drug weights. For example, trafficking between 18 to 36 grams of heroin (or a mixture of heroin and any other substance, such as cutting agents) carries a mandatory minimum sentence of three and one-half -years.⁹⁵ In contrast, under federal law, possession of 100 grams of heroin with intent to distribute is required to trigger a mandatory sentence—in that case, five

⁹⁰ *Id.* at 83.

⁹¹ *See generally* MASSACHUSETTS SENTENCING COMMISSION, FELONY AND MISDEMEANOR MASTER CRIME LIST 1 (Dec. 2015), www.mass.gov/courts/docs/admin/sentcomm/mastercrimelist.pdf.

⁹² *See* G. L. c. 265, §1 (life imprisonment).

⁹³ *See, e.g.*, G. L. c. 90, §24(1)(a)(1) (thirty days for second offense OUI liquor or drugs).

⁹⁴ *See e.g.*, G.L. c. 269, §10(a) (18 months for carrying a firearm without a license).

⁹⁵ G. L. c. 94C, §32E(c)(1). For reference, a packet of Domino sugar contains three and one-half grams. Under Massachusetts law, “trafficking” simply means possession with intent to distribute. *Commonwealth v. James*, 30 Mass. App. Ct. 490, 493 n. 4 (1990).

years.⁹⁶ (Under the more severe Massachusetts law, trafficking 100 grams of heroin carries an eight-year sentence.)

Despite reducing mandatory minimum sentences for many drug crimes in 2012 (*see* discussion below), the number of people serving mandatory minimum sentences remains high. As of January 1, 2017, 867 people were serving mandatory state prison sentences for drug offenses, more than one in 10 inmates then serving sentences in the Department of Correction.⁹⁷

Mandatory Minimum Sentences Contribute to Racial Disparity

Sentencing in Massachusetts has a disparate impact on blacks and Hispanics. There persists evidence of racial and ethnic disparities in the rate of incarceration, length of sentences, and the demographics of the prison population.

As we discussed above, higher incarceration rates and harsher sentences for defendants of color have resulted in a prison population where blacks and Hispanics are dramatically overrepresented.⁹⁸ The record in Massachusetts is even worse than in the nation as a whole.

The data shows that in Massachusetts, as elsewhere, mandatory minimum drug sentences have made the problem of racial disparity worse, not better.⁹⁹ As the National Research Council observed, “the disproportionate number of arrests of black people bear little relationship to levels of black Americans’ drug use or involvement in drug trafficking.”¹⁰⁰ While mandatory minimum sentencing may have been intended to achieve uniformity of sentences, we have not accomplished that result when it comes to race.

⁹⁶ 21 U.S.C. §841(b)(1)(B)(i).

⁹⁷ *See Public Safety: Prison Population Trends*, MASS. GOV. (2017), <http://www.mass.gov/eopss/law-enforce-and-cj/prisons/rsch-data/prison-population-trends.html>. We do not have similar data for Houses of Correction.

⁹⁸ *See pp. 2-3, supra*.

⁹⁹ SELECTED RACE STATISTICS, MASSACHUSETTS SENTENCING COMMISSION 1, 6 (Sept. 27, 2016), <http://www.mass.gov/courts/docs/sentencing-commission/selected-race-statistics.pdf>.

¹⁰⁰ Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, NATIONAL RESEARCH COUNCIL 1, 97 (2014).

A study drawing on admissions data provided by the Suffolk County Sheriff's Department from 2009-2015 and on 2014 crime data found that, "[p]eople of color represent[ed] three-quarters of those convicted of mandatory drug offenses in Massachusetts though they [made] up less than one-quarter of the Commonwealth's population."¹⁰¹ A 2016 Massachusetts Sentencing Commission study showed a similar racial disparity for people sentenced to Massachusetts state prisons. The study found that, in fiscal year 2013, 73% of prisoners serving a mandatory state sentence for a drug offense were either black or Hispanic; that rate was substantially higher than the overall percentage of black and Hispanics inmates serving sentences at the Department of Correction.¹⁰² A 2013 study, based on federal sentencing data, found that "racial disparities in recent years have been largely driven by the cases in which judges have the least sentencing discretion: those with mandatory minimums."¹⁰³

Mandatory Minimum Drug Sentences Do Not Advance Public Safety

Although they were aimed at preventing crime, the National Research Council observed that "[t]he overwhelming weight of the evidence ... shows that [mandatory minimum sentences] have few if any deterrent effects."¹⁰⁴ Rather, the evidence suggests that these and other similar sentencing laws "shifted sentencing power from judges to prosecutors; provoked widespread circumvention; exacerbated racial

¹⁰¹ See Benjamin Forman, *The Geography of Incarceration*, BOSTON INDICATORS PROJECT 1, 14 (Oct. 2016), <http://massinc.org/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf>; see also EXECUTIVE OFFICE OF THE TRIAL COURT DEPARTMENT OF RESEARCH AND PLANNING, SURVEY OF SENTENCING PROCEDURES: FY2013 i, iv (Dec. 2014), <http://www.mass.gov/courts/docs/admin/sentcomm/fy2013-survey-sentencing-practices.pdf>, (finding that in FY2013, Massachusetts courts convicted about 450 defendants to a mandatory drug offense; of those convicted, 74.7% were of racial minorities: 33.8% were black, 38.9% were Hispanic, and 25.3% were white (2.0% were other races)).

¹⁰² SELECTED RACE STATISTICS, MASSACHUSETTS SENTENCING COMMISSION 1, 6 (Sept. 27, 2016), <http://www.mass.gov/courts/docs/sentencing-commission/selected-race-statistics.pdf>.

¹⁰³ Sonja B. Starr, M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123(1) YALE L. J. 1, 78 (2013).

¹⁰⁴ Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, NATIONAL RESEARCH COUNCIL 1, 83 (2014).

disparities in imprisonment; and made sentences much longer, prison populations much larger, and incarceration rates much higher.”¹⁰⁵

The experience in Massachusetts similarly suggests that repealing mandatory minimum sentences will not jeopardize public safety. In 2012, Massachusetts passed a sentencing reform bill that reduced the length of mandatory sentences for many drug crimes—for example, at the lowest level of what is considered trafficking in cocaine, the mandatory sentence was reduced from three years to two years, and the range of weights triggering that sentence was increased from 14-28 grams to 18-36 grams. For heroin, the mandatory sentence was reduced from five years to three-and-one-half years, with the same change in weights.¹⁰⁶ Since 2012, the Massachusetts crime rate has declined,¹⁰⁷ the total number of people incarcerated

¹⁰⁵ *Id.* at 102. “The evidence is overwhelming that practitioners frequently evade or circumvent mandatory sentences, that there are stark disparities between cases in which the laws are circumvented and cases in which they are not, and that the laws often result in the imposition of sentences in individual cases that everyone directly involved believes to be unjust.” Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, NATIONAL RESEARCH COUNCIL 1, 83 (2014), (citing J.A. Beha, II, “*And Nobody Can Get You Out*”: *The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the use of Firearms and on the Administration of Criminal Justice in Boston*, 57 B.U. L. Rev. 96-146, 289-333 (1977); see generally THE NATION’S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE, JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION (1978); see generally David Rossman, Paul Froyd, Glen Pierce, John McDevitt, & William Bowers, *The Impact of the Mandatory Gun Law in Massachusetts*, U.S. DEPARTMENT OF JUSTICE 1 (1979); see generally Colin. Loftin, Milton Heumann, & David McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17(2) LAW AND SOCIETY REVIEW 287-318 (1983); Candace McCoy J.D., & Patrick McManimon, Jr., *New Jersey’s “No Early Release Act”: Its Impact on Prosecution, Sentencing, Corrections, and Victim Satisfaction*, U.S. DEPARTMENT OF JUSTICE, 1 (Feb. 2004); see generally Nancy Merritt, Terry Fain, & Susan Turner, *Oregon’s Get Tough Sentencing Reform: A Lesson in Justice System Adaptation* 5(1) CRIMINOL. AND PUBLIC POLICY 5-36 (Feb. 2006).

¹⁰⁶ See An Act Relative to Sentencing and improving law Enforcement Tools, H.B. 3818, 190th Gen. Court (Aug. 2, 2012), <https://malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter192>.

¹⁰⁷ From 2012-2015, the Massachusetts violent crime rate per 100,000 inhabitants has decreased 3.6%, and the Massachusetts property crime rate per 100,000 inhabitants has decreased by 21.5%. Compare [HTTPS://UCR.FBI.GOV/CRIME-IN-THE-U.S/2012/CRIME-IN-THE-U.S.-2012/TABLES/5TABLEDATAEXCEL/TABLE_5_CRIME_IN_THE_UNITED_STATES_BY_STATE_2012.XLS](https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/5tabledataexcel/table_5_crime_in_the_united_states_by_state_2012.xls), with <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-5>. The FBI does not report statistics for drug crimes.

in Massachusetts has declined,¹⁰⁸ and recidivism rates have declined as well.¹⁰⁹ Thus, the evidence suggests that the sentencing reform of 2012 did not jeopardize public safety.

In Practice, Mandatory Sentencing Schemes Likely Increase Recidivism

State prison sentences in Massachusetts are indeterminate. The court imposing a state prison sentence fixes a maximum and a minimum term for the sentence pursuant to statute.¹¹⁰ But in many cases where the law calls for mandatory drug sentences, judges impose so-called “year-and-a day” sentences (for example “two

¹⁰⁸ MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2015 10 (Mar. 2016), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2015-final.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, WEEKLY AND DAILY COUNT SHEET 7 (Jan. 2, 2012), <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2012/2012-wc01-02.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, WEEKLY AND DAILY COUNT SHEET 7 (Jan. 7, 2013), <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2013/01-07-2013.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, WEEKLY AND DAILY COUNT SHEET 7 (Jan. 6, 2014), <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2014/01-06-2014.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, WEEKLY AND DAILY COUNT SHEET 7 (Jan. 5, 2015), <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2015/week-count-01052015.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, WEEKLY AND DAILY COUNT SHEET 7 (Jan. 4, 2016), <http://www.mass.gov/eopss/docs/doc/research-reports/wkly-countsheet/2016/week-count-01042016.pdf>.

¹⁰⁹ MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2012 46 (May 2013), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrendsfinal-2012.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2013 46 (May 2014), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2013-final-5-21-2014.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2014 46 (April 2015), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2014-05042015-final.pdf>; MASSACHUSETTS DEPARTMENT OF CORRECTION, PRISON POPULATION TRENDS 2015 46 (March 2016), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2015-final.pdf>.

¹¹⁰ “If a convict is sentenced to the state prison, except as an habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he may be imprisoned.” G. L. c. 279, §24.

years to two years and one day”) where the minimum and the maximum sentence is only one day apart.¹¹¹

The “and a day” sentencing scheme is common for mandatory minimum sentences.¹¹² By closing the gap between the minimum and the maximum sentence to one day, the sentencing judge ensures that the person sentenced will not serve more than the already substantial term of incarceration under the mandatory minimum sentencing scheme. Since sentencing judges’ hands are tied by mandatory minimum sentences, “and a day” sentences may often reflect judges’ attempt to respect “the principle of ‘parsimony’ in punishment: the ultimate disposition that is fashioned, after consideration of the various purposes of sentencing, should be no more severe than necessary to achieve these purposes.”¹¹³

One unintended consequence, however, of an “and a day” sentence is that the sentenced person does not have an incentive to accrue earned time credits by participating in evidence-based anti-recidivism programs that would accelerate parole eligibility. As stated in the recently adopted Superior Court *Best Practices for Individualized Evidence-Based Sentencing*, “[t]he constraints of mandatory minimum sentences and concerns about the likelihood of parole often lead a judge to impose a state prison sentence with a one-day range between the minimum and maximum term, resulting in an offender serving the full sentence but then being

¹¹¹ See *CSG Report #2*, *supra* note 19, at 30 (citing CSG Justice Center analysis of 2013 CARI sentencing data).

¹¹² Those serving mandatory sentences are not eligible to accrue credits until they have served the minimum term required by statute. In 2013, out of the 1,854 total state prison sentences, 698 (38%) were “and a day” sentences, where the minimum and maximum sentence were one day apart; 343 (19% of the total sentences) of those sentences required no post-release probation. *CSG Interim Report #3*, *supra* note 5, at 55 (citing CSG Justice Center analysis of 2013 CARI sentencing data)). Department of Correction data suggests that most of these “and a day” sentences are for mandatory drug offenses. See Erick Lockmer, MASSACHUSETTS DEPARTMENT OF CORRECTION, ANALYSIS OF MANDATORY SENTENCES OF GOVERNING DRUG OFFENSES 1 (July 2012), <http://www.mass.gov/eopss/docs/doc/research-reports/briefs-stats-bulletins/mando-drug-brief-final.pdf>. While we are aware of no data tracking whether these sentences are mandatory drug sentences, experience in the court system teaches that they most commonly are.

¹¹³ See *Superior Court Working Group on Sentencing Best Practices, Criminal Sentencing in the Superior Court: Practices for Individualized Evidence-Based Sentencing*, COMMONWEALTH OF MASSACHUSETTS: SUPERIOR COURT i, 6 (Mar. 2016), <http://www.mass.gov/courts/docs/sentencing-commission/sc-sbp-report.pdf>.

released without supervision, without drug treatment and, often, without means.”¹¹⁴

With an “and a day” sentence, there is no parole eligibility before the mandatory minimum is served, and release occurs within 24 hours after that minimum runs, which *de facto* negates parole eligibility altogether. Additionally, the preclusion of parole often results in no post-release supervision and support. In 2013 alone, “195 drug sentences with an ‘and a day’ sentence [lacked] post-release probation.”¹¹⁵ As an analysis by the Department of Correction found, “and a day” sentences provide no opportunity for inmates to establish earned time credits, nor is there an opportunity for parole supervision.¹¹⁶ The best way to reduce the prevalence of “and a day” sentences is to repeal these mandatory minimum sentencing provisions to allow judges to craft individualized sentences that provide incentives for rehabilitation and compliance with the law.¹¹⁷

¹¹⁴ *Id.* at iv.

¹¹⁵ *CSG Report #2, supra* note 19, at 83 (citing CSG Justice Center analysis of 2013 CARI sentencing data).

¹¹⁶ Erick Lockmer, MASSACHUSETTS DEPARTMENT OF CORRECTION, ANALYSIS OF MANDATORY SENTENCES OF GOVERNING DRUG OFFENSES 1 (July 2012), <http://www.mass.gov/eopss/docs/doc/research-reports/briefs-stats-bulletins/mando-drug-brief-final.pdf>, (“Inmates with mandatory sentences on a governing drug offense... are required to serve a minimum sentence for which they cannot reduce the parole eligibility period by earning good time, nor can they receive probation, furloughs, or release for work, education, or program-related activities during this mandatory minimum... [I]mposing [“and a day”] sentence terms for mandatory governing drug offenses precludes the possibility of parole as an inmate is parole-eligible only after serving the minimum sentence, but would be released the very next day.”)

¹¹⁷ As described below, in a positive step, CSG recommended extending the availability of earned time credits for participating in and completing anti-recidivism programs to people serving mandatory minimum sentences for certain drug offenses. *CSG Policy Framework, supra* note 28, at 3. The legislation filed by the Governor to implement those recommendations permit prisoners serving mandatory sentences for certain of those offenses to begin accruing earned time credits before they have served the statutory minimum, thus potentially expediting their eligibility for parole. An Act Implementing the Joint Recommendation of the Massachusetts Criminal Justice Review, H.D. 3803, 190th Gen. Court (Mass. 2017), <https://malegislature.gov/Bills/190/H74.pdf>. Unfortunately, however, the proposed legislation excludes a number of people and, therefore, limits the public benefit from programming designed to reduce recidivism.

Repealing Mandatory Minimum Drug Sentences Would Likely Create Opportunities for Justice Reinvestment

The Commonwealth pays a high cost¹¹⁸ to incarcerate its racially disproportionate prisoner population. Both the fiscal and social costs that result from incarceration from mandatory minimum sentences place an unneeded burden on the Commonwealth and its taxpayers because the cost of incarceration is higher than the cost of effective rehabilitation.

Studies demonstrate that for high risk individuals, high intensity interventions with treatment programs significantly decrease recidivism.¹¹⁹ “With the average annual cost in fiscal year 2014 of \$53,040.87 to house a Massachusetts state prisoner and the annual cost of \$5,000 to supervise one parolee, it is clear that failure to maximize parole supervision is costly for taxpayers.”¹²⁰

The social costs of the high rates of incarceration are also expensive. Incarceration during adolescence and early adulthood has negative effects on employment; “[o]n average, former inmates earn 40 percent less annually than they would had they not been sent to prison.”¹²¹ Additionally, incarceration at an early age results in increased criminal activity in later years.¹²² The under-resourced communities that

¹¹⁸ The cost to incarcerate “residents of Boston neighborhoods who entered the Suffolk County House of Correction and the Nashua Street Jail in 2013... [was] two and half times the state’s combined FY 2013 budgets for Bunker Hill Community college and Roxbury Community College... It costs twice as much to incarcerate residents of Fields Corner (\$3.89 million) than Roca receives annually (\$1.6 million) through its social impact bond to provide high-touch training and services to Boston’s proven-risk youth.” Benjamin Forman, *The Geography of Incarceration*, THE BOSTON INDICATORS PROJECT 1, 11 (Oct. 2016).

¹¹⁹ *Massachusetts Criminal Justice Review Working Group Meeting 5*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, 1, 7 (Nov. 15, 2016); citing *Benefit Cost Results: Adult Criminal Justice System*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (last updated May 2017), <http://wsipp.wa.gov/benefitcost?topicid=2>.

¹²⁰ *Frequently Asked Questions About the DOC*, MASS. GOV. (2017), <http://www.mass.gov/eopss/agencies/doc/faqs-about-the-doc.html>.

¹²¹ Benjamin Forman & John Larivee, *Crime, Cost and Consequences: Is It Time to Get Smart on Crime?*, MASSINC 1, 19 (Mar. 2013), http://massinc.org/wp-content/uploads/2013/03/Crime_Cost_Consequences_MassINC_Final1.pdf (citing *see generally* Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DÆDALUS, JOURNAL OF THE AMERICAN ACADEMY OF ARTS & SCIENCES 1 (Summer 2010).

¹²² Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. OF CRIM. L. 173, 203

consistently bear the majority of this burden¹²³ suffer immensely from high incarceration rates as “[s]tudies show that children with fathers in prison are four times more likely to enter the child welfare system.”¹²⁴ “The best evidence produced thus far links paternal incarceration to childhood mental health and behavioral problems, problems that are strongly linked to difficulty in school, trouble finding work, and becoming involved in crime.”¹²⁵

Our Recommendation

Massachusetts should repeal mandatory minimum drug sentences.

Repealing mandatory minimum drug sentences would enable judges to do what they do best: consider the arguments of both the prosecutor and defense attorney, assess the facts, and follow the criteria developed by the Superior Court Working Group on Best Practices in Formulating a Sentence: “In formulating a criminal disposition, a judge should consider the following factors and sources of information: the facts and circumstances of the crime of conviction; a defendant’s prior criminal record; the Massachusetts Sentencing Guidelines; victim impact statements; the defendant’s background, personal history and circumstances; and the sentencing arguments and memoranda and other materials (if any) submitted by counsel.”¹²⁶

(2008), http://moritzlaw.osu.edu/osjcl/Articles/Volume6_1/Fagan-Meares-PDF.pdf, (citing Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIR. LEG. STUD., 715 (2007), (showing that risk and reward both contribute to the decisions to continue in or desist from crime)).

¹²³ See Benjamin Forman, *The Geography of Incarceration*, BOSTON INDICATORS PROJECT (Oct. 2016), <http://massinc.org/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf>.

¹²⁴ Benjamin Forman & John Larivee, *Crime, Cost and Consequences: Is It Time to Get Smart on Crime?*, MASSINC, 1, 19 (Mar. 2013); (citing *Parental Incarceration and Child Wellbeing in Fragile Families: Fragile Families Research Brief*, CENTER FOR RESEARCH ON CHILD WELLBEING (Apr. 2008), <http://www.f2f.ca.gov/res/pdf/ParentalIncarceration.pdf>).

¹²⁵ *Best Practices in Sentencing Utilizing Social Science Data & Research*, COMMONWEALTH OF MASSACHUSETTS TRIAL COURT BEST PRACTICES WORKING GROUP 1, 5 (Mar. 2016), <http://www.mass.gov/courts/docs/sentencing-commission/best-practices-in-sentencing-using-social-science.pdf>; (citing Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavior Problems*, 10(3) CRIMINOL. & PUB. POL’Y 793, 806 (2011)).

¹²⁶ *Superior Court Working Group on Sentencing Best Practices, Criminal Sentencing in the Superior Court: Practices for Individualized Evidence-Based Sentencing*, COMMONWEALTH

The Boston Municipal and the District Court have adopted a similar set of Best Practice Principles.¹²⁷ Sentencing judges seek the “fullest possible picture of the defendant” and create a “disposition individualized to the offense committed and to the offender.”¹²⁸ By reducing the need for “and a day” sentences to avoid harsher sentences, judges will be able to fashion sentences that provide opportunities and incentives to participate in and complete anti-recidivism programs that advance public safety.

Moreover, there is now public support for eliminating mandatory sentencing schemes.¹²⁹ Poll results from interviews of 754 registered voters in Massachusetts conducted by MassINC between April 24, 2017, and May 1, 2017, confirm this notion.¹³⁰ When the Massachusetts voters polled were presented with three sentencing schemes, the vast majority preferred that sentencing judges retain some discretion: 46% were in favor of having judges use sentencing guidelines while still having some discretion; 41% were in favor of letting judges decide the punishment each time on a case by case basis; and only 8% were in favor of requiring judges to sentence some offenders to prison for a minimum period of time.¹³¹ The majority of the residents polled (66%) felt that drug use should be treated more as a health problem than as a crime.¹³² The majority (62%) also felt that to respond to the sharp rise in deaths related to heroin and other opiate drugs the state should invest more money in drug treatment programs and facilities.¹³³

OF MASSACHUSETTS SUPERIOR COURT i, 6 (Mar. 2016),
<http://www.mass.gov/courts/docs/sentencing-commission/sc-sbp-report.pdf>.

¹²⁷ COMMONWEALTH OF MASSACHUSETTS, BOSTON MUNICIPAL COURT AND DISTRICT COURT SENTENCING BEST PRACTICE PRINCIPLES 1 (2016),
<http://www.mass.gov/courts/docs/sentencing-commission/dc-bmc-sentencing-best-practices.pdf>.

¹²⁸ *Id.*

¹²⁹ *See MassINC Criminal Justice Poll*, MASSINC, POLLING GROUP 1 (May 11, 2017),
<https://massinc.org/wp-content/uploads/2017/05/topline-2017-04-criminal-justice-poll.pdf>.

¹³⁰ *Id.* at 1.

¹³¹ *Id.*

¹³² *Id.* at 2.

¹³³ *Id.* at 3. In an earlier poll, “[m]ajorities thought connecting inmates with community groups (93%) and providing job training (91%) and education (89%) would reduce crime.” Rich Parr & Steve Koczela, *Massachusetts Voters Ready for Major Changes to State Criminal Justice System*, MASSINC (May 11, 2011),

When the topic shifted toward “dealing with crime[,]” 41% identified preventative measures like education and youth programs as a top priority, 25% indicated that rehabilitative measures like education and job training for prisoners should be the top priority, 22% were in favor of more street-level enforcement, and only 8% felt an emphasis on punishment, like longer sentences and more prisons, should be the top priority.¹³⁴

A recent national survey concluded that support for alternatives to incarceration is even greater for people living in “[c]ommunities of color [that] are disproportionately affected not only by incarceration but also through higher rates of victimization as well.”¹³⁵ The victims of crimes who live in communities of color, “[b]y a margin of 7 to 1 prefer increased investments in mental health treatment over investments in prisons and jails.”¹³⁶ Victims also preferred holding people accountable through options beyond prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service.”¹³⁷

The data also suggests that, locally, residents in high crime areas do not support mandatory minimum sentences. As the Boston Foundation reported last year:

MassINC’s 2014 polling of Massachusetts residents living in urban neighborhoods with high incarceration rates revealed a preference for reforms that allow judges greater freedom in sentencing. Fewer than one in 10 residents in these neighborhoods supported the use of mandatory minimum drug sentences. And they were more likely to favor full judicial discretion in sentencing matters (51 percent in high

<https://massinc.org/2017/05/11/massachusetts-voters-ready-for-major-changes-to-state-criminal-justice-system/>; *Id.*

¹³⁴ *Id.*

¹³⁵ Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91(3) THE PRISON J. 87S, 89S (Aug. 25, 2011), <http://sentencingproject.org/wp-content/uploads/2016/01/Addressing-Racial-Disparities-in-Incarceration.pdf>.

¹³⁶ *Crime Survivors Speak, the First-Ever National Survey on Victims’ Views on Safety and Justice*, ALLIANCE FOR SAFETY AND JUSTICE 1, 5 (2016), <http://www.allianceforsafetyandjustice.org/crimesurvivorsspeak/report>.

¹³⁷ *Id.* at 5.

incarceration areas vs 39 percent in all other Massachusetts communities).¹³⁸

The Legislature should follow sound public policy, supported by those most affected, and repeal mandatory minimum sentences for drug crimes.

¹³⁸ Benjamin Forman, *The Geography of Incarceration*, THE BOSTON INDICATORS PROJECT 1, 14 (Oct. 2016).

IV. ENSURE FINES AND FEES DO NOT PUNISH THE POOR AND IMPEDE SUCCESSFUL REENTRY

Introduction

The vast majority of criminal defendants are poor. It is estimated that 80-90 percent of those charged are indigent and qualify for appointed defense counsel.¹³⁹ Nevertheless, like many other states,¹⁴⁰ the Commonwealth of Massachusetts has required courts to charge criminal defendants a number of fines and fees. While raising revenue for the state, they make it more difficult for individuals to comply with the law while supporting themselves and their families and, therefore, likely contribute to the recidivism that plagues the Massachusetts criminal justice system. Unfortunately, the CSG Policy Framework, and the legislation filed to implement it, do not address the problems associated with criminal fines and fees. We recommend that the Commonwealth adopt changes that will remove unfair obstacles preventing successful reentry to a law-abiding life.

Criminal Fines and Fees in Massachusetts

As the Massachusetts Trial Court Fines and Fees Working Group recently found, court assessments have increased in number, categories and amounts over time,¹⁴¹ perhaps as state budgets have grown tighter. The following are examples of the fines and fees imposed in Massachusetts:

¹³⁹ Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CENTER FOR JUSTICE 1, 2 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [hereinafter *Criminal Justice Debt*], (citing Access and Fairness Info Center, National Center for State Courts, *Indigent Defense FAQs I* (2009)). Unfortunately, Massachusetts courts do not track the number or percentage of cases in which defendants qualified for assignment of counsel because of indigency.

¹⁴⁰ *Criminal Justice Debt*, *supra* note 139, at 7-10.

¹⁴¹ *See Massachusetts Trial Court Fines and Fees Working Group*, REPORT TO TRIAL COURT JUSTICE PAULA M. CAREY 1, 2 (Nov. 17, 2016), <http://www.mass.gov/courts/docs/trial-court/report-of-the-fines-and-fees-working-group.pdf> [hereinafter *Fines and Fees Report*].

Table 3

Fine/Fee	Amount	Statute
Probation fee with Victim Services Surcharge	\$65/month \$50/month for administrative probation	G.L. c. 276 §87A
Counsel fee when counsel appointed for indigent defendant	\$150	G.L. c. 211D §2A(f)&(g)
Default warrant fee when default warrant is issued solely for defendant's failure to pay required moneys and for removal of default	\$50	G.L. c. 276 §§31 & 32
Default warrant arrest fee from a defendant who is arrested on a probation violation	\$75	G.L. c. 276 §30
Court costs for the "reasonable and actual expenses of the prosecution" as a condition of dismissal, filing or probation	As determined by court.	G.L. c. 280 §6
Victim/Witness Assessment	For felony, not less than \$90 For misdemeanor, \$50	G.L. c. 258B §8
Drug Analysis Fee	For felonies, \$150-\$500 For misdemeanors, \$35-\$100	G.L. c. 280 §6B

The trial court can assess over twenty additional fees in criminal cases; in addition, the Parole Board orders those on parole to pay monthly supervision fees as a condition of parole, now \$80.¹⁴²

In some instances, fees are mandatory; courts have no discretion to waive them.¹⁴³ In other cases, courts may waive the assessment, but the standards they must

¹⁴² See Potential Money Assessments in Criminal Cases, MASSACHUSETTS TRIAL COURT DISTRICT COURT DEPARTMENT, <http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/potential-moneyassessment-criminalcases.pdf>; *Official Audit Report: Massachusetts Parole Board*, COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE STATE AUDITOR 1, 6-8 (Oct. 19, 2016) (citing to c. 26 §368 of the Acts of 2003 and Parole Board policy), <http://www.mass.gov/auditor/docs/audits/2016/201601543j.pdf>.

apply vary depending on the type of fee. For example, probation fees may be waived or reduced only on written findings of undue hardship to the defendant or his/her family due to limited income, employment status, or some other factor.¹⁴⁴ The court may waive counsel fees “only upon a determination from [the chief probation] officer’s data verification process that the person is unable to pay such \$150 within 180 days.”¹⁴⁵ Waiver of default warrant fees can result only from a “finding of good cause.”¹⁴⁶ Victim/witness assessments can be reduced only on written findings that they would cause “severe financial hardship,” to be determined independently of the finding of indigence for purposes of appointing counsel.¹⁴⁷

Our Concerns

The adverse consequences of criminal justice fees are significant. Scraping together enough money to pay these types of fees reduces household income “and compel[s] people living on very tight budgets to choose between food, medicine, rent, child

¹⁴³ See, e.g., G. L. c. 90, §24(1)(a)(1) and G. L. c. 90B §8(a) (governing OUI victims assessments); see also G. L. c. 209A §7 (governing additional fines for 209A violations).

¹⁴⁴ G. L. c. 276, §87A. A recent report by the Commonwealth of Massachusetts Office of the State Auditor, entitled *Trial Court—Administration and Oversight of Probation Supervision Fee Assessments*, suggests that courts may not always waive fees even when the defendant is unable to pay them. Although critical of the Trial Court’s collection efforts, the auditor found that, of 694 criminal cases tested in twelve district court locations (that included relatively low per capita income districts such as Fitchburg, East Hampshire, Fall River, Worcester, Orange, and Holyoke), the judge waived probation supervision fees in only 115 instances, approximately 17% of the total. *Trial Court: Administration and Oversight of Probation Supervision Fee Assessments*, COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE STATE AUDITOR 1, 14-15 (Jan. 13, 2016); see also, Wendy Sawyer, *Punishing Poverty: The High Cost of Probation Fees in Massachusetts*, PRISON POLICY INITIATIVE (Dec. 8, 2016), https://www.prisonpolicy.org/probation/ma_report.html.

¹⁴⁵ G. L. c. 211D, §2A(f).

¹⁴⁶ G. L. c. 276, §§30, 31.

¹⁴⁷ G. L. c. 258B, §8. Alternatives to a financial charge exist for some assessments, but not for others. Courts may permit a defendant to work off his or her counsel fees with 10 hours of community service for each \$100 owed. G. L. c. 211D, §2A(g). If a default warrant arrest fee is waived for indigency, the defendant must perform one day of community service unless he or she is physically or mentally unable. G. L. c.276, §30. If probation fees are waived, the defendant must perform community service of not less than four hours per month. G. L. c.276, §87A. No such options are available statutorily for most other types of fines and fees.

support, and legal debt.”¹⁴⁸ In fact, frequently it is innocent family members who bear the burden of satisfying these legal obligations: “Facing the state’s Damocles sword of punishment, the poor family members of individuals involved in the criminal justice system become their ‘safety net’ of last resort.”¹⁴⁹

Default brings with it a cascade of negative outcomes, all of which make it more difficult for people to lead law-abiding lives. The effect on credit scores can impede employment and housing prospects.¹⁵⁰ For counsel fees, courts are required to report defendants who have not paid within sixty days of appointment of counsel to the Registry of Motor Vehicles, which cannot renew their drivers’ licenses or motor vehicle registrations.¹⁵¹ For those on probation, even for less serious crimes, failure to pay violates the terms of their supervision, with severe outcomes even short of revocation, including extension of the term of supervision. In addition, individuals are disqualified from receiving important federal benefits such as food stamps, low income housing and housing assistance, and Supplemental Security Income for the elderly and disabled.¹⁵² The struggle is even harder for those facing legal debt after their release from prison; they already face significant obstacles to employment, housing and community support for themselves and their families.¹⁵³ Criminal justice debt is just one more obstacle to economic viability after release.¹⁵⁴

¹⁴⁸ See Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AMERICAN JOURNAL OF SOCIOLOGY 1753, 1786 (May 2010) [hereinafter, *Drawing Blood from Stones*].

¹⁴⁹ Mary Katzenstein & Maureen Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPECTIVES ON POLITICS 638, 639 (Sept. 2015). The authors cited a survey conducted in thirteen counties in Alabama, which found that slightly over 55% of those who owed fines and fees relied on their family and friends for help to pay their debts. *Id.* citing Foster Cook, *The Burden of Criminal Justice Debt in Alabama: 2014 Participant Self-Report Survey*, JEFFERSON COUNTY’S COMMUNITY CORRECTIONS PROGRAM 1, 8 (2014), https://www.uab.edu/medicine/substanceabuse/images/The_Burden_of_Criminal_Justice_Debt_in_Alabama_Part_1_Main_Report.pdf.

¹⁵⁰ *Criminal Justice Debt*, *supra* note 139, at 27.

¹⁵¹ G. L. c. 211D, §2A (h).

¹⁵² *Criminal Justice Debt*, *supra* note 139, at 28 (citations omitted).

¹⁵³ See generally *Drawing Blood From Stones*, *supra* note 148.

¹⁵⁴ Bruce Western and Becky Pettit, *Collateral Costs: Incarceration’s Effect on Economic Mobility*, PEW CHARITABLE TRUSTS 1, 11, 23 (2010). This comprehensive study

Of course, the most draconian consequence of failure to pay is incarceration, although confinement is unconstitutional unless the court determines that the default was willful and not because of inability to pay.¹⁵⁵ For probationers, revocation is a risk, potentially requiring defendants to serve their originally suspended sentence or any other sentence provided for by law.¹⁵⁶ Similarly, nonpayment of the monthly parole supervision fees can lead to revocation of parole.¹⁵⁷ Finally, even those not under probation or parole supervision face the risk of going to jail. Under Massachusetts law, for most fines and fees,¹⁵⁸ courts can issue default warrants for nonpayment, can arrest defendants in those circumstances, and can order individuals to what has been referred to as debtor's prison to serve "fine time" until they have satisfied their financial obligations.¹⁵⁹ Someone confined for non-payment can "work off" the outstanding debt at the rate of \$30 per day, which was set in 1987.¹⁶⁰ Not only does jailing these debtors cost the Commonwealth money, it also leads to termination of employment and other efforts by individuals to build a life in compliance with the law.

A recent report by the Senate Committee on Post Audit and Oversight, *Fine Time Massachusetts: Judges, Poor People, and Debtors' Prison in the 21st Century*,

demonstrated that incarceration itself "reduced subsequent wages by 11 percent, cut annual employment by nine weeks and reduced yearly earnings by 40 percent"; *id.* at 11.

¹⁵⁵ *Bearden v. Georgia*, 461 U.S. 660, 664-74 (1983); *Commonwealth v. Gomes*, 407 Mass. 206, 211-13 (1990) (establishing that defendants have a right to counsel when facing possible incarceration for a default and requiring that an alternative to confinement first be considered).

¹⁵⁶ *Guidelines for Probation Violation Proceedings in the Superior Court*, MASS. GOV.: MASSACHUSETTS COURT SYSTEM, (effective Feb. 1, 2016), <http://www.mass.gov/courts/court-info/trial-court/sc/guidelines-for-probation-violation-proceedings.html>; *see also* *District/Municipal Courts Rules for Probation Violation Proceedings*, MASS. GOV.: MASSACHUSETTS COURT SYSTEM, (effective Sep. 8, 2015), <http://www.mass.gov/courts/case-legal-res/rules-of-court/district-muni/probation/>.

¹⁵⁷ *Failure to Pay Supervision Fee Policy*, 120 PAR 434 §08 (2007).

¹⁵⁸ Under the recently enacted Supreme Judicial Court Rule 3:10, governing the appointment of indigent counsel, "[n]o party may be subject to incarceration for failing to pay an indigent counsel fee". S.J.C. Rule 3:10(11), as amended July 20, 2016.

¹⁵⁹ G. L. c. 276, §§31, 32; G. L. c. 127 §144.

¹⁶⁰ G. L. c. 127, §144. This is done by way of *Mittimus*es for Unpaid Monies, through which courts commit people to county Houses of Correction and direct sheriffs to keep them until the unpaid amount is paid as ordered or earned at the \$30 per day rate. *See* *Commonwealth v. Gomes*, 407 Mass. 206, 214 (1990).

reveals the injustices of the fines and fees system.¹⁶¹ Since there is no data on the number of people who are incarcerated for defaults on fines and fees, the Committee requested Mittimus for Unpaid Monies for 2015 from county sheriffs and examined the 105 cases that it received from the three counties – Essex, Plymouth, and Worcester – that had complied fully with the request.¹⁶² In the course of its review, the Committee determined that “most of the precipitating [charges] were relatively minor.”¹⁶³ Indeed, many of the charges were dismissed, “continued without a finding,’ disposed of with pretrial probation, or treated as civil infractions.”¹⁶⁴ Only four defendants out of 105 were incarcerated for their original offense; nonetheless, all 105 defendants went to jail and 99 of them served “fine time” for failure to pay.¹⁶⁵ In addition, court records, including audio recordings of some of the cases, suggested that constitutional rights were not protected: there apparently were inquiries into the individual’s ability to pay in only six instances, although court records made clear that 60% had previously been found indigent for purposes of receiving court-appointed counsel.¹⁶⁶

But it is not just the impact of fees and fines on individuals that is a concern. Fees and fines also have an adverse effect on public safety and the community as a whole. In a news story on the *Fine Time* report, Massachusetts Probation Commissioner Edward Dolan is quoted as stating, “[w]e’re mindful that criminal justice-related debt can significantly interfere with a person’s effort to gain traction in efforts at rehabilitation and behavior change.”¹⁶⁷ As the Brennan Center’s report on *Criminal Justice Debt* affirms,

¹⁶¹ See COMMONWEALTH OF MASSACHUSETTS REPORT OF THE SENATE POST AUDIT AND OVERSIGHT COMMITTEE, FINE TIME MASSACHUSETTS: JUDGES, POOR PEOPLE, AND DEBTORS’ PRISON IN THE 21ST CENTURY 1, 11 (Nov. 7, 2016).

¹⁶² See *id.*

¹⁶³ *Id.* at 11.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 16.

¹⁶⁶ *Id.*

¹⁶⁷ Shira Schoenberg, *Committee Considers Impact of Court Fees on Poor Defendants*, MASSLIVE (July 28, 2016), http://www.masslive.com/news/boston/index.ssf/2016/07/committee_considers_impact_of.html.

From seeking and maintaining employment and housing, to obtaining public benefits, to meeting financial obligations such as child support, to exercising the right to vote, criminal justice debt is a barrier to individuals seeking to rebuild their lives after a criminal conviction. In the rush to raise revenue, states have not considered whether turning defendants into debtors is consistent with the need to reduce recidivism, reduce over-incarceration, and promote reentry.¹⁶⁸

Our Recommendations

Raising state revenue from convicted individuals and their families who are too poor to pay is counter-productive. Changes in the laws, many proposed by Massachusetts legislators and judges, should be adopted to improve the prospects for successful reentry following conviction and help stem the cycle of recidivism. Although the recommended reforms would deprive the Commonwealth of a relatively small amount of revenue in the short term, implementing them is the right thing to do and will save money in the long run.

1. Waiver or reduction should be permitted for every criminal justice fine or fee courts are required to impose.

It is insufficient simply to prohibit incarceration of debtors who are unable to pay. The court-mandated debt itself causes the harm. In holding that courts must consider a defendant's ability to pay before ordering restitution, the Supreme Judicial Court recognized that "[b]urdening a defendant with these risks [including arrest and probation revocation] by imposing restitution that the defendant will be unable to pay violates the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty."¹⁶⁹ The legislature should adopt that principle for all required assessments. Although these fees and fines contribute to the Commonwealth's revenues, they are a miniscule part of the budget and operate as a regressive tax on individuals who are too poor to pay.

¹⁶⁸ *Criminal Justice Debt*, *supra* note 139, at 27.

¹⁶⁹ *Commonwealth v. Henry*, 475 Mass. 117, 122 (2016).

2. Waivers should be based on a uniform standard for inability to pay.

One possible standard is whether the assessment “will cause a substantial financial hardship to the person or the family or dependents thereof.” As the Massachusetts Trial Court Fines and Fees Working Group has observed, the standard of “substantial financial hardship” is already in place in similar situations.¹⁷⁰ It concluded that “a single standard for indigence would promote clarity, uniformity, and transparency in court proceedings, and would eliminate instances in which indigent defendants may be incarcerated for a failure to pay a court fee.”¹⁷¹

3. The counsel fee assessed when a court appoints counsel should be repealed.

In these circumstances, courts have already determined that the defendant is indigent as defined by Supreme Judicial Court Rule 3:10. For example, earning an annual income, after taxes, of only 125% or less of the current poverty threshold defined by state law qualifies the party as indigent and should disqualify the person from having to pay a counsel fee.

4. Parole fees and probation fees for people who are on parole or probation after release from prison or a House of Correction should be eliminated.

These are the individuals facing the greatest obstacles to successful reentry and the greatest risk of recidivism. Parole and probation officers should be allowed to focus on helping those under their supervision succeed, not on collecting money from them.

5. Courts should be required to provide adequate notice to defendants at sentencing.

Defendants should be informed that they face the risk of commitment if they default on their financial obligations and also that fines and fees may be waived for

¹⁷⁰ *Fines and Fees Report*, *supra* note 141, at 11 n.27 (referring to the standards employed for appointment of indigent counsel and restitution orders).

¹⁷¹ *Id.* at 23.

inability to pay as the result of a change in financial circumstances or for any other reason.

6. Statutes should provide the guarantees required by the constitution and sound policy.

Statutes should make clear that courts cannot incarcerate someone if failure to pay was not willful, including that the person had no ability to pay without causing substantial financial hardship to him or her or his or her family or dependents. In addition, people should not be incarcerated for non-payment without first being offered counsel. Finally, courts should consider alternatives to incarceration before committing someone to prison solely for default on fines and fees.

7. The monetary credit with which people can “work off” their criminal justice debt when confined for non-payment should be significantly increased.

The existing credit of \$30/day was established 30 years ago. Even assuming that the failure to pay the required assessments was willful and the individual appropriately incarcerated, the credit should be increased at least to account for the effects of inflation.

V. EXPAND RECIDIVISM REDUCTION PROGRAMS

Introduction

The CSG's Policy Framework appropriately focused on the need to expand access to recidivism-reduction programs and to provide incentives to individuals to complete them. We concur strongly with CSG and the Steering Committee that Massachusetts' high recidivism rate is harmful to public safety. Unfortunately, as CSG recognized, incarceration itself "is associated with modest increases in recidivism risk."¹⁷² Fortunately, however, there is something that can be done to reduce the tendency of convicted people to reoffend. Effective, evidence-based anti-recidivism programs provided to individuals both while and after they are incarcerated can significantly reduce recidivism.¹⁷³ We applaud the recommendations of CSG to broaden the appropriate use of these programs and offer some changes to increase their effectiveness.

Recidivism and Recidivism-Reduction Programs in the Commonwealth

In requesting support for CSG's technical assistance, Massachusetts leaders noted that despite reducing the rate of incarceration, "our three-year recidivism rate has remained at approximately 40% for a number of years."¹⁷⁴ In fact, CSG found that 48% of the people released from Houses of Correction and 38% of those released from state prisons were reconvicted within the following three years¹⁷⁵ and that 74% of those convicted had prior convictions.¹⁷⁶

As CSG recognized, "programs are most effective in reducing recidivism when they are tailored to a person's assessed risk of reoffending, address certain needs that contribute to criminal behavior, and utilize responsive strategies to change

¹⁷² *Massachusetts Criminal Justice Review Working Group Meeting 4*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER 1, 11 (Oct. 20, 2016) [hereinafter CSG Report #4].

¹⁷³ *Id.* at 10-18.

¹⁷⁴ Letter from Governor Charles Baker, Senate President Stan Rosenberg, House Speaker Robert DeLeo and Chief Justice Ralph Gants to Juliene James, Bureau of Justice Assistance and Adam Gelb, Pew Center on the States (July 30, 2015) [hereinafter CSG Letter].

¹⁷⁵ *CSG Interim Report #3*, *supra* note 5, at 24 (looking at FY2011-2014).

¹⁷⁶ *CSG Report #2*, *supra* note 19, at 22.

behavior.”¹⁷⁷ It is empirically well-established that well-designed programming designed to help individuals re-enter society when released from prison can be effective in reducing recidivism.¹⁷⁸ This is so for adult and juvenile offenders, violent offenders, drug offenders, and others.

Many inmates in Department of Correction facilities are unable to participate in recidivism-reduction programming for three reasons: (1) lengthy wait lists; (2) lack of program availability; and (3) ineligibility for participation due to restrictions related to the crime for which they were convicted. Although county Houses of Correction offer 389 recidivism reducing programs, the extent of programming varies by facility and only 9% of them address key predictors of criminal behavior.¹⁷⁹

CSG Proposals

In requesting support for CSG’s technical assistance, Massachusetts leaders made clear they “intend[ed] to use [various CSG] analyses to develop data-driven, cost-effective practices and policy options for further consideration that will reduce our recidivism rate and make our Commonwealth safer.”¹⁸⁰ Indeed, CSG recommended expansion of recidivism-reduction programming in state prisons.¹⁸¹ CSG highlighted the obvious need to first evaluate the quality of the programs already available and shown to be effective in reducing recidivism, suggesting a partnership with an academic institution to conduct program evaluations.¹⁸² In addition, it

¹⁷⁷ *CSG Policy Framework*, *supra* note 28, at 9, citing D.A. Andrews & J. Bonta, *The Psychology of Criminal Conduct* (5th ed. 2010).

¹⁷⁸ Mark W. Lipsey, *Can Intervention Rehabilitate Serious Delinquents*, 564(1) THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENCES 142-166 (1999); Craig Dowden, Daniel Antonowicz & D.A. Andrews, *The Effectiveness of Relapse Prevention With Offenders: A Meta-Analysis*, 47(5) INT. J. OFFENDER THER. COMP. CRIMINOL. 516-528 (Oct. 1, 2003); Paula Smith, Paul Gendreau & Kristin Swartz, *Validating the Principles of Effective Intervention: A Systematic Review of Contributions of Meta-Analysis in the Field of Corrections*, (4)(2) VICTIMS AND OFFENDERS 148-169 (2009).

¹⁷⁹ *CSG Interim Report #3*, *supra* note 5, at 36; *CSG Report #4*, *supra* note 172, at 23; *see generally CSG Policy Framework*, *supra* note 28, at 9.

¹⁸⁰ *CSG Letter*, *supra* note 172.

¹⁸¹ *See CSG Policy Framework*, *supra* note 28, at 9-11.

¹⁸² *Id.* at 9.

recommended expansion not only in the state prisons, but also in the Houses of Correction and jails.¹⁸³

CSG also proposed increasing the incentives for individuals to take advantage of these programs in Department of Correction facilities by: (1) increasing the number of days an inmate can earn in a month from program participation from 10 to 15 days; (2) increasing from 10 to 90 days the earned time credit for completion of a program; and (3) establishing the maximum amount that can be accrued in earned time credits at 35% of a person's maximum sentence (or 17.5% for program completion credits). CSG recommended that inmates serving mandatory minimum sentences for certain drug offenses be allowed to accrue earned time credits upon admission to state prison and not after they have served the minimum sentence, which is the current law. However, CSG specifically did not recommend overriding existing statutory language that restricts the accrual of earned time for people who have been convicted of drug offenses involving opioids, minors, firearms or violence.¹⁸⁴ The legislation filed by the Governor to implement these recommendations excludes from participation, for example, anyone convicted of "the illegal manufacturing, distribution, dispensing, or possession with intent to manufacture, distribute or dispense a naturally occurring, synthetic or semi-synthetic opioid."¹⁸⁵ CSG and the implementing legislation do not extend these increased incentives to those serving mandatory minimum sentences for non-drug offenses.

Finally, CSG proposed strengthening community supervision by, among other things, enhancing the training of probation and parole officers in effective recidivism-reduction practices, providing earned time credit for compliance with the conditions of parole or probation, and expanding access to services and programs at Community Correction Centers. CSG also proposed establishing—and funding—a public-private program to increase access to behavioral health services for individuals at high risk of reoffending with serious behavior health needs.¹⁸⁶

¹⁸³ *Id.* at 11-12.

¹⁸⁴ *Id.* at 11.

¹⁸⁵ An Act Implementing the Joint Recommendation of the Massachusetts Criminal Justice Review, H.D. 3803, 190th Gen. Court (Mass. 2017), <https://malegislature.gov/Bills/190/H74.pdf>.

¹⁸⁶ *CSG Policy Framework*, *supra* note 28, at 13-19.

Our Recommendations

1. Extend incentives for participating in and completing programs to all inmates who may be released from state prison.

Reducing the likelihood that incarcerated people will commit crimes once they are released is a public safety imperative. Since most inmates will be released from prison at some point—CSG determined that 79% of those incarcerated in state prison in 2014 were guaranteed to be released and another 10% serving a life sentence had the possibility of parole¹⁸⁷—we believe the Commonwealth should go further to achieve the goal of reducing recidivism and protecting public safety. Specifically, we recommend that *all* inmates who will be eligible for release be able to accrue earned time credit from the day of admission no matter the offense or sentence. This will broaden the reach of the incentive to participate in and complete programming, in turn reducing recidivism. Further, greater expansion of programming would lead to earlier releases, thereby saving money. We must shift the discourse in recognition of the data: programming is not a reward; programming is a means to protect public safety by reducing recidivism.

2. Increase reliance on cognitive behavioral therapy.

As CSG recognized, recidivism-reduction programming that employs a risk/needs/responsivity (RNR) framework¹⁸⁸ generates much stronger results than those that do not.¹⁸⁹ These treatments are effective (although less so) even with violent offenders, both adult and juvenile, particularly when cognitive behavioral therapy (CBT) is used.¹⁹⁰

¹⁸⁷ *CSG Report #4, supra* note 172, at 6.

¹⁸⁸ As defined by CSG, the core principles of the RNR Framework are as follows: “The Risk Principle asserts that criminal behavior can be reliably predicted, intensity of services should match the offender’s risk level, and treatment should focus on higher-risk offenders”; “The Need Principle highlights the importance of addressing criminogenic needs in the design and delivery of interventions”; “The Responsivity Principle focuses on utilizing interventions proven to be effective and tailored to individual characteristics (i.e., gender, age, language, mental health, learning style, motivation).” *CSG Report #4, supra* note 172, at 13.

¹⁸⁹ *Id.*

¹⁹⁰ Vicente Garrido & Luz Anyela Morales, *Serious (Violent and Chronic) Juvenile Offenders: A Systematic Review of Treatment Effectiveness in Secure Corrections*, 3(7)

CBT is a short-term, goal-oriented treatment that takes a hands-on, practical approach to problem-solving. It works by examining the connections between a person's thoughts, feelings, and behaviors. During CBT, a therapist will actively work with a person or persons to uncover unhealthy thought patterns and explore how they might be causing self-destructive behaviors. With criminal offenders, such patterns typically include self-justificatory thinking, misinterpretation of social cues, displacement of blame, deficient moral reasoning, and schemas of dominance and entitlement, among others. By identifying and addressing such patterns, more constructive ways of thinking can be developed to produce healthier behaviors. Treatment with CBT tends to be short, spanning a matter of months, and can be done individually or in group settings.

A Campbell Collaboration Systematic Review published in 2007 found CBT effective in reducing recidivism among juvenile and adult offenders, in institutional or community settings, as part of a broader program or as a stand-alone intervention.¹⁹¹ Simply put, few interventions can match the reliability and versatility of CBT. Those surveying the evidence concerning CBT appear unanimous: “[It is a] striking fact that meta-analyses of the offender treatment literature have consistently favored cognitive-behavioral interventions over other treatment modalities.”¹⁹² The Washington State Institute for Public Policy, a U.S. national leader in juvenile and criminal justice cost-benefit analysis, recently reported that CBT for adult offenders yields a savings of \$26 for every dollar invested, with a 100% likelihood that the benefits of CBT will exceed its costs.¹⁹³

CAMPBELL SYSTEMIC REVIEWS, 1-47 (Sept. 21, 2007); Darrick Jolliffe & David P. Farrington, *A Systematic Review of the National and International Evidence on the Effectiveness of Interventions with Violent Offenders*, MINISTRY OF JUSTICE i, 29 (Dec. 2007).

¹⁹¹ Mark W. Lipsey, Nana A. Landenberger, Sandra J. Wilson, *Effects of Cognitive-Behavioral Programs for Criminal Offenders: A Systematic Review*, 3(6) CAMPBELL SYSTEMIC REVIEWS 1, 27 (2007). Campbell Collaboration systematic reviews are research reports that summarize all the high-quality research on an issue to inform evidence-based policy and practice.

¹⁹² Paula Smith, Paul Gendreau & Kristin Swartz, *Validating the Principles of Effective Intervention: A Systematic Review of Contributions of Meta-Analysis in the Field of Corrections*, (4)(2) VICTIMS AND OFFENDERS 148, 155 (2009).

¹⁹³ Stephanie Lee, Steve Asos & Annie Pennucci, *What Works and What Does Not? Benefit-Cost Findings from WSIPP*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY 1, 12 (Feb.

Additionally, the Campbell Collaboration Systematic Review made a number of important observations with regard to the flexibility of CBT. First, CBT is slightly more effective when combined with other services, rather than when operating as a stand-alone intervention, although apparently combination programs perform best when CBT is the primary intervention.¹⁹⁴ Examples of such services included mental health counseling, employment and vocational training, and educational programs. Second, “brand name” versions of CBT do not outperform “generic” versions, meaning that it is “the general CBT approach, and not any specific version, that is responsible for the overall positive effects on recidivism.” Third, CBT is as effective for juveniles as adults and could therefore be useful in both juvenile justice and criminal justice settings. Fourth, the setting of CBT treatment does not affect its performance. Offenders treated in the community performed as well as offenders treated in prison.¹⁹⁵

3. Eliminate dual supervision by probation and parole.

The changes recommended by CSG to strengthen supervised release and better enable returning individuals to comply with the law are important. Collaboration between agencies is key: Department of Correction and the Parole Board would be required to create a collaborative case plan within six months of a person’s admission to a Department of Correction facility. And Department of Correction and House of Corrections staff would work with probation and parole to strengthen reentry planning for people who are being released under supervision.¹⁹⁶

There is one place, however, where mere coordination between two agencies is counterproductive and wastes resources. CSG found that in 2015, nearly 13 percent of people released from state prisons (212 people) and 7 percent of people released from HOCs (657 people) *received both probation and parole supervision upon release*. There is no public safety reason (nor any compelling reason at all) to

2015), http://www.wsipp.wa.gov/ReportFile/1602/Wsipp_What-Works-and-What-Does-Not-Benefit-Cost-Findings-from-WSIPP_Report.pdf.

¹⁹⁴ Thomas Feucht & Tammy Holt, *Does Cognitive Behavioral Therapy Work in Criminal Justice? A New Analysis from CrimeSolutions.gov.*, 277 NIJ J. 10-17 (2016), <http://nij.gov/journals/277/Pages/crimesolutions-cbt.aspx>.

¹⁹⁵ Paula Smith, Paul Gendreau & Kristin Swartz, *Validating the Principles of Effective Intervention: A Systematic Review of Contributions of Meta-Analysis in the Field of Corrections*, (4)(2) VICTIMS AND OFFENDERS 148, 157 (2009).

¹⁹⁶ *CSG Policy Framework*, *supra* note 28, at 4.

require this unnecessary duplication of services. CSG suggested that parole and probation enter into a memorandum of understanding to establish an agreed upon process “to coordinate oversight of the person under dual supervision.”¹⁹⁷ A MOU between separate branches of government with different union employees appears destined for failure and there is no reason to continue this costly and ineffective practice. We recommend a statutory amendment eliminating dual supervision, requiring that eligible persons be supervised by either probation or parole, but not both.¹⁹⁸

4. Ensure adequate funding and accountability for anti-recidivism programs and related reforms.

CSG’s proposals are to be applauded. But they will yield no public benefit unless the legislature funds the expansion of anti-recidivism programs. As noted above, supporting CBT-focused programs especially makes fiscal sense since they are estimated to return \$26 for every dollar invested.

Many of CSG’s recommendations rely on administrative action. While these have laudatory goals, it is unclear whether they are merely aspirational or will be implemented with sufficient accountability and organization to yield results. For instance, the requirement that Department of Correction and parole create collaborative case plans for individuals who are imprisoned will achieve no benefit unless it is monitored and enforced.

¹⁹⁷ *Id.* at 16.

¹⁹⁸ We recognize that one advantage of probation supervision is that courts provide oversight and individuals are entitled to certain rights such as the right to counsel in revocation proceedings.

VI. CONTINUE TO REFORM CORI LAWS

Introduction

When an individual is convicted of a crime, the fact of the conviction itself can create a stigma that helps drive recidivism. Even after an individual has served his or her sentence and finished any period of parole or probation that may follow, significant consequences typically remain. People who have completed their sentences and are finished with post-release supervision face an array of legal and practical problems re-entering society. Employment, in particular, is extraordinarily important for individuals released into the community. But despite the fact that regular employment is associated with reductions in recidivism, Massachusetts law permits a broad range of parties, including prospective employers, to obtain significant information about an individual's prior convictions—information that often impairs an individual's ability to obtain jobs.

We certainly recognize that some organizations *need* to obtain meaningful information about an individual's criminal record, even long after a defendant has ended formal supervision. Schools and day care centers, for example, should not have to guess whether people they are considering for employment have been convicted of child abuse, even if the conviction took place years before. But we believe that, in a number of important respects, Massachusetts law governing access to an individual's criminal record does not strike the right balance between an employer's right to know of an applicant's prior criminal record and the public's interest in encouraging, not discouraging, released inmates to seek and maintain honest, legitimate employment.

In 2010, Massachusetts enacted legislation that made important reforms limiting some of the negative collateral consequences of criminal convictions. But important work remains to be done. In our view, two kinds of reform are necessary. First, in appropriate cases, further restrictions should be placed on the public's, including prospective employers', ability to obtain information about an individual's criminal history. Second, the legislature should make it easier, in appropriate cases, for individuals to "seal"—that is, to prevent the public from accessing—records of their criminal cases.

Employer Access to Criminal Records: the Massachusetts CORI System

The Massachusetts Criminal Offender Record Information (“CORI”) database contains records of arraignment-based court proceedings, and includes records of sentences judges impose on criminal defendants.¹⁹⁹ Pursuant to G.L. c. 6, §168A, this information is electronically transmitted on a daily basis to the Department of Criminal Justice Information Services (DCJIS), an executive-branch agency, where it is maintained and disseminated by DCJIS to lawful requesters as CORI. DCJIS also maintains the Criminal Justice Information System for Massachusetts, which provides law enforcement agencies 24-hour access to individuals’ criminal records, as well as other criminal justice information such as warrants and missing persons.²⁰⁰ Access to this information is an important criminal justice tool.

Members of the public, including prospective employers considering job applications, can also, in certain circumstances, obtain information about a job candidate’s criminal record. The CORI system provides all employers what Massachusetts law calls “standard access” to the CORI database. This permits employers to access the following criminal history information:

- All pending criminal charges, including cases continued without a finding of guilt until they are dismissed;
- All misdemeanor convictions for five years following the date of disposition or date of release from incarceration, whichever is later;
- All felony convictions for ten years following the date of disposition or date of release from incarceration, whichever is later;
- All convictions for murder, voluntary manslaughter, involuntary manslaughter, and sex offenses;

¹⁹⁹ See *Criminal Offender Record Information (CORI)*, MASS. GOV. (2017), <http://www.mass.gov/eopss/crime-prev-personal-sfty/bkgd-check/cori/>.

²⁰⁰ See *Massachusetts Criminal Justice Information System (CJIS)*, MASS. GOV. (2017), <http://www.mass.gov/eopss/law-enforce-and-cj/cjis/massachusetts-criminal-justice-information-system.html>. Similarly, “a requestor authorized or required by statute, regulation or accreditation requirement to obtain [certain] offender record information” has access to that information in order to comply with its legal requirement. G. L. c. 6, §172(a)(2).

- Information relating to offenses on which the subject was adjudicated as an adult while younger than 18 years old.²⁰¹

In addition, the law permits increased access to criminal history information (including non-convictions) for certain categories of employers who serve vulnerable populations.²⁰²

Massachusetts law contains an important “ban the box” provision, enacted in 2010, preventing employers from asking about criminal history on initial job applications.²⁰³ This provision, part of a set of reforms enacted in 2010, was designed to prohibit prospective employers from rejecting job applications from ex-offenders without at least giving them the opportunity to interview for a position. The idea behind the “ban the box” law was that those with criminal records would see an increase in job interviews, and be able to explain their criminal history after having gotten through the initial screening process, thus increasing their chances of securing employment. The goal of the 2010 CORI reform law was clear: by banning prospective employers’ ability to reject applications because they have criminal histories without ever meeting them, and providing a limited and uniform report of reliable criminal history information, those with criminal records would have an increased chance at finding employment.

Massachusetts’ CORI System Continues to Pose a Barrier to Employment for Many Former Defendants

In practice, however, the 2010 reforms did not fully achieve this objective; in fact, the employment rate of ex-offenders compared to individuals without CORI records slightly declined.²⁰⁴ A research report by the New England Public Policy Center of

²⁰¹ See *Summary Levels of CORI Access With Requestor Types*, MASS.GOV. (2017), <http://www.mass.gov/eopss/agencies/dcjis/summary-of-levels-of-cori-access-with-requestor-types.html>.

²⁰² *Id.*

²⁰³ See G. L. c. 151B, §4(9 ½).

²⁰⁴ Osborne Jackson, Riley Sullivan & Bo Zhao, *Reintegrating the Ex-Offender Population in the U.S. Labor Market: Lessons from the CORI Reform in Massachusetts*, NEW ENGLAND PUBLIC POLICY CENTER RESEARCH REPORT 17-1 1, 11-17 (Mar. 2017), <https://www.bostonfed.org/publications/new-england-public-policy-center-research-report/2017/reintegrating-the-ex-offender-population-in-the-us-labor-market.aspx>.

the Federal Reserve Bank of Boston assessing the impact of criminal records on employment in New England²⁰⁵ reported that:

- “Compared to the 1990s, nearly double the amount of employers now conduct criminal background checks as part of the hiring process, with over 70 percent now engaging in the practice.”²⁰⁶
- “[J]ob prospects are dramatically affected by the presence of a criminal record: among nearly identical applicants, those with a criminal record are 50 percent less likely to receive an interview or job offer than their counterparts without records.”²⁰⁷
- “Those ex-offenders who do gain employment have lower wages on average; the formerly incarcerated who are able to find jobs earn 10 to 40 percent less compared to individuals without criminal records working at comparable jobs.”²⁰⁸
- “There are almost 1,000 mandatory exclusions for professional and occupational licenses for those with misdemeanor convictions and over 3,000 exclusions for felony convictions.”²⁰⁹

²⁰⁵ Robert Clifford & Riley Sullivan, *The Criminal Populations in New England: Records, Convictions, and Barriers to Employment*, NEW ENGLAND PUBLIC POLICY CENTER POLICY REPORT 17-1 1, 14 (Mar. 2017), <https://www.bostonfed.org/publications/new-england-public-policy-center-policy-report/2017/the-criminal-population-in-new-england-records-convictions-and-barriers-to-employment.aspx>.

²⁰⁶ *Id.* at 14 (citing *Economic Perspectives on Incarceration and the Criminal Justice System*, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES 1, 45 (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf).

²⁰⁷ *Id.* at 14 (citing Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623(1) THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 195, 199 (May 2009), https://scholar.harvard.edu/files/pager/files/annals_sequencingdisadvantage.pdf).

²⁰⁸ *Id.* at 14 (citing *Collateral Costs: Incarceration’s Effect on Economic Mobility*, THE PEW CHARITABLE TRUSTS 1, 11 (2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf).

²⁰⁹ *Id.*

The inability of individuals with criminal records to procure employment creates significant obstacles to re-entry, often placing ex-offenders in precarious financial situations, which, among other things, may prevent them from obtaining adequate, housing and socially reintegrating into the community. These compound collateral consequences ultimately increase the likelihood of reoffending.²¹⁰

Sealing Criminal Records in Massachusetts

Massachusetts law permits individuals to seal their criminal history records in certain circumstances.²¹¹ Sealing a record shields it from public view, thus preventing prospective private employers, credit reporting agencies, and others from learning details about a defendant's prior criminal record. Applicants for employment who have sealed records may answer "no record" when prospective employers inquire about their arrest or conviction history.²¹² Sealing does *not* prevent law enforcement agencies and courts from obtaining access to criminal records.²¹³

²¹⁰ See Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 531-532 (2005) (citing John H. Laub & Robert I. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 20 (2001) ("Job stability and marital attachment in adulthood were significantly related to changes in adult crime—the stronger the adult ties to work and family, the less crime and deviance."); Laurie Robinson & Jeremy Travis, *Managing Prisoner Reentry for Public Safety*, 12(5) FED. SENTENCING REP. 258, 258-59 (Mar./Apr. 2000) (studies indicate that prison employment programs contribute to employment and lower recidivism: participants in vocational programs were more likely to be employed following release and to have a recidivism rate 20 percent lower than nonparticipants)).

²¹¹ See generally COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF THE TRIAL COURT, A GUIDE TO PUBLIC ACCESS, SEALING & EXPUNGEMENT OF DISTRICT COURT RECORDS (Sept. 2013), <http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/pubaccesscourtrecords.pdf>.

²¹² G. L. c. 276 §§100A, 100C.

²¹³ G. L. c. 276 §100A. Massachusetts law also permits individuals, in very unusual circumstances, to *expunge*—that is, completely eliminate all trace of—a prior criminal conviction. While this procedure is important in the rare cases where it applies (expungement is permitted, for example, where an innocent person can establish a different person was convicted of a crime using the innocent person's name; see *Commonwealth v. S.M.F.*, 40 Mass. App. Ct. 42, 43-44 (1996)). As a practical matter, these circumstances are so limited that expungements of criminal records in Massachusetts almost never take place.

Massachusetts law takes a two-tiered approach to sealing *adult* criminal history records, depending on whether the case resulted in *conviction* or, in contrast, a not guilty verdict or dismissal. A separate set of considerations applies to records of juvenile delinquency cases. We address each of these below.

Sealing Records of Convictions

Requests to seal criminal *convictions* are governed by G. L. c. 276, §100A. Under that provision, the Commissioner of Probation is required, upon the filing of a simple form petition, to seal the record of a prior criminal conviction under the following circumstances:

- For misdemeanors, the petition may be filed five years after the date of conviction or release from any jail time, whichever is later;
- For felonies, the petition may be filed ten years after the date of conviction or release from any jail time, whichever is later;²¹⁴
- For sex offenses, the petition may be filed fifteen years after (i) the date of conviction or (ii) the release from any jail time, or (iii) the date at which one is no longer required to register as a sex offender, whichever is later. Level 2 or Level 3 sex offenders can never have such convictions sealed.²¹⁵

In addition, the petitioner must certify that he or she has not been convicted of any crime anywhere in the United States in the period since the date of conviction seeking to be sealed. If the time limits have been met, the Probation Department must “automatica[lly]” seal the record²¹⁶; the defendant need make no further showing.

Sealing Criminal Records Not Resulting in Conviction

G. L. c. 276 §100C governs sealing of records of arrest and court action that did not result in a conviction and permits the defendant to petition for sealing before the waiting periods have elapsed. If a no bill was returned by the grand jury sealing is

²¹⁴The time limits set forth in the sealing statute thus generally track the time limits for prospective employers to obtain access to an applicant’s criminal record under the CORI laws.

²¹⁵A few crimes, including certain public corruption offenses, are ineligible for automatic sealing no matter how old. G. L. c. 276 §100A.

²¹⁶Commonwealth v. Pon, 469 Mass. 296, 306 n.17 (2014).

immediate and should be automatic unless the accused makes a written request to the Commissioner *not* to seal the proceedings.

If the defendant was found not guilty, if the court made a finding of no probable cause,²¹⁷ if dismissal came at the instance of the prosecution before trial (*nolle prosequi*) or if the defendant's case was continued without a finding ("CWOFD," in the language of the trial court) and dismissed by the court following the defendant's successful completion of a period or probation, sealing is not automatic, but discretionary. A judge may order that the record be sealed when the defendant demonstrates that "substantial justice" would be served by sealing the record.

The Supreme Judicial Court recently revised how trial courts deciding discretionary petitions to seal should determine when "substantial justice" would be served by sealing records of cases dismissed by courts following a CWOFD. The SJC held that in determining whether "substantial justice" existed to seal such records the court should balance the common law presumption of public access against the "interests of the defendant and of the Commonwealth in keeping the information private."²¹⁸ The new relaxed standard requires the defendant to prove "good cause" exists for sealing the record. In particular, judges should consider six factors when evaluating for good cause:²¹⁹

- Disadvantages arising from the availability of the criminal record;
- Evidence of rehabilitation;
- Any other evidence suggesting that sealing would alleviate identified disadvantages;
- Consideration of the defendant's circumstances at the time of the offense;

²¹⁷ Although the first paragraph of G.L. c. 276 §100C provides for automatic sealing of records in cases in which there was a not guilty verdict or a finding of no probable cause by the court, the Supreme Judicial Court, applying a First Amendment analysis, held that these records could not be sealed unless the court determined that petitioners satisfied a "substantial justice" test. *Commonwealth v. Doe*, 420 Mass. 142, 147, 151 (1995). The SJC recently suggested that this approach continues to be a "reasonable one," as long as the "substantial justice" test is modified in accordance with the SJC's new test for sealing in cases of dismissals under the second paragraph of Section 100C. *Pon*, 469 Mass. at 313 n. 24.

²¹⁸ *Id.* at 315.

²¹⁹ *Id.* at 316.

- The amount of time since the offense and since the dismissal or nolle prosequi; and
- The nature and reasons for the particular disposition.

The SJC cited the “clearly expressed legislative concerns regarding the deleterious effects of criminal records on employment opportunities for criminal defendants” and found that the prior, more stringent, standard “serve[d] to frustrate rather than further the Legislature’s purpose by imposing too high a burden of proof on the defendant”²²⁰ The SJC went on to note that core First Amendment issues of public access to criminal proceedings and ensuring the fairness of criminal trials were not implicated by post hoc sealing of this category of records.²²¹

Sealing Juvenile Records

Under G. L. c. 276, §100B, any person who has been accused of juvenile delinquency because he allegedly committed a criminal offense when under the age of 18 may petition the Commissioner of Probation to have the record of that court proceeding sealed,²²² as long as: (1) it has been three years since the termination of any court disposition including court supervision, probation, commitment, or parole, and (2) it has been three years since the person has been adjudicated delinquent or found guilty of any criminal offense within or outside the Commonwealth (or in federal court).²²³ Juveniles, therefore, are currently not eligible to petition for sealing for at least three years following termination of any court disposition. According to a 2014 Juvenile Law Center study analyzing the extent to which states protect individuals’ records during and after their involvement with the juvenile justice system, Massachusetts (and thirteen other states) earned only two stars out of a possible five (the national average was three stars).²²⁴

²²⁰ *Id.* at 308.

²²¹ *Id.* at 310.

²²² Juvenile records include records maintained by the court as well as probation records. *See State Fact Sheet: Massachusetts*, JUVENILE LAW CENTER (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/factsheet-MA.pdf>; (citing *Commonwealth v. Gavin G.*, 437 Mass. 470, 474 (2002)).

²²³ G. L. c. 276, §100B.

²²⁴ *See Failed Policies, Forfeited Futures: A National Scorecard of Juvenile Justice*, JUVENILE LAW CENTER (2014), <http://juvenilerecords.jlc.org/juvenilerecords#!/map>.

This finding is troubling given the lasting collateral consequences of youthful offending, as “[t]he weight of a criminal record makes it difficult to continue education, find work, and form healthy relationships.”²²⁵ Many universities, for example, “conduct supplemental reviews of students who indicate that they have a record”—a recent survey of 273 colleges found, to this end, that 66 percent “collect criminal records information during the admissions process,” while 20 percent of colleges have “policies denying admission based on the severity of a juvenile record.”²²⁶ Certain juvenile adjudications may also “foreclose the entire family from seeking public housing,” as public housing authorities are “permitted to consider juvenile adjudications in determining whether families are eligible.”²²⁷ And even decades later, “a juvenile court record can prevent an individual from becoming a foster parent or obtaining certain types of employment.”²²⁸ Ultimately, as Massachusetts Senator and Ways and Means Committee Chair Karen Spilka (Ashland) has stated, “[j]uvenile records sometimes follow [offenders] into adulthood, even though they’re not supposed to,” which “can limit their ability to obtain jobs and pursue higher education.”²²⁹

²²⁵ Ben Forman, Geoff Foster & Naoka Carey, *Massachusetts Should Clear Juvenile Justice Records: Research Shows ‘Expungement’ Leads to Lower Adult Arrest Rates, Higher Grad Rates*, COMMONWEALTH MAGAZINE (May 20, 2016), <https://commonwealthmagazine.org/criminal-justice/massachusetts-should-clear-juvenile-records/>.

²²⁶ Riya Saha Shah, Jean Strout, *Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records*, JUVENILE LAW CENTER 1, 12 (Feb. 2016), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/future-interrupted.pdf>; (citing Marsha Weissman, Ph.D., Alan Rosenthal & Patricia Warth, *The Use of Criminal History Records in College Admissions: Reconsidered*, CENTER FOR COMMUNITY ALTERNATIVES i, i (2010), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>; *Boxed Out: Criminal History Screening and College Application Attrition*, CENTER FOR COMMUNITY ALTERNATIVES i, 12 (Mar. 2015), http://communityalternatives.org/pdf/publications/BoxedOut_FullReport.pdf).

²²⁷ *Id.* at 9.

²²⁸ *Removing Barriers to Youth Success and Positive Development: An Act Relative to Sealing of Juvenile Records and Expungement of Court Records*, CITIZENS FOR JUVENILE JUSTICE 1, 1 (Jan. 20, 2017), <https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5907dfd52e69cf0188cf4fa9/1493688278258/FACTSHEET-Expungement2017.pdf> (citing G. L. c. 6 §§172B; §172F; §172G).

²²⁹ Andrew Bettinelli, *Advocates Fight to Erase Shadow of Juvenile Court Records*, BOSTON GLOBE (July 18, 2016), <https://www.bostonglobe.com/metro/2016/07/18/advocates-fight-expunge-juvenile-records/SenIwGdnCjpNQS8dAIzHoN/story.html>.

Other States Laws With Respect to Sealing Criminal Records

Recognizing the serious negative collateral consequences that stem simply from making criminal record information accessible publicly, many other states have recently enacted reforms in this area. Indeed, many of these states have taken more stringent steps than Massachusetts to restrict public access to criminal history information through means such as enacting more permissive sealing options and permitting permanent expungement of criminal records.

Between 2013 and 2016, Arkansas, Indiana, and Minnesota enacted comprehensive new legislation limiting public access to information about prior convictions, while Illinois, Kentucky, Louisiana, and Missouri expanded laws to make certain felonies eligible for sealing or expungement for the first time.²³⁰

States have also reduced the time period for sealing misdemeanor convictions to time periods ranging from immediately after conviction/sentencing to three years, and for felony convictions to time periods ranging from 3-5 years.²³¹ Further, many states have passed laws allowing for expungement of non-conviction records, sometimes immediately.²³² Finally, certain of those states permit faster sealing and expungement of records for cases resulting in dispositions such as dismissals after pre-diversion programs, thereby preventing such dispositions from having longer term collateral consequences on a defendant's life.

Our Recommendations

The BBA believes that Massachusetts could reduce recidivism, without jeopardizing public safety, by mitigating the adverse consequences of an individual's criminal history. We make the following recommendations:

²³⁰ *Four Years of Second Chance Reforms, 2013-2016: Restoration of Rights & Relief from Collateral Consequences*, COLLATERAL CONSEQUENCES RESOURCE CENTER 1, 2 (Feb. 21, 2017), <http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf>.

²³¹ *See 50-State Comparison Judicial Expungement, Sealing, and Set-Aside*, RESTORATION OF RIGHTS PROJECT (June 2017), <http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparison-judicial-expungement-sealing-and-set-aside/>.

²³² *Id.*

1. Reduce the time period for making criminal convictions available through standard CORI access.

Any prospective employer can now obtain information about an applicant's felony conviction ten years after the applicant finished serving his sentence for that crime; employers have access to information about misdemeanor convictions for five years. In our view, this is longer than necessary, and does not strike the right balance between an employer's legitimate interests in safeguarding the hiring process and the public's interest in maximizing the possibility of successful re-entry for defendants convicted of crimes.

Empirical research supports the judgment that the ten year (for felony) and five year (for misdemeanor) time periods are too long. A recent National Institute of Justice-funded study recited what studies have long shown: "It is well known — and widely accepted by criminologists and practitioners alike — that recidivism declines steadily with time clean. Most detected recidivism occurs within three years of an arrest and almost certainly within five years."²³³

The authors of that study, Alfred Blumstein and Kiminori Nakamura, closely examined data from New York to try to estimate the point in time when "a person with a criminal record ... is of no greater risk than a counterpart of the same age— an indication of redemption from the mark of crime."²³⁴ Their results showed that the risk of re-offending varied with the age a defendant first committed a crime, and with the type of crime.²³⁵ But the reported "greater than average risk periods" for

²³³ Alfred Blumstein & Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, 263 NIJ JOURNAL 10, 11, n.8 (2009), <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>; (citing Allen J. Beck, Ph.D., Bernard E. Shipley, *Recidivism of Prisoners Released in 1983*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (Apr. 1989), <https://www.bjs.gov/content/pub/pdf/rpr83.pdf>; and Patrick A. Langan, Ph. D., & David J. Levin, Ph. D., *Recidivism of Prisoners Released in 1994: Special Report*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (June 2012), <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>).

²³⁴ Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47(2) CRIMINOL. 327 (May 2009), http://jrnsa.org/webinars/presentations/cch_part2-criminology-2009.pdf.

²³⁵ *Id.* at 339, 350 (exact "redemption" points differed based on crime and age, but by way of example, this study showed that the "hazard rate" (i.e., the risk of reoffending) of people who committed burglary at age 18 declined to the same as the general population 3.8 years post-arrest, while the hazard rates for those who committed aggravated assault at age 18 occurred 4.3 years post-arrest).

the felonies the authors studied fell well short of the ten-year period for employer access Massachusetts law now permits.²³⁶ This research is consistent with several decades of studies demonstrating that ex-offenders “have the highest probability of reoffending within several years, and the probability will decline steadily afterward.”²³⁷

Ultimately, however, the question is one of legislative and policy judgment. We must ask ourselves: how long should a defendant bear the stigma for a crime *after* he or she has already completed his or her sentence, including any period of probation or parole that follows the term of incarceration? We believe the current periods are far too long. We recommend that the standard CORI access be reduced to five years for felonies and three years for misdemeanors. These ranges are consistent with existing empirical research we discuss above, but it also reflects the BBA’s own judgment about when defendants should be deemed to have paid their debt to society in full. As noted above, this will not preclude law enforcement officials from obtaining access to these records. Nor do we recommend changes to the law which already gives employers considering applicants in the most sensitive positions—day care providers, for example—broad ability to request criminal record information about applications.

2. Reduce the time period for defendants to wait to seal records of conviction.

As noted above, current law generally permits defendants to seal records of conviction on a timetable consistent with employers’ right to access those records (10 years for most felonies, five years for misdemeanors). For the reasons outlined above, we recommend that that the waiting period for sealing most felony records be reduced from ten to five years and for misdemeanor records from five to three years.²³⁸

²³⁶ *See id.*

²³⁷ *Id.* at 331 (citing MICHAEL D. MALTZ, *RECIDIVISM* (Academic Press, Inc., [1984] (2001)); PETER SCHMIDT & ANN DRYDEN WITTE, *PREDICTING RECIDIVISM USING SURVIVAL MODELS* (Alfred Blumstein & David Farrington eds. 1988); Christy Visher, Pamela Lattimore & Richard Linster, *Predicting the Recidivism of Serious Youthful Offenders Using Survival Models*, 29(3) *CRIMINOL.* 329–366 (1991)).

²³⁸ We do not recommend that the time period for sealing records of sex offenses, *see* page 63, *supra*, be reduced.

3. Reduce the time period for juveniles to wait to seal records of juvenile proceedings.

Juvenile offenders are now not eligible to petition to seal their records until three years after termination of any court disposition. We recommend that the legislature consider adopting laws that shorten this time period to one year, thereby providing more efficient and expansive protection for juveniles, mitigating the wide-ranging negative collateral consequences that stem from juvenile adjudications and follow youths into adulthood.

4. Require Courts and the Probation Department to seal automatically cases dismissed prior to arraignment or pursuant to a statutory diversion program.

Earlier in this report, we recommended expansion of the state's pre-trial diversion program. The benefits of these programs could be enhanced by ensuring that individuals who successfully complete a diversion program avoid potential collateral consequences of their initial encounter with law enforcement. Where a charge is dismissed prior to arraignment, or dismissed following the successful completion of a diversion program, there is little conceivable benefit for anyone outside of law enforcement to have access to information about an individual's brush with the law. In those circumstances, we recommend that the Legislature act to require that such records be sealed automatically immediately upon the court's finding that the defendant had successfully completed the program, unless the district attorney objects and, following a hearing, persuades the court that sealing does not serve substantial justice.

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